



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

FIFTH SECTION

CASE OF OMMER v. GERMANY (no. 2)

(Application no. 26073/03)

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. 2),

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. 26073/03) 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 1 August 2003.

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

3. The applicant complained under Article 6 § 1 of the Convention that the length of the criminal investigation proceedings against him had been excessive and argued that German law did not provide for compensation for damage caused by the duration of these proceedings.

4. On 20 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. Background to the case

6. From 1982 the applicant was the sole shareholder and sole managing director of the DETAG investment trust corporation which negotiated the sale of apartments to private investors. He later arranged for some of these apartments, which had been returned by the investors, to be taken up into funds managed by the IHV Real Estate Company.

7. The present application concerns criminal investigations instituted against the applicant and others related to the management of the real estate funds of the IHV Company. Additional criminal proceedings were pending against the applicant in connection with his business activities for the DETAG corporation and its arrangements made for the sale of apartments to private investors. On 4 February 2002 the judgment of the Bonn Regional Court acquitting the applicant of charges of fraud in this respect became final. The applicant also lodged an application with the Court related to these proceedings (no. 10597/03).

2. The investigation proceedings against the applicant

8. By a letter dated 19 February 1987, which reached the applicant on that day, the Cologne police headquarters summoned the applicant for questioning on charges of fraud in connection with his business activities for the DETAG corporation. Thereby the applicant obtained knowledge of the criminal investigations instituted against him in this respect. The Cologne Public Prosecutor's Office later joined several sets of proceedings concerning accusations of fraud against the applicant (file no. 110 Js 24/88).

9. On 6 December 1990 the Cologne District Court's order of 28 October 1990, made in the proceedings no. 110 Js 24/88, to search the applicant's home and car was executed and a file was seized. The applicant was suspected of having at least instigated a partner of the IHV Real Estate Company to breach her fiduciary duty. The applicant had purportedly abetted that partner in respect of apartments, which had been returned to the DETAG corporation having been bought by private investors at prices far

above their market value, into the real estate funds managed by the IHV Company.

10. On 11 and 17 December 1990 and on 11 and 18 April 1991, 23 and 31 October 1991 and 6 November 1991 the Cologne Public Prosecutor's Office questioned suspects on the charges related to the IHV Company. In December 1991 and January 1992 the Public Prosecutor's Office evaluated the documents seized in a note for the records.

11. On 10 November 1993 the Cologne Public Prosecutor's Office instituted further separate proceedings for fraud and breach of fiduciary duty against the applicant and others concerning the management of the funds of the IHV Real Estate Company (file no. 110 Js 748/93). The accused persons in these proceedings were suspected of having committed fraud to the detriment of investors by including unmarketable apartments in the funds set up by the IHV Real Estate Company, thereby reducing the profitability of the funds. Moreover, they were suspected of breach of fiduciary duty by mismanaging the said funds, which operated at a loss.

12. In a file note dated 21 November 1994 the Cologne Public Prosecutor's Office stated that the suspicion that fraud and breach of fiduciary duty had been committed in connection with the management of funds of the IHV Real Estate Company had already arisen in the proceedings no. 110 Js 24/88. Several searches had been conducted on 6 December 1990 and several persons had already been examined in the course of those proceedings. In so far as the investigation proceedings in file no. 110 Js 24/88 concerned charges of fraud in connection with the funds of the IHV Real Estate Company, they were separated from the said file and joined to the proceedings no. 110 Js 748/93.

13. On 13 December 1994 the Cologne Public Prosecutor's Office questioned witness G.

14. On 10 January 1995 M., a specialist in economic offences at the Cologne Public Prosecutor's Office, having examined the case file, concluded that several funds managed by the IHV Company would always operate at a loss and that the investors had been deceived about the value of the funds.

15. On 23 April 1996 the Cologne District Court's order of 23 October 1995 to search the homes of the applicant and of other co-accused was executed and several documents were seized.

16. In April 1996 W., another specialist in economic offences at the Cologne Public Prosecutor's Office, as did M., on 6 May 1996, submitted reports concerning the profitability of the funds in question, finding that in respect of several of them a suspicion of fraud prevailed.

17. In a letter to the Cologne Public Prosecutor's Office dated 7 May 1996 the Federal Supervisory Office for Banking explained the nature of the contracts concluded between the IHV Company and the investors.

18. On 20 May 1996 the Cologne District Court ordered the seizure of further documents.

19. On 8 August 1996 W. submitted another expert report, finding that there was a persistent lack of profitability of the funds managed by the IHV Company.

20. On 18 February 1997 and on 7 November 1997 M. found that the prosecution of part of the offences had become time-barred, but that there still was a suspicion of fraud in respect of several funds managed by the IHV Company. By submissions dated 24 November 1997 and 10 December 1997 the applicant contested these findings. He submitted an expert report drawn up by the ETL auditing company in support of his view.

21. In a note dated 7 April 1998 expert M. contested the findings of the ETL auditing company.

22. On 29 April 1998 and on 8 June 1998 the Public Prosecutor's Office asked the applicant to submit certain documents, which the latter refused to do in submissions dated 31 July 1998 before re-inspecting the case file.

23. On 15 October 1998 counsel for the applicant proposed that all investigation proceedings pending against the applicant be settled. The prosecution rejected that proposal on 10 November 1998.

24. On 8 October 1999 the Public Prosecutor's Office again requested the applicant to submit certain documents. In December 1999 the applicant initially agreed to do so before the end of the year 1999, but subsequently failed to submit the documents in question.

25. On 21 December 1999 the Cologne District Court ordered the seizure of the balance sheets of the IHV Company.

26. On 4 July 2000 the Cologne Public Prosecutor's Office questioned the applicant.

27. On 5 February 2001 K., another specialist in economic offences at the Public Prosecutor's Office, disagreed with M.'s conclusions and found that part of the IHV Company's funds actually seemed to be operating profitably.

28. On 11 May 2001 the Cologne District Court ordered another search, which was carried out on 31 October 2001.

29. On 18 December 2002 and on 10 January 2003 expert K., having regard to further balance sheets seized, found that the funds examined had in fact yielded considerable profits.

30. On 29 January 2003 the Cologne Public Prosecutor's Office discontinued the proceedings against the applicant, partly pursuant to Article 170 § 2 of the Code of Criminal Procedure (see paragraph 36 below), and partly pursuant to Article 153 § 1 of that Code (see paragraph 32 below). It found that the prosecution of a part of the offences of which the applicant was suspected was time-barred. As to the suspicion that the applicant was guilty of a breach of fiduciary duty, the Public Prosecutor's Office found that mismanagement of the funds concerned had not been

proved, as the funds disposed of assets of a considerable value. There prevailed a suspicion of fraud in respect of part of the funds, as apartments had been bought for the funds at prices far above their market value. The proceedings should, however, be discontinued pursuant to Article 153 § 1 of the Code of Criminal Procedure in this respect. The said apartments constituted only a small part of the assets of the fund, so the damage caused had to be considered minor. Moreover, the commission of the offences dated back a long time.

31. By a letter dated 3 February 2003 the Cologne Public Prosecutor's Office, having obtained the consent of the Cologne District Court to discontinue the proceedings pursuant to Article 153 § 1 of the Code of Criminal Procedure, notified the applicant that the investigation proceedings no. 110 Js 748/93 against him had been discontinued.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Provisions governing the discontinuance of criminal proceedings

32. Article 153 § 1 of the Code of Criminal Procedure governs the discontinuance of criminal proceedings on the ground of insignificance. During the investigation proceedings the Public Prosecutor's Office may discontinue the criminal proceedings 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. The court which has jurisdiction to open the main proceedings must consent to discontinuing the proceedings unless they concern offences which are not subject to an increased minimum penalty and the consequences ensuing from the offence are minor.

33. 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 penalty 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).

34. Article 154 § 1 of the Code of Criminal Procedure provides that the Public Prosecutor's Office may dispense with prosecuting an offence if the penalty in which the prosecution might result is not particularly significant compared to a penalty which has been imposed with binding effect upon the defendant for another offence or which he has to expect for another offence. It may also dispense with prosecuting an offence if a judgment in respect of that offence is not to be expected within a reasonable time and if the penalty which has been imposed on the defendant with binding effect or which he has to expect for another offence appears sufficient to have an influence on the offender and to defend the legal order. Pursuant to Article 154 § 2 of the Code of Criminal Procedure, the court may provisionally discontinue proceedings upon the request of the Public Prosecutor's Office at any stage if charges have already been preferred. If the proceedings have been discontinued provisionally on account of a penalty which was to be expected for another offence, the proceedings may be resumed, unless barred by limitation in the meantime, within three months after the judgment delivered in respect of the other offence has become final (Article 154 § 4 of the Code of Criminal Procedure).

35. Article 154a § 1 of the Code of Criminal Procedure authorises the Public Prosecutor's Office to limit prosecution to certain parts of an offence or certain breaches of the law if, in particular, other separable parts of the offence or other breaches of the law committed by the same act are not particularly significant for the penalty to be expected. The court may order such limitation with the consent of the Public Prosecutor's Office at any stage of the proceedings after the bill of indictment has been filed (Article 154 § 2). The court may reintroduce into the proceedings those parts of the offence or breaches of the law which have not been considered at any stage of the proceedings (Article 154a § 3).

36. Pursuant to Article 170 § 2 of the Code of Criminal Procedure the Public Prosecutor's Office discontinues the criminal investigation proceedings if investigations show that there are not sufficient reasons to prefer an indictment. It notifies the accused of this if he has been questioned as accused, if an arrest warrant has been issued against him, if he has requested to be notified or if it is obvious that there is a special interest in notification.

2. Provisions governing compensation for damage caused by investigation proceedings which are subsequently discontinued

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

37. 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*).

38. 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.

39. In cases in which proceedings have been discontinued pursuant to a provision allowing for discontinuance at the discretion of the prosecution or the court, the person concerned may be granted compensation for the measures listed in section 2 if this is equitable in the circumstances of the case (see section 3 of that Act). Compensation may be refused if the proceedings against the defendant have been discontinued due to an impediment to the proceedings (see section 6 § 1 no. 2 of that Act).

40. 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 court's finding that the Treasury is under a duty to compensate has become final (see section 9 of the said Act), a compensation claim must be submitted within six months to the Public Prosecutor's Office which was last in charge of the investigations at first instance (section 10 § 1 of the said Act).

b. Provisions of the Civil Code and the Basic Law

41. 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 of a refusal to discharge a function or a delay in performing it contrary to professional duty.

42. 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 and applicable to damage caused up to that date, compensation for non-pecuniary damage can be awarded only if it is provided for by law. In this connection, Article 847 § 1 of the Civil Code, 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. According to the established case-law of the Federal Court of Justice, a claim for non-pecuniary damage can, moreover, arise in case of a serious violation of a person's personality rights (*Persönlichkeitsrecht*) which cannot be compensated for in another manner (see, *inter alia*, Federal Court of Justice, no. III ZR 9/03, judgment

of 23 October 2003, *Neue Juristische Wochenschrift (NJW)* 2003, pp. 3693 et seq. with further references). The new Article 253 § 2 of the Civil Code, 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.

3. Provisions of the Federal Constitutional Court Act and case-law of the Federal Constitutional Court on complaints of excessive length of criminal proceedings

43. According to the settled case-law of the Federal Constitutional Court, Article 2 § 1 of the Basic Law, read in conjunction with the principle of the rule of law as enshrined in Article 20 § 3 of the Basic Law, guarantees the right to expeditious criminal proceedings (see, *inter alia*, that court's judgment of 24 November 1983, no. 2 BvR 121/83, § 3; decision of 19 April 1993, no. 2 BvR 1487/90, § 16; and decision of 5 February 2003, nos. 2 BvR 327/02, 2 BvR 328/02 and 2 BvR 1473/02, § 33). Moreover, penalties imposed on a defendant have to comply with the constitutional right to liberty guaranteed by Article 2 § 2 of the Basic Law, read in conjunction with the principle of proportionality enshrined in the rule of law (see, *inter alia*, the Federal Constitutional Court's decision of 5 February 2003, nos. 2 BvR 327/02, 2 BvR 328/02 and 2 BvR 1473/02, § 58; decision of 25 July 2003, no. 2 BvR 153/03, § 31, and decision of 21 January 2004, no. 2 BvR 1471/03, § 28).

44. As the legislator did not lay down any rules on the consequences of a violation of the right to expeditious proceedings, the criminal courts and the prosecution authorities are, as a rule, called upon to draw the necessary conclusions from undue delay in the proceedings. They may discontinue the proceedings pursuant to Articles 153 and 153a of the Code of Criminal Procedure, limit criminal prosecution pursuant to Articles 154 and 154a of the Code of Criminal Procedure, terminate the proceedings either by dispensing with a penalty or by a warning with sentence reserved (*Verwarnung mit Strafvorbehalt*) or take the length of the proceedings into account as a mitigating factor when fixing the penalty (see Federal Constitutional Court, judgment of 24 November 1983, no. 2 BvR 121/83, §§ 4-5; decision of 5 February 2003, nos. 2 BvR 327/02, 2 BvR 328/02 and 2 BvR 1473/02, §§ 35-36; decision of 25 July 2003, no. 2 BvR 153/03, §§ 34-35, and decision of 21 January 2004, no. 2 BvR 1471/03, §§ 31-32). In exceptional cases, in which the delay in the proceedings was particularly serious and had led to a particular burden for the person concerned and in which the said options provided by the criminal law and the law on criminal procedure were insufficient, the proceedings may be discontinued because of a constitutional impediment to the proceedings (see Federal Constitutional Court, judgment of 24 November 1983, no. 2 BvR 121/83, § 8; decision of 19 April 1993, no. 2 BvR 1487/90, § 18; decision of

5 February 2003, nos. 2 BvR 327/02, 2 BvR 328/02 and 2 BvR 1473/02, § 36, and decision of 21 January 2004, no. 2 BvR 1471/03, § 45). In the latter case, the Federal Constitutional Court may discontinue the proceedings itself (see, *inter alia*, that court's decision of 5 February 2003, nos. 2 BvR 327/02, 2 BvR 328/02 and 2 BvR 1473/02, § 61, and decision of 25 July 2003, no. 2 BvR 153/03, § 49).

45. Pursuant to section 90 § 2 of the Federal Constitutional Court Act, complainants must exhaust the remedies available in the domestic courts prior to lodging a constitutional complaint. However, the Federal Constitutional Court may decide on a constitutional complaint lodged before the exhaustion of these remedies if the complaint is of general importance or if the complainant would otherwise suffer a serious and unavoidable disadvantage.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

46. The applicant complained that the criminal investigation proceedings instituted against him had lasted an unreasonably long time. He relied on Article 6 § 1 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

1. *The parties' submissions*

a. **The Government**

48. In the Government's view, the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention on two grounds. Firstly, he had failed to lodge a constitutional complaint with the Federal Constitutional Court about the length of the investigation proceedings prior to lodging his application with this Court. Secondly, he had not brought any compensation claims in the domestic courts.

49. The Government argued that a constitutional complaint was an effective remedy within the meaning of Article 13 of the Convention to

complain about the length of criminal proceedings and the applicant therefore should have exhausted that remedy. The Court's findings in its judgment of 8 June 2006 in the case of *Sürmeli v. Germany* ([GC], no. 75529/01, ECHR 2006-...) that a constitutional complaint was not an effective remedy to complain about the length of civil proceedings and that applicants therefore did not have to avail themselves of that remedy did not apply to complaints about the duration of criminal proceedings. In the latter case, the Federal Constitutional Court could not only find that the duration of criminal proceedings had been excessive, it could also provide both preventive and compensatory redress. According to its case-law (compare paragraphs 43-44 above), measures to be taken to redress an excessive delay in the proceedings included the limitation of criminal prosecution pursuant to Article 154 and Article 154a of the Code of Criminal Procedure, the termination of the proceedings by dispensing with a penalty or by issuing a warning with sentence reserved, a mitigation of the penalty or the discontinuance of the proceedings pursuant to Articles 153 and 153a of the Code of Criminal Procedure. As a rule, the criminal courts provided such redress on remittal of a case from the Federal Constitutional Court. However, the latter also had jurisdiction to discontinue the criminal proceedings itself in exceptional circumstances if it considered that the excessive length of the proceedings had led to a constitutional impediment to the proceedings. The Government stressed that a constitutional complaint could be used to complain both about the excessive length of terminated criminal proceedings and, under the conditions of section 90 § 2 of the Federal Constitutional Court Act (see paragraph 45 above), to complain about the duration of pending criminal investigation proceedings.

50. The Government further claimed that the applicant had failed to assert claims for compensation of damage caused by his criminal prosecution in the domestic courts. Firstly, he could have obtained compensation for pecuniary damage suffered by certain measures of criminal prosecution, in particular searches and seizures, pursuant to sections 2 et seq. of the Act on Compensation for Measures of Criminal Prosecution (see paragraphs 37-40 above). Secondly, he could have brought official liability proceedings pursuant to Article 839 of the Civil Code, read in conjunction with Article 34 of the Basic Law, in the civil courts. In those proceedings, he could have obtained compensation for pecuniary damage, such as lawyers' fees and loss of earnings, which he had 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. Compensation for non-pecuniary damage could be obtained if the conditions of Articles 253 and 847 of the Civil Code (see paragraph 42 above) were met.

b. The applicant

51. The applicant contested this view. He argued that German legislation and the domestic courts' case-law did not provide for remedies to obtain adequate compensation for the pecuniary and non-pecuniary damage suffered as a consequence of the excessive length of proceedings.

52. In the applicant's submission, no complaint to the Federal Constitutional Court could be used to complain about the duration of pending investigation proceedings. Moreover, that court could not afford redress in such circumstances, because it had no jurisdiction to order the prosecution to discontinue the proceedings. Likewise, that court had no jurisdiction to order the payment of compensation for damage caused by excessive length of proceedings.

53. As to compensation claims, the applicant conceded that he had not lodged a request for compensation for damage 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.

2. The Court's assessment**a. General principles**

54. The Court reiterates that the rule of exhaustion of domestic remedies is based on the assumption, reflected in Article 13 of the Convention, with which it has close affinity, that there is an effective remedy available in respect of the alleged breach in the domestic system (see *Hartman v. Czech Republic*, no. 53341/99, § 56, ECHR 2003-VIII (extracts)). Remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are "effective" within the meaning of Article 13 if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred. A remedy is therefore effective if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see *Mifsud v. France* (dec.) [GC], no. 57220/00, § 17, ECHR 2002-VIII; *Hartman*, cited above, § 81; and *Sürmeli v. Germany* [GC], no. 75529/01, § 99, ECHR 2006-...).

55. It is incumbent on the Government claiming non-exhaustion to convince the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was

capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Horvat v. Croatia*, no. 51585/99, § 39, ECHR 2001-VIII; *Hartman*, cited above, § 58).

b. Application of these principles to the present case

i. Complaint to the Federal Constitutional Court

56. The Court will examine first whether, in the light of these principles, a constitutional complaint was an effective remedy to complain about the length of criminal investigation proceedings which the applicant should have exhausted. It reiterates that prior to its judgment in the case of *Sürmeli v. Germany* ([GC], no. 75529/01, ECHR 2006-...), it has taken the view that a complaint to the German Federal Constitutional Court was an effective remedy in respect of complaints concerning the length of proceedings, having regard to the Federal Constitutional Court's case-law acknowledging the existence of a constitutional right to expeditious proceedings (see, in particular, *Sürmeli*, cited above, § 103 with further references to the case-law of the Convention institutions). Since its judgment in the *Kudła* case (see *Kudła v. Poland* [GC], no. 30210/96, §§ 146 et seq., ECHR 2000-XI), the Court has subjected the effectiveness of remedies in respect of the length of the proceedings in a number of Contracting States to a closer examination. In the case of *Sürmeli* (cited above, §§ 102-108), it found that a complaint to the German Federal Constitutional Court was not an effective remedy within the meaning of Article 13 of the Convention providing adequate redress for the duration of pending civil proceedings. In the case of *Herbst v. Germany* (no. 20027/02, §§ 64-66, 11 January 2007), it further concluded that a constitutional complaint could also not be considered an effective remedy to complain about the length of terminated civil proceedings.

57. As regards complaints concerning excessive length of criminal proceedings, the Court has until now taken the view that a complaint to the Federal Constitutional Court about the length of such proceedings was an effective remedy capable of providing the litigant with adequate redress (compare, *inter alia*, *Uhl v. Germany* (dec.), no. 64387/01, 6 May 2004; and *Weisert v. Germany* (dec.), no. 14374/03, 3 April 2007). In this connection, the Court accepted that, other than in civil proceedings, the Federal Constitutional Court could provide redress for the unreasonable duration of criminal proceedings by directing the prosecution or the criminal courts to draw the necessary consequences from an undue delay in the proceedings.

These notably included discontinuing the proceedings pursuant to Articles 153 and 153a of the Code of Criminal Procedure, limiting criminal prosecution pursuant to Articles 154 and 154a of the Code of Criminal Procedure or dispensing with or mitigating the penalty (see *Weisert*, cited above; compare further *Jansen v. Germany* (dec.), no. 44186/98, 12 October 2000 and *Dželili v. Germany*, no. 65745/01, §§ 100-104, 10 November 2005 for a mitigation of the sentence; see *Sprotte v. Germany* (dec.), no. 72438/01, 17 November 2005 for a discontinuance of the proceedings; and paragraphs 43-44 above).

58. The Court finds that the said measures, if applicable to the case at issue, are indeed capable of providing adequate redress for a violation of the reasonable time requirement which has occurred. In the case of the discontinuance of the proceedings, they may, in addition, prevent the continuation of the violation. However, the Court observes that it is a prerequisite for all forms of redress at issue that the person concerned has either been found guilty of an offence or – if Articles 153, 153a, 154 or 154a of the Criminal Code are applied – that the proceedings are discontinued on the assumption that the person concerned could be found guilty of an offence by the criminal courts otherwise. Furthermore, the applicable provisions of criminal law and of the law of criminal procedure must have authorised the use of the measure in question in the circumstances of the case.

59. In the present case, the applicant complained that the length of the criminal investigation proceedings against him, which had been discontinued by the investigation authorities without him being found guilty of the essential offences he had been accused of, was unreasonable. In these circumstances, the remedies at the Federal Constitutional Court's disposal (as described above) on a subsequent complaint by the applicant could not have provided the applicant with adequate redress for the breach of the reasonable time requirement. The Court notes in this connection that the Federal Constitutional Court does not have jurisdiction to award compensation for pecuniary and non-pecuniary damage caused by lengthy proceedings (see *Sürmeli*, cited above, § 105; *Grässer v. Germany*, no. 66491/01, § 48, 5 October 2006; and *Herbst*, cited above, §§ 65-66).

60. It remains to be determined whether, as claimed by the Government, the applicant could have obtained adequate redress for the alleged breach of the reasonable time requirement had he lodged a complaint with the Federal Constitutional Court while the investigation proceedings against him were still pending and should therefore have availed himself of this remedy at that moment.

61. The Court, having regard to the provisions of the Federal Constitutional Court Act (see paragraph 45 above), notes that a constitutional complaint may be used, in exceptional circumstances, to complain about the duration also of pending proceedings. While the Federal

Constitutional Court is not empowered to set deadlines for lower authorities and courts or to order specific measures to speed up the proceedings (see *Sürmeli*, cited above, § 105), it could have directed the investigation authorities to take the remedial measures at their disposal (see paragraph 57 above). However, in a case like the present one, in which the suspect could not be found guilty of the essential offences he had been accused of, adequate redress could not have been provided for the length of the proceedings as a whole by any of the measures at the disposal of the domestic authorities, which presuppose, or operate on an assumption of, the suspect's guilt.

ii. Claim for compensation

62. As to the further question whether a claim for compensation for damage caused by the criminal investigation proceedings was an effective remedy the applicant should have used, the Court notes that in the Government's submission, the applicant should have made a request for compensation under the Act on Compensation for Measures of Criminal Prosecution and should also have brought a compensation claim in official liability proceedings. However, by lodging a request for compensation under sections 2 and 7 § 1 of the Act on Compensation for Measures of Criminal Prosecution (see paragraphs 37-40 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 on the ground that the proceedings against him had subsequently been discontinued. Thus, this remedy, which operated independently of the duration of the proceedings at issue, was not capable of affording him redress for the protracted length of the investigation proceedings.

63. As regards official liability proceedings against the State (see paragraphs 41-42 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*, cited above, §§ 113-114; *Grässer*, cited above, §§ 49-50; and *Herbst*, cited above, §§ 67-68). In particular, the domestic 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; *Hartman*, cited above, § 68; and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 204, ECHR 2006-...). 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. In particular, it has not been shown that the domestic courts

were ready to grant compensation for non-pecuniary damage caused by the excessive duration of proceedings by considering this duration to violate the personality rights of the person concerned (compare paragraph 42 above).

iii. Conclusion

64. Having regard to the above considerations, the Court finds that the Government have not shown that in the present case, in which the investigation proceedings against the applicant were discontinued, a constitutional complaint or a claim for compensation either under the Act on Compensation for Measures of Criminal Prosecution or in official liability proceedings was an effective remedy capable of affording redress for the excessive length of the criminal investigation proceedings against the applicant. Accordingly, the applicant was not required to avail himself of any of these remedies for the purposes of Article 35 § 1 of the Convention prior to lodging his application with the Court. The Government's plea of non-exhaustion of domestic remedies must therefore be dismissed.

65. 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 parties' submissions

a. The applicant

66. The applicant claimed that the length of the investigation proceedings against him, which lasted from the moment when he was summoned by the police for the first time in February 1987 until he was informed of the discontinuance of the proceedings by a letter dated 3 February 2003, had clearly been excessive. He took the view that throughout the proceedings, the prosecution had not duly furthered the investigations, which since 1995 consisted only of reports being drafted by experts at the Public Prosecutor's Office. His reputation and his business activities were seriously damaged by the continuing investigations.

b. The Government

67. The Government argued that, for the purposes of Article 6, the proceedings had started only on 6 December 1990. On that day, the applicant was confronted for the first time with the charges concerning the management of the funds of the IHV Real Estate Company (as opposed to the previous charges dating back to 1987 concerning the DETAG

corporation) in the course of a search of his home. They had ended when the applicant was informed of the prosecution's decision of 29 January 2003 to discontinue the proceedings.

68. In the Government's view, the length of the investigation proceedings against the applicant had still been reasonable and had thus complied with Article 6 § 1. The proceedings had been particularly complex as they had concerned several defendants, companies and victims and had necessitated the assessment of large quantities of documents as well as the preparation of expert reports. In view of this, the Public Prosecutor's Office could hardly have evaluated the material before it more quickly. The applicant, who had suffered potential burdens rather in the proceedings at issue in application no. 10597/03 than in the proceedings at issue here, caused delays in the proceedings between April 1998 and October 2001. Having initially refused to submit certain documents requested in April 1998, he promised in December 1999 to submit these by the end of that year. As he repeatedly failed to do so, the documents had to be seized on 1 October 2001.

2. The Court's assessment

a. The reasonableness of the length of the proceedings

69. The Court reiterates that in criminal matters, the "reasonable time" referred to in Article 6 § 1 begins to run when formal charges are brought against a person or when that person has otherwise been substantially affected by actions taken by the prosecuting authorities as a result of a suspicion against him (see *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 44, ECHR 2004-XI). It notes that the applicant was summoned in February 1987 to be questioned on charges of fraud in relation with his business activities for the DETAG corporation and thus in relation to that corporation's sale of apartments to private investors. In the proceedings at issue here, the applicant was suspected of being involved in further acts of fraud committed by taking up apartments, which had subsequently been rendered by the said private investors to the applicant's corporation, into the real estate funds of another company, the IHV Company. Even though the different charges of fraud against the applicant were thus not entirely disconnected from each other, the Court does not find it established on the material before it that the applicant, when summoned in February 1987, had already been notified of the additional charges in relation to the funds of the IHV Company. Therefore, the investigation proceedings started on 6 December 1990, when the applicant's home was searched on suspicion of fraud in relation to the IHV Company. They ended when the applicant was notified by letter dated 3 February 2003 of the prosecution's decision to discontinue the proceedings.

The investigation proceedings thus lasted for approximately twelve years and two months.

70. The Court, having regard to the criteria established in its case-law (see *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII), accepts that the proceedings at issue, which concerned several suspects and necessitated an evaluation of the profitability of several funds with the help of specialists, were quite complex. The applicant, whose business activities continued to be adversely affected by the continuing proceedings, can be said to have caused some delay in that he failed to keep his commitment made in December 1999 to submit certain documents by the end of that year. However, this delay must be considered minor compared to the delays attributable to the investigation authorities. Since January 1992, the proceedings as a whole, the total duration of which calls for particular grounds justifying it, cannot be considered as having been furthered with the necessary diligence. They were not furthered at all between January 1992 and 10 November 1993. Moreover, between that date and 13 December 1994, between 10 January 1995 and 23 October 1995, between 31 July 1998 and 8 October 1999, between 4 July 2000 and 5 February 2001 and between 31 October 2001 and 18 December 2002 there were either apparently no investigations at all or long delays in the evaluation of documents seized.

71. In view of the foregoing, the Court finds that the applicant's case was not heard within a reasonable time as required by Article 6 § 1.

b. Loss of victim status

72. The Court shall further examine whether the applicant lost his status as a victim of a violation of Article 6 § 1 because the Public Prosecutor's Office discontinued the proceedings against him partly pursuant to Article 153 of the Code of Criminal Procedure, arguing, *inter alia*, that the commission of the offences dated back a long time (see paragraph 30 above). It 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 v. Germany*, judgment of 15 July 1982, Series A no. 51, 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).

73. The Court observes that the prosecution, in discontinuing the proceedings, found that the applicant's offences dated back a long time. It considers that this finding cannot be considered as amounting to an acknowledgement, in substance, that the investigation proceedings had also lasted an unreasonably long time. In any event, the loss of an applicant's

victim status further requires that he is afforded adequate redress for the breach of his Convention right at national level. In this respect, the Court refers to its finding that the discontinuance of criminal proceedings on account of their excessive length may be capable, depending on the duration in question, of adequately redressing a breach of Article 6 § 1 (see paragraph 57 above; as well as *Eckle*, cited above, p. 39, § 94; and *Sprotte*, cited above).

74. However, in the present case, the investigation proceedings were mainly discontinued because the applicant could not or no longer be found guilty of an offence. They were only discontinued in part under Article 153 of the Code of Criminal Procedure, on grounds of insignificance. Moreover, there is no indication that the prosecution thereby meant to afford the applicant redress for the unduly long duration of the proceedings.

75. 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.

76. Accordingly, the Court 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. Referring to his observations made in respect of his application no. 10597/03 and without submitting any documentary evidence, he alleged that he had suffered pecuniary damage as the length of the proceedings, which continued to lose him customers, staff and business partners, had caused considerable losses of profits and the insolvency, in 2002, of his firm, the DETAG corporation. He estimated that the damage incurred amounted to seven million Deutschmarks per year.

79. As regards non-pecuniary damage, the applicant claimed that he was a well-known personality in Germany and that he had been ruined financially and his reputation irretrievably damaged both in the professional and the private sphere by the lengthy unjustified investigation proceedings against him. He left it to the Court to estimate the total damage caused and to fix an appropriate amount.

80. In the Government's submission, 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 non-pecuniary damage. Potential burdens he had been subjected to had resulted, if at all, rather from the proceedings at issue in application no. 10597/03 than from the proceedings at issue here.

81. As regards the applicant's claim for reimbursement in respect of pecuniary damage, the Court does not exclude that the length of the investigation proceedings against the applicant on charges of fraud and breach of fiduciary duty, which were not unconnected to his business activities for the DETAG corporation and ended with the discontinuance of the proceedings, caused the applicant loss 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 clearly excessive length of the criminal investigation proceedings which were finally discontinued. Making its assessment on an equitable basis, having regard also to the fact that the proceedings at issue here and the proceedings at issue in application no. 10597/03 concerned separate, but not wholly unrelated charges, the Court awards the applicant EUR 14,000 under this head, plus any tax that may be chargeable.

B. Costs and expenses

83. The applicant referred to his submissions made in respect of application no. 10597/03 also in this respect. In those proceedings, he had claimed, without submitting any documentary evidence relating to his claim, that 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. The Court accepts that in length-of-proceedings cases the

protracted examination of a case beyond a “reasonable time” may involve 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). It notes, however, that the applicant, who was represented by counsel in the investigation proceedings, not only failed to substantiate the exact amount of costs and expenses caused only by the protracted length of the investigation proceedings here at issue; other than in application no. 10597/03, it is not clear from the material before the Court that he in fact incurred additional costs as a result of the duration of the present proceedings. The Court therefore cannot make an award for costs and expenses incurred in the domestic proceedings. 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 either.

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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *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 14,000 (fourteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (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;
4. *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