



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

FIFTH SECTION

CASE OF OMMER v. GERMANY (no. 1)

(Application no. 10597/03)

JUDGMENT

STRASBOURG

13 November 2008

FINAL

13/02/2009

This judgment may be subject to editorial revision.

In the case of Ommer v. Germany (no. 1),

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

Rait Maruste, *President*,
Karel Jungwiert,
Volodymyr Butkevych,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 10597/03) 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 German national, Mr Manfred Ommer (“the applicant”), on 20 March 2003.

2. The applicant was initially represented by Mr B. Schreiber, a lawyer practising in Brühl, and subsequently by Mr U. Sommer, a lawyer practising in Köln, and also by Mr G. Widmaier, a lawyer practising in Karlsruhe. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*.

3. The applicant complained under Article 6 § 1 of the Convention that the length of the criminal proceedings against him had been excessive and that German law did not provide for sufficient compensation for the damage suffered by him as a consequence of the protracted length of the proceedings.

4. On 14 November 2006 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1950 and lives in Bergisch Gladbach, Germany. In the 1970s he participated as a sprinter in the Olympic Games and from 1986 to 1993, he was the president of FC Homburg, a football club playing in the German Football League.

1. Investigation proceedings

6. From 1982 the applicant was the sole shareholder and sole managing director of the DETAG investment trust corporation, which arranged the sale of apartments.

7. By a letter dated 19 February 1987, which reached the applicant on that day, the Cologne police headquarters summoned the applicant to question him on charges of fraud in relation with his business activities for the DETAG corporation. Thereby the applicant obtained knowledge of the criminal investigations instituted against him.

8. On 24 May 1988 and on 19 August 1988 the Cologne Public Prosecutor's Office joined several different sets of proceedings concerning charges of fraud against the applicant, which had partly been transferred to it by other Public Prosecutor's Offices (no. 110 Js 24/88).

9. In February 1989, court orders issued in October 1988 and February 1989, authorising the search of the applicant's home, those of four co-defendants, of the companies led by them and of numerous banks in Germany, were executed and many documents seized.

10. In February 1990 the police submitted to the Public Prosecutor's Office an evaluation of the documents seized and the statements of numerous witnesses who had been heard by way of a mailed questionnaire.

11. Between 5 October 1990 and 6 December 1990 further search orders, *inter alia* against the applicant and his company, were executed.

12. On 27 August 1992 the Cologne police headquarters, having heard ten witnesses since December 1990, sent back the files to the Public Prosecutor's Office with a summary note on the results of their investigations.

13. On 28 July 1994 the Cologne Public Prosecutor's Office, having questioned the applicant twice and following unsuccessful negotiations with the defence with a view to discontinuing the proceedings under Article 153a of the Code of Criminal Procedure (see paragraph 37 below), preferred an indictment (running to 460 pages) against the applicant with the Cologne Regional Court. It charged the applicant, who was represented by counsel, with seventy-four cases of aggravated fraud and attempted fraud, committed together with his co-defendants G. and D. between September 1984 and

November 1986. The applicant, acting as the DETAG corporation's managing director, was accused of having incited investors to buy apartments at a price far above their market value. According to the indictment, the applicant had obtained the investors' consent to buy the apartments by misleading them about their true value and by orally undertaking, in particular, to repurchase the apartments after two years at the investors' request, a guarantee which he never intended to keep.

2. Proceedings before the Cologne Regional Court

14. On 21 November 1994 the Cologne Regional Court opened the main proceedings in respect of sixty-seven charges of aggravated fraud and attempted fraud against the applicant, who was represented by defence counsel throughout the proceedings.

15. On 1 June, 1 September and 1 December 1995 and on 1 March 1996 the president of the chamber of the Regional Court noted that due to two other sets of proceedings pending before the Regional Court which had to be granted priority as the defendants concerned were in custody, it was not possible to fix dates for the hearing in the applicant's case.

16. On 13 June 1996 the Cologne Regional Court ordered seven experts to submit reports on the market value of sixty-eight apartments at the time they were bought by the investors. The expert reports were submitted to the Regional Court between 19 July 1996 and 20 March 1997.

17. On 21 March, 21 August and 21 November 1997 and on 20 February, 6 May and 24 June 1998 the president of the chamber of the Regional Court noted that due to hearings in other proceedings which were granted priority as the defendants concerned were in custody, in particular the hearings in the proceedings against F. and others, against L. and S. and against Fe., it was not possible to fix dates for the hearing in the applicant's case.

18. On 27 July 1998 the applicant requested that the proceedings against him be discontinued on account of their excessive length, if necessary after he had complied with a condition for discontinuance, pursuant to Article 153a of the Code of Criminal Procedure.

19. As proposed by the Regional Court, the applicant and the Public Prosecutor's Office subsequently entered into negotiations about discontinuing the proceedings in exchange for the payment of a sum of money (see Article 153a of the Code of Criminal Procedure, paragraph 37 below) which lasted until 3 December 1998. However, they were unable to reach agreement.

20. From 13 January 1999 until 30 September 1999 the Regional Court held forty-four hearings in which it questioned forty-eight witnesses and two experts. It stressed that in its view, the case appeared to be suitable for discontinuance in accordance with Article 153a of the Code of Criminal

Procedure, but the prosecution and the defence were unable to reach a settlement.

21. On 21 June 1999 the applicant requested that the proceedings be discontinued pursuant to Article 260 § 3 of the Code of Criminal Procedure (see paragraph 38 below) because their excessive length was an impediment to the proceedings (*Verfahrenshindernis*).

22. On 4 October 1999 the Cologne Regional Court, having heard the parties, discontinued the proceedings pursuant to Article 260 § 3 of the Code of Criminal Procedure. It ordered the Treasury to bear the costs of the proceedings and the applicant's necessary expenses pursuant to Article 467 § 1 of the Code of Criminal Procedure (see paragraph 39 below). The court found that the length of the proceedings constituted a procedural impediment to their continuation, as proceeding with them would breach Article 6 § 1 of the Convention.

23. The Regional Court found that it would not be possible to deliver a judgment in due course and before all offences became time-barred in November 2001. It was unclear at that stage of the proceedings whether the applicant would have to be convicted or acquitted. Even assuming that the applicant was found guilty of fraud, his guilt could not be considered serious, notably because the investors who had bought the apartments had in fact received the tax benefits they had sought by their investment.

24. Having regard to all the circumstances of the case, the Regional Court found that the length of the proceedings since the applicant's notification thereof and their further expected duration was excessive and violated the right to a hearing within a reasonable time as guaranteed by Article 2 § 1 of the Basic Law, read in conjunction with the rule of law, and Article 6 § 1 of the Convention. This warranted the discontinuance of the proceedings. The duration of the proceedings, which had lasted for more than twelve and a half years, had been caused by structural problems at the Cologne Public Prosecutor's Office and the Cologne Regional Court, which were understaffed. The applicant had not caused any delays in the proceedings. The proceedings were quite complex, but this did not sufficiently explain their length. The ongoing proceedings imposed a burden on the applicant because there had been several, partly polemical, press articles about the case, so that his business activities kept being adversely affected.

25. The Regional Court found that it was not possible to take into consideration the excessive duration of the proceedings when fixing the applicant's sentence, as this presupposed his conviction. The applicant could, however, no longer be convicted, as continuing the proceedings would breach Article 6 § 1 of the Convention. Moreover, if the proceedings resulted in the applicant being acquitted, it would likewise be impossible to consider the length of the proceedings when fixing the sentence.

3. Proceedings before the Federal Court of Justice

26. On 25 October 2000 the Federal Court of Justice, allowing the appeal on points of law lodged by the Public Prosecutor's Office, quashed the judgment of the Cologne Regional Court and remitted the case to the Bonn Regional Court. It found that it was not in a position fully to examine whether there was in fact a procedural impediment to the continuation of the proceedings for failure to comply with the reasonable time requirement.

27. Having heard the parties at an oral hearing, the Federal Court of Justice stated that in very exceptional circumstances a violation of Article 6 § 1 of the Convention, taken in conjunction with the rule of law, could lead to an impediment to the proceedings.

28. According to the Federal Court of Justice there had been a violation of Article 6 § 1 of the Convention in the present case. The length of the investigation and court proceedings, which was attributable to the organisation within the judiciary, had been excessive, and the applicant had no responsibility for it. However, the Cologne Regional Court had failed sufficiently to ascertain the extent of the applicant's guilt. Without that knowledge, it was impossible for the Federal Court of Justice to assess whether the violation of Article 6 § 1 of the Convention was so severe that it could neither be compensated when fixing the sentence nor by discontinuing the proceedings pursuant to Article 153 or 153a of the Code of Criminal Procedure (see paragraphs 36-37 below) and consequently was a procedural impediment to continuing the proceedings. Having regard to the contents of the case file and assuming the speedy processing of the case by the Bonn Regional Court, it still appeared possible to take into consideration the violation of Article 6 § 1 of the Convention when fixing the sentence.

29. In January 2001 the applicant lodged a complaint with the Federal Constitutional Court against this judgment (see 5. below).

4. Proceedings before the Bonn Regional Court

30. On 30 November 2001 the Bonn Regional Court, having held forty-three hearings, acquitted the applicant. It ordered that the Treasury bear the costs of the proceedings and the applicant's necessary expenses pursuant to Article 467 § 1 of the Code of Criminal Procedure. It further held that the applicant was entitled to compensation for damage caused by the searches of his home and the seizure of his property pursuant to the Act on Compensation for Measures of Criminal Prosecution (see paragraphs 41-43 below).

31. Having heard ninety-four witnesses, the Bonn Regional Court found that the applicant was not guilty of fraud, because he had not misled or caused his staff to mislead the purchasers of apartments about their true value or by giving a binding guarantee to repurchase the apartments.

32. On 4 February 2002 the judgment became final, the Cologne Public Prosecutor's Office having withdrawn its appeal on points of law.

5. Proceedings before the Federal Constitutional Court

33. On 11 January 2001 the applicant, represented by counsel, lodged a complaint with the Federal Constitutional Court against the judgment of the Federal Court of Justice. He argued in particular that remitting the case to the Bonn Regional Court and continuing the proceedings despite the fact that his right to be heard within a reasonable time had been disregarded throughout the proceedings further violated his right to a fair trial. Following the judgment of the Bonn Regional Court, he further submitted that he had suffered pecuniary and non-pecuniary damage caused by the excessive length of the criminal proceedings against him despite his acquittal. German law did not provide for adequate compensation for this.

34. On 24 September 2002 the Federal Constitutional Court, having stayed the proceedings between 22 November 2001 and 15 March 2002 at the applicant's request awaiting the outcome of the proceedings in the criminal courts, refused to admit the applicant's constitutional complaint. It argued that the complaint was inadmissible because following his acquittal, the applicant no longer had a legitimate interest in a finding that the judgment of the Federal Court of Justice had violated his rights guaranteed by the Basic Law.

35. The Federal Constitutional Court found that the applicant was no longer prejudiced by the judgment delivered by the Federal Court of Justice as the criminal proceedings against him had been terminated by his final acquittal. Assuming that the constitutional complaint would be well-founded, the violation of fundamental rights caused by the judgment of the Federal Court of Justice would not have severe consequences for the applicant. His basic rights had notably been breached by the duration of the proceedings until the judgment of the Federal Court of Justice. Following this judgment, the criminal proceedings had lasted for more than another six months, but had ended with his acquittal and therefore his rehabilitation. Moreover, the Federal Court of Justice had clearly stated in its judgment that the duration of the criminal proceedings against the applicant had breached Article 6 § 1 of the Convention. For lack of a sufficient statement of facts by the Regional Court, that court had only found itself not to be in a position to draw the legal conclusion that there was a procedural impediment to continuing the proceedings, even though it acknowledged for the first time that this was a possible result of a breach of Article 6 § 1.

II. RELEVANT DOMESTIC LAW

1. Provisions governing the discontinuance of criminal proceedings

36. Article 153 of the Code of Criminal Procedure governs the discontinuance of criminal investigation or court proceedings on grounds of insignificance. According to that provision, criminal proceedings may be discontinued if they concern an offence for which it is not mandatory to impose a sentence of at least one year's imprisonment (*Vergehen*), if the defendant's guilt would be of a minor nature and if there was no public interest in criminal prosecution. If the indictment has already been preferred, the court may only discontinue the proceedings with the consent of both the Public Prosecutor's Office and the defendant (§ 2 of the Article).

37. Pursuant to Article 153a § 1 of the Code of Criminal Procedure, the Public Prosecutor's Office may discontinue criminal proceedings concerning offences for which the regular minimum punishment is less than one year's imprisonment at the investigation stage with the defendant's consent, if the latter complies with certain conditions. These conditions must be suitable to remove the public interest in criminal prosecution and may not be in conflict with the severity of the defendant's guilt. Such conditions notably entail the payment of a sum of money to a non-profit-making organisation or to the Treasury. The court which has jurisdiction to open the main proceedings must consent under certain circumstances. If the indictment has already been preferred with that court, the latter may discontinue the proceedings under the conditions set out in § 1 with the consent of both the Public Prosecutor's Office and the defendant (Article 153a § 2).

38. Pursuant to Article 260 § 3 of the Code of Criminal Procedure, the discontinuance of the proceedings shall be pronounced in a judgment if there is a procedural impediment to the continuation of the proceedings.

2. Provisions governing costs, expenses and compensation for damage caused by investigation and court proceedings when the defendant is subsequently acquitted

a. Provisions of the Code of Criminal Procedure

39. Pursuant to Article 467 § 1 of the Code of Criminal Procedure the costs of the criminal proceedings and the defendant's necessary expenses shall be borne by the Treasury if the defendant is acquitted, if the court refuses to open the main proceedings against him or if the proceedings against him are discontinued. According to Article 467 § 3 of the said Code, the court may decline to award the defendant's necessary expenses against

the Treasury where the defendant has avoided conviction merely because of an impediment to the proceedings (*Verfahrenshindernis*).

40. Article 464a § 2 of the Code of Criminal Procedure stipulates that the necessary expenses of a participant in the proceedings shall also comprise compensation for an inevitable loss of time in accordance with the provisions on compensation of witnesses (no. 1) and the fees and expenses of a lawyer in so far as these are to be reimbursed under Article 91 § 2 of the Code of Civil Procedure (no. 2). Section 2 of the Act on Compensation of Witnesses and Experts (*Gesetz über die Entschädigung von Zeugen und Sachverständigen*), in its version in force between 1 January 2002 and 30 June 2004, on the compensation payable to witnesses for their loss of earnings, stipulates in paragraph 2, first sentence, that each hour of lost working time shall be compensated at a rate of two to thirteen euros (EUR). Article 91 § 2 of the Code of Civil Procedure, in its version in force at the relevant time, stipulates in particular that the fees and expenses of the lawyer of the successful party as fixed by law shall be reimbursed. Before 1 July 2004, the fees and expenses payable to a lawyer were fixed in the Federal Regulation on Lawyers' Fees (*Bundesrechtsanwaltsgebührenordnung* – BRAGO). Lawyer and client could, however, agree on a higher remuneration than that payable under the said Regulation (see its section 3).

b. Provisions of the Act on Compensation for Measures of Criminal Prosecution

41. Compensation for damage caused by wrongful prosecution is covered by the Act on Compensation for Measures of Criminal Prosecution (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*).

42. Pursuant to section 2 of that Act, a defendant is notably entitled to compensation for damage incurred by certain specified measures of criminal prosecution if he is acquitted, if the proceedings against him are discontinued or if the court refuses to open the main proceedings against him. The measures of criminal prosecution for which compensation may be granted notably comprise pre-trial detention and searches and seizures of property.

43. Section 7 § 1 of the Act on Compensation for Measures of Criminal Prosecution stipulates that pecuniary damage incurred as a result of the criminal prosecution measure is compensated for, as well as non-pecuniary damage in the event of a deprivation of liberty by a court decision. Once the finding that the Treasury is under a duty to compensate has become final, the compensation claim must be submitted within six months with the Public Prosecutor's Office which last was in charge of the investigations at first instance (section 10 § 1 of the said Act).

c. Provisions of the Civil Code and the Basic Law

44. Pursuant to Article 34 of the Basic Law, taken in conjunction with Article 839 of the Civil Code, an individual has the right to be compensated by the State for any damage arising from a breach of official duty committed by a public servant. These provisions are also applicable to a breach of duty in giving judgment on an action if the breach consists in a refusal to discharge a function or a delay in performing it contrary to professional duty.

45. Damages are afforded to the individual concerned in accordance with Articles 249 et seq. of the Civil Code. By Article 253 of the Civil Code, in the version in force until 31 July 2002, compensation for non-pecuniary damage could be awarded only if it was provided for by law. In this connection, Article 847 § 1 of the Civil Code, which was in force until that same day, provided for non-pecuniary compensation only in the event of physical injury, damage caused to someone's health or deprivation of liberty. The new Article 253 § 2 of the Civil Code, as in force since 1 August 2002, which replaced Article 847 of the Civil Code, has not introduced any amendments relevant to the matters in issue in the instant case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

46. The applicant complained that the duration of the criminal proceedings against him had been excessive. He alleged a violation of Article 6 of the Convention, which, in so far as relevant, reads as follows:

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

47. The Government contested that argument.

A. Admissibility

48. The Government argued that the application was incompatible *ratione personae* with the provisions of the Convention (Article 35 § 3, read in conjunction with Article 34, first sentence, of the Convention) as the applicant could no longer claim to be the victim of a violation of Article 6.

49. The applicant contested this view. He argued that under German law he had not been able to obtain sufficient compensation for the damage caused by the excessive length of the proceedings against him.

50. In the Court's view, the issue whether the applicant is deprived of his status as a victim within the meaning of Article 34 of the Convention is closely linked to the questions raised with respect to his complaint under Article 6 § 1 of the Convention about the length of the proceedings. It observes, in particular, that the question whether an applicant was afforded adequate redress in order to remedy a breach of the reasonable time requirement under Article 6 § 1 notably depends on the extent of that breach (see *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 32, § 70; and *Dželili v. Germany*, no. 65745/01, § 103, 10 November 2005). It therefore joins this issue to the merits of the application.

51. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The reasonableness of the length of the proceedings

52. The applicant claimed that the length of the criminal proceedings against him, which lasted from the moment when he was summoned by the police in February 1987 until the Federal Constitutional Court's decision of 24 September 2002, had clearly been excessive.

53. The Government, referring to the findings of the Federal Court of Justice in its judgement of 25 October 2000, conceded that the length of the investigation and criminal proceedings against the applicant failed to comply with the reasonable time requirement laid down in Article 6 § 1.

54. The Court finds that the period to be considered started on 19 February 1987, when the applicant was officially notified by the police of the allegation that he had committed an offence. It ended on 24 September 2002 when the Federal Constitutional Court – a complaint to which was considered as an effective remedy to complain of excessive length of criminal proceedings at the time the applicant lodged his complaint (compare, *inter alia*, *Uhl v. Germany*, no. 64387/01, § 26, 10 February 2005) – took its decision. The proceedings thus lasted for more than fifteen years and seven months at the investigation stage and three levels of jurisdiction, including one remittal.

55. The Court, having regard to the criteria established in its case-law (see *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII), finds that the – quite complex – proceedings against the applicant have been unreasonably delayed at the investigation stage (duration of seven and a half years) and by the Cologne Regional Court, which started hearing the case only some four years after having opened the main proceedings. These considerable delays were not attributable to the applicant, whose

business activities were adversely affected by the ongoing proceedings, but to the Cologne investigation authorities and Regional Court, which were understaffed.

56. Accordingly, the Court agrees not only that the applicant's case was not heard within a reasonable time within the meaning of Article 6 § 1 of the Convention, it finds the proceedings' length plainly excessive.

2. Loss of victim status

a. The parties' submissions

i. The Government

57. In the Government's view, the applicant could, however, no longer claim to be the victim of a violation of Article 6 § 1. Both the Federal Court of Justice and the Federal Constitutional Court had expressly found that the length of the proceedings had violated that Article.

58. The Government further argued that the applicant had obtained adequate redress for this breach of the Convention. Firstly, as ordered in the Bonn Regional Court's judgment of 30 November 2001, the Treasury not only had to bear the costs of the proceedings, but also the applicant's necessary expenses pursuant to Article 467 § 1 of the Code of Criminal Procedure (see paragraph 39 above). In the present case, the applicant had received to date a total of EUR 7,292.75 plus interest reimbursing his necessary expenses. The latter comprised, in particular, the fees payable according to the Federal Regulation on Lawyers' Fees and the expenses of the acquitted person's defence counsel as well as the acquitted person's loss of earnings and travel expenses as a result of summons to appear before the investigation authorities and the courts. It was adequate to reimburse only the counsel's fees as fixed by the said Regulation, and not the higher fees actually paid by a client in accordance with a fees agreement.

59. Secondly, it was equally adequate to reimburse a maximum rate of EUR 13 per hour of lost working time (see Article 464a § 2 no. 1 of the Code of Criminal Procedure, read in conjunction with section 2 § 2 of the Act on Compensation of Witnesses and Experts, see paragraph 40 above). Even though this might not cover the actual loss of earnings of persons with higher incomes, it was the civic duty of every citizen to make himself available in criminal proceedings if accused.

60. Thirdly, in the Government's submission, the applicant had obtained redress in that, in its judgment of 30 November 2001, the Bonn Regional Court had acquitted him.

61. Fourthly, the Government argued that the applicant had failed to assert further claims he had against the Treasury. As regards pecuniary damage caused by the searches of his home and the seizure of his private

property, the Bonn Regional Court, in its judgment of 30 November 2001, had admitted such a claim on the merits. Despite this, the applicant had not lodged a request for compensation under sections 2, 7 and 10 § 1, first sentence, of the Act on Compensation for Measures of Criminal Prosecution (see paragraphs 41-43 above) within the prescribed time-limit. Furthermore, he had failed to bring official liability proceedings pursuant to Article 839 of the Civil Code, read in conjunction with Article 34 of the Basic Law (see paragraphs 44-45 above), against the Federal State concerned before his claim had probably become time-barred. Thereby, he could have obtained compensation for pecuniary damage, such as loss of earnings, which he proved to have been caused by the courts' failure to adjudicate within a reasonable time, even if this failure had been caused by a lack of sufficient staff. Moreover, the applicant had failed sufficiently to substantiate that he had suffered non-pecuniary damage. The applicant's failure to avail himself of the remedies at his disposal in order to obtain redress could not prevent him from losing his victim status.

ii. The applicant

62. The applicant argued that he had not lost his status as a victim of a violation of Article 6. He accepted that none of the German courts dealing with his case had disputed that the duration of the proceedings against him had been excessive, but claimed that they had failed to set out in detail the delays caused by the investigation authorities and courts.

63. Moreover, in the applicant's submission, he had not obtained sufficient compensation for the pecuniary and non-pecuniary damage suffered by him as a consequence of the excessive length of the proceedings. German legislation and the domestic courts' case-law did not provide for remedies in order to obtain such compensation. As regards, firstly, the reimbursement of his necessary expenses pursuant to Article 467 of the Code of Criminal Procedure, the applicant claimed that the fees he had actually paid to counsel had not been reimbursed. He had only received the amounts which would have been due according to the Federal Regulation on Lawyers' Fees. However, lawyers and clients were not bound to this Regulation and, in practice, often agreed on considerably higher fees.

64. Secondly, German legislation and practice did not allow for an adequate compensation for his loss of earnings. He had passed several thousand hours studying the voluminous case files, preparing his defence and attending the court hearings. However, his claim for reimbursement of his actual loss of earnings had been dismissed as he had failed to prove that he had not been able to conduct his business despite the time lost. Moreover, the maximum rate of compensation of some EUR 13 per hour did not at all reflect his earnings of several thousand euros per hour at the relevant time. In any event, these amounts had only been paid because of his acquittal, and not because of the protracted length of the proceedings.

65. Thirdly, in view of the fact that he had been ruined both financially and as a person as a result of the proceedings, the applicant considered it cynical to consider that he had obtained sufficient redress merely by the fact that he had been acquitted at last.

66. With respect to the Government's fourth argument, the applicant conceded that he had not lodged a request for compensation under the Act on Compensation for Measures of Criminal Prosecution. However, this Act only provided for compensation for pecuniary damage caused by the searches of his home and did not cover compensation for any damage caused by the duration of proceedings. Likewise, it would have been to no avail for him to bring official liability proceedings under Article 839 of the Civil Code, read in conjunction with Article 34 of the Basic Law in order to obtain such compensation. He would not have been able to prove that the delays in the proceedings had been caused by a particular person's fault.

b. The Court's assessment

i. General principles

67. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" of a violation of a Convention right unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, *inter alia*, *Eckle*, cited above, pp. 30-31, § 66; *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36; and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

68. As to the redress which has to be afforded to an applicant in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation found. In cases concerning a breach of Article 6 § 1 due to the excessive length of criminal proceedings, the Court has repeatedly found that redress could notably be granted by adequately reducing the prison sentence of the person found guilty of an offence in an express and measurable manner (see, *inter alia*, *Eckle*, cited above, pp. 31, 38, §§ 67, 87; *Beck v. Norway*, no. 26390/95, §§ 27-29, 26 June 2001; *Dželili*, cited above, §§ 100-104; and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 186, ECHR 2006-V). The discontinuance of the criminal proceedings on account of their excessive length may also be capable, depending on the duration in question, adequately to redress a breach of Article 6 § 1 (see, *inter alia*, *Eckle*, cited above, p. 39, § 94; and *Sprotte v. Germany* (dec.), no. 72438/01, 17 November 2005).

69. Otherwise, the question whether an applicant's status as a victim has been removed following the payment at domestic level of a sum of money

by way of compensation for the damage caused by the protracted length of proceedings will depend, in particular, on whether the redress thus afforded was adequate and sufficient having regard to the awards of just satisfaction as provided for under Article 41 of the Convention (see *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003; *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001; and *Scordino*, cited above, §§ 181, 202). While there is no requirement under the existing case-law that the domestic authorities should award the same sum by way of compensation as the Court would be likely to award under Article 41 of the Convention, the level of just satisfaction granted at national level must nevertheless not be manifestly inadequate in the particular circumstances of the case (see *Horváthová v. Slovakia*, no. 74456/01, § 32, 17 May 2005, and *Scordino*, cited above, §§ 202 et seq.). Thus, for example, exempting the person concerned from paying legal costs such as fees to counsel, which he would otherwise have had to pay, because of the protracted length of the proceedings may afford redress which was adequate and sufficient, having regard to just satisfaction as provided for under Article 41 of the Convention (see *Normann*, cited above; *Ohlen v. Denmark* (striking out), no. 63214/00, §§ 29-31, 24 February 2005; and *Hansen and Others v. Denmark* (dec.), no. 26194/03, 29 May 2006).

ii. Application of these principles to the present case

70. The Court notes that both the Cologne Regional Court, in its judgment of 4 October 1999, and the Federal Court of Justice, in its judgment of 25 October 2000, expressly stated that the length of the investigation and court proceedings against the applicant, which was attributable to the national authorities, failed to comply with the “reasonable time” requirement laid down in Article 6 § 1. In its decision of 24 September 2002, the Federal Constitutional Court confirmed this finding. The Court is therefore satisfied that the national authorities expressly acknowledged the breach of the Convention at issue.

71. As to the question whether the applicant was granted adequate redress for the excessive length of the criminal proceedings against him, the Court observes at the outset that the domestic courts in the present case were not in a position to grant him such redress by reducing his sentence because they acquitted him of the offences he was charged with. Moreover, the judgment of the Cologne Regional Court discontinuing the proceedings on account of their excessive length was subsequently quashed by the Federal Court of Justice. The Court therefore has to examine whether the applicant, as claimed by the Government, has otherwise received adequate and sufficient reparation at domestic level for the damage caused by the protracted length of the proceedings, having regard to the awards of just satisfaction as provided for under Article 41 of the Convention.

72. The Court notes that the Government argued, firstly, that the applicant had obtained redress for the breach of the reasonable time requirement in that the Bonn Regional Court had ordered the reimbursement of fees payable to his defence counsel. The applicant had received some EUR 7,300 plus interest accordingly (covering all necessary expenses). The Court observes that the payment of these fees was ordered by the Regional Court under Articles 467 § 1 and 464a § 2 no. 2 of the Code of Criminal Procedure, read in conjunction with Article 91 § 2 of the Code of Civil Procedure and the Federal Regulation on Lawyers' Fees (see paragraphs 39-40 above). The parties agreed that the applicant had been reimbursed only the fees which would have been payable to his counsel according to these provisions, in particular the Federal Regulation on Lawyers' Fees, and not the considerably higher fees he claimed to have paid to his counsel in accordance with a fees agreement. However, Article 467 § 1 of the Code of Criminal Procedure only provides for the reimbursement of a defendant's necessary expenses, such as lawyer's fees, as a result of his acquittal. The Court is therefore convinced that the reimbursement of fees to the applicant was a mere consequence of his acquittal, which itself was pronounced for factual reasons unrelated to the length of proceedings. The applicant thus was not granted redress in having been exempted from paying any fees, which he would otherwise have been obliged to pay, only because of the excessive duration of the proceedings against him (compare *Normann*, cited above, and, by contrast, *Hansen and Others*, cited above, as well as *Ohlen*, cited above, §§ 28-31).

73. The Government submitted, secondly, that the reimbursement of the applicant's loss of earnings at a maximum rate of EUR 13 per hour of lost working time had provided the applicant with redress for the breach of Article 6 § 1 of the Convention. The Court notes that it is uncontested between the parties that this compensation was paid in accordance with Articles 467 § 1 and 464a § 2 no. 1 of the Code of Criminal Procedure, read in conjunction with section 2 § 2 of the Act on Compensation of Witnesses and Experts (see paragraphs 39-40 above). Thus, these payments, like the fees reimbursed, were equally only a consequence of the applicant's acquittal and did not provide him with redress for the protracted length of the proceedings against him.

74. The Court further notes that the Government claimed, thirdly, that the applicant had obtained redress in that the Bonn Regional Court had acquitted him. However, as found above (at paragraph 72), the applicant was acquitted because he was found not guilty of fraud, that is, for reasons wholly unrelated to the excessive length of the proceedings. Therefore, his acquittal did not affect his status as a victim of a violation of Article 6 either.

75. The Government argued, fourthly, that the applicant lost his status as a victim of a violation of Article 6 § 1 because he failed to avail himself of

further remedies at his disposal to redress the breach of the Convention. He should both have made a request for compensation under the Act on Compensation for Measures of Criminal Prosecution and should also have brought a compensation claim against the Federal State concerned in official liability proceedings. The Court finds in this respect that for the question whether the applicant lost his status as a victim of a violation of Article 6, it is, however, decisive whether he actually received adequate compensation for the damage caused by the excessive length of the proceedings as such (compare, for instance, *Grässer v. Germany*, no. 66491/01, § 49, 5 October 2006), which is not the case here. In any event, by lodging a request for compensation under sections 2 and 7 § 1 of the Act on Compensation for Measures of Criminal Prosecution (see paragraphs 41-43 above), the applicant could only have obtained compensation for pecuniary damage incurred as a result of searches and seizures of his property, and this only because he was subsequently acquitted. Thus, this remedy, again, was not capable of affording him redress for the protracted length of the proceedings. As regards official liability proceedings against the Federal State concerned (see paragraphs 44-45 above), the Court refers to its findings in its *Sürmeli* judgment, according to which such proceedings could not be considered a remedy capable of affording adequate redress for the length of civil proceedings (see *Sürmeli v. Germany* [GC], no. 75529/01, §§ 113-114, ECHR 2006-VIII; and also *Grässer*, cited above, §§ 49-50; and *Herbst v. Germany*, no. 20027/02, §§ 67-68, 11 January 2007). In particular, the relevant courts would not be able to make any award in respect of non-pecuniary damage, whereas in cases concerning the length of civil proceedings the applicants above all sustain damage under that head (see *Sürmeli*, cited above, §§ 113-114; and also *Hartman v. Czech Republic*, no. 53341/99, § 68, ECHR 2003-VIII; and *Scordino*, cited above, § 204). The Court considers that these findings apply, *mutatis mutandis*, to the length of criminal proceedings in cases such as the present one, in which redress shall be granted by the payment of compensation. The Court further notes that the Government have not adduced any fresh reasons or decisions of domestic courts which would justify departing from the findings made in the above-mentioned judgments.

76. In view of the foregoing, the Court concludes that the applicant has not lost his status as a victim of a breach of the reasonable time requirement for the purposes of Article 34 of the Convention. Accordingly, the Court rejects the Government's preliminary objection to that effect and finds that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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

78. The applicant claimed compensation for pecuniary and non-pecuniary damage. As regards pecuniary damage, he alleged that the length of the proceedings, which had damaged his reputation and had continuously made him lose customers, staff members and the cooperation of several banks, had caused considerable losses of profits and the insolvency, in 2002, of his firm, the DETAG corporation. Without submitting any documentary evidence, the applicant argued that it was impossible to calculate the exact amount of the enormous pecuniary damage caused. As the DETAG had made profits amounting to more than seven million Deutschmarks in 1986, at the beginning of the investigation proceedings against him, he estimated that the damage incurred amounted to seven million Deutschmarks per year which he would have earned otherwise. He had thus suffered losses of earnings of several thousand Deutschmarks per hour.

79. As regards non-pecuniary damage, the applicant claimed that he had been ruined financially and his reputation had been irretrievably damaged both in the professional and the private sphere. He had been subjected to immense psychological pressure by the excessive duration of the unjustified criminal proceedings against him. Moreover, as he was a well-known personality in Germany and due to arrangements made by the prosecution, the criminal proceedings against him had constantly been covered by the media, without him having had an opportunity to be rehabilitated speedily in the court proceedings. He left it to the Court to estimate the total damage caused and to fix an appropriate amount.

80. The Government stressed that the applicant had failed to prove that there was a causal link between the length of the proceedings and any losses of profit or the insolvency of the DETAG corporation. It was mere speculation that damage caused to his reputation by the proceedings had caused his financial ruin. Moreover, the applicant had failed to substantiate that he had suffered losses of earnings of several thousand Deutschmarks per hour and that he had suffered non-pecuniary damage.

81. As regards the applicant's claim for reimbursement of pecuniary damage, the Court does not exclude that the length of the criminal proceedings against the applicant on charges of fraud, which were related to

his business activities for the DETAG corporation and ended with his acquittal, caused the applicant losses of profit which he would not have suffered had the proceedings been terminated earlier with the same outcome. However, having regard to the material before it, the Court is unable to assess at least approximately the amount of damage suffered by the applicant and finds that it cannot speculate as to this amount. Accordingly, no award can be made to the applicant under this head.

82. With regard to non-pecuniary damage, the Court considers that the applicant must have suffered distress from the plainly excessive length of the criminal proceedings resulting in his acquittal. Moreover, he must be considered to have borne a particular burden because of the proceedings instituted against him. It notes in this connection that the Cologne Regional Court acknowledged that there had been several, partly polemical press articles about his case, so that his business activities kept being adversely affected (see paragraph 24 above). In the light of the foregoing, the Court, making its assessment on an equitable basis, awards the applicant EUR 15,000 under this head, plus any tax that may be chargeable.

B. Costs and expenses

83. Without submitting any documentary evidence relating to his claim, the applicant further alleged that in the proceedings before the domestic courts, he had paid more than EUR 500,000 in fees to one of his counsels, based on fee agreements of EUR 100 to EUR 250 per working hour and EUR 2,500 per hearing day.

84. The Government stressed that only reasonable costs for mandating a lawyer, which were caused not by the proceedings as such, but only by their length, could be reimbursed and that the applicant failed to substantiate any of the fees he had paid to his defence counsel.

85. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Even though the applicant failed to substantiate the exact amount of costs and expenses caused only by the protracted length of the proceedings, the Court notes that the applicant, represented by counsel, has brought motions and participated in negotiations aimed at discontinuing the proceedings on account of their length and has lodged a constitutional complaint complaining about the excessive length of the proceedings. Moreover, the Court accepts that in length-of-proceedings cases the protracted examination of a case beyond a "reasonable time" involves an increase in the applicant's costs (see *Bouilly v. France (no. 1)*, no. 38952/97, § 33, 7 December 1999; and *Sürmeli*, cited above, § 148). The Court, having regard to the information in its possession and the above criteria, thus considers it reasonable to award the sum of EUR 5,000, which

includes VAT, for costs and expenses in the domestic proceedings, plus any tax that may be chargeable to the applicant. As the applicant failed to submit a claim for costs and expenses incurred in the proceedings before this Court, the Court does not make an award under this head.

C. Default interest

86. 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. *Decides* to join to the merits the Government's preliminary objection that the applicant has lost his victim status, but rejects it after an examination on the merits;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 6 of the Convention;
4. *Holds*
 - (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 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 5,000 (five thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Rait Maruste
President