



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

FIFTH SECTION

**CASE OF KAEMENA AND THÖNEBÖHN v. GERMANY**

*(Applications no. 45749/06 and no. 51115/06)*

JUDGMENT

STRASBOURG

22 January 2009

**FINAL**

***22/04/2009***

*This judgment may be subject to editorial revision.*



**In the case of Kaemena and Thöneböhn v. Germany,**

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Renate Jaeger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 16 December 2008,

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

## PROCEDURE

1. The cases originated in two applications (no. 45749/06 and no. 51115/06) 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 two German nationals, Ms Christiane Kaemena and Mr Uwe-Karsten Thöneböhn (“the applicants”), on 10 November 2006 and 19 December 2006 respectively.

2. The first applicant, Ms Christiane Kaemena, was represented by Mr H.-J. Weider and Mr R. Schlothauer, Professors of Law and lawyers practising in Frankfurt am Main and Bremen respectively. The second applicant, Mr Uwe-Karsten Thöneböhn, was represented by Mr S. Barton, Professor of Law at the University of Bielefeld. The German Government (“the Government”) were represented by their Deputy Agent, Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice.

3. Relying on Article 6 § 1 of the Convention, the applicants argued, in particular, that the length of the criminal proceedings against them had exceeded a reasonable time. They further submitted that they could still claim to be victims of a violation of their Convention rights because the domestic courts had failed to afford redress for this breach of Article 6 by mitigating their life sentences.

4. On 23 August 2008 the President of the Fifth Section decided to give notice of the applications to the Government. It was also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Ms Kaemena, was born in 1967 and is currently detained in Vechta. The second applicant, Mr Thöneböhn, was born in 1968 and is currently detained in Celle.

#### *1. The investigation proceedings*

6. On 9 May 1996 the first and the second applicant were arrested and placed in pre-trial detention on suspicion of having jointly murdered the first applicant's husband on 2 May 1996.

7. On 5 September 1996 the indictment for murder was preferred against the applicants with the Verden Regional Court.

#### *2. The proceedings before the Regional Court*

8. On 21 January 1997 the Verden Regional Court opened the trial against the applicants, who were represented by counsel throughout the proceedings before the domestic courts, and against another co-defendant (M.).

9. On 16 December 1997 the Verden Regional Court convicted the applicants and their co-defendant, who had all denied the charges, of having jointly murdered the first applicant's husband, who had stood in the way of the applicants' plan to marry, and sentenced them to life imprisonment.

10. Having heard more than fifty witnesses and at least five experts, having inspected the scene of the crime and having analysed the time and duration of numerous telephone calls between the defendants, the Regional Court concluded that the first applicant had given 20,000 Deutschmarks to M. and had lured her husband to a remote place, where he had been shot by the second applicant and M. acting jointly.

11. The Regional Court found that in view of their considerable involvement in their intimate relationship, in which they had driven each other to commit the offence in question, the applicants' guilt was not of a particular gravity (Article 57a § 1 of the Criminal Code; see paragraph 45 below).

#### *3. The proceedings before the Federal Court of Justice*

12. On 17 December 1997 the applicants both lodged an appeal on points of law. They complained, *inter alia*, that the Regional Court had made a procedural error in that it had based its judgment on a document containing a list of telephone calls they had made without that evidence having been produced at the main hearing.

13. The Public Prosecutor's Office likewise lodged an appeal on points of law, which it reasoned on 29 May 1998. It contested in particular the Regional Court's finding that the applicants' guilt was not of a particular gravity.

14. By a decision of 10 February 1999 the Federal Court of Justice (third senate) dismissed the applicants' appeal on points of law as manifestly ill-founded. It added that it considered the applicants' appeal to be inadmissible in so far as they had alleged a procedural error. It argued that the applicants had failed sufficiently to substantiate this complaint. They had not informed the court that in the summons for a witness working for the telephone company who had listed the applicants' phone calls, the president of the Regional Court had stated that the witness was called to explain the content of the said list of calls.

15. By a judgment delivered on the same day, the Federal Court of Justice, having held a hearing, allowed the prosecution's appeal on points of law. It quashed the judgment of the Verden Regional Court in so far as the latter had not considered the applicants' guilt to be of a particular gravity and remitted the case to a different chamber of the Regional Court.

#### *4. Proceedings before the Federal Constitutional Court*

16. By submissions dated 8 and 9 April 1999 respectively the second and the first applicant lodged a constitutional complaint with the Federal Constitutional Court. They notably contested the Federal Court of Justice's finding that their appeal had been inadmissible in so far as they had alleged a procedural error.

17. On 5 July 2001 the Federal Constitutional Court communicated the constitutional complaints to the Federal Court of Justice and the Federal Public Prosecutor for observations.

18. On 6 December 2001 the Federal Public Prosecutor submitted his observations to the Federal Constitutional Court. On 27 December 2001 the president of the Federal Court of Justice filed the observations of all senates of that court.

19. In January 2002 the Federal Constitutional Court invited the applicants to submit written observations in reply by 30 April 2002.

20. On 20 August 2002 the first applicant and on 14 October 2002 the second applicant lodged observations in reply. Both applicants had previously been informed by the Federal Constitutional Court, at their request, that the court would not take a decision before the end of that year.

21. On 30 March 2004 the Federal Constitutional Court informed the first applicant, at her request, that a decision would probably be taken in the course of the year 2004.

22. On 25 January 2005 the Federal Constitutional Court, sitting as a senate of eight judges, quashed the decision of the Federal Court of Justice

of 10 February 1999 and remitted the case to that court (file no. 2 BvR 657/99 and no. 2 BvR 656/99).

23. In its leading decision (running to 45 pages), the Federal Constitutional Court examined the constitutionality of the requirements set forth in the case-law of the Federal Court of Justice which an appellant has to satisfy in order to lodge an admissible appeal on points of law about a procedural error. The Federal Constitutional Court found that as a rule, these requirements did not violate the individuals' right to effective legal protection. However, in the applicants' case, having regard to the entirety of their submissions made, the Federal Court of Justice had over-stretched the said requirements by requesting information also about a witness's summons as such, and had therefore breached the applicants' right to effective legal protection.

24. The Federal Constitutional Court's decision was served on the applicants' counsel on 25 May 2005.

#### *5. Renewed proceedings before the Federal Court of Justice*

25. In their submissions dated 18 July 2005 to the Federal Court of Justice the applicants, contesting the Federal Public Prosecutor's view, argued, in particular, that the proceedings had lasted unreasonably long. They requested the court to find a violation of Article 6 § 1 of the Convention (the first applicant argued that there had also been a breach of Article 5 § 3 of the Convention) and to mitigate the length of their prison term in compensation.

26. On 28 September 2005 the execution of the arrest warrant against the first applicant was suspended and she remained at liberty until 23 February 2006.

27. The hearing fixed for 1 December 2005 had to be cancelled as the first applicant's counsel were unavailable.

28. On 15 December 2005 the second applicant suffered a heart attack.

29. Having held a hearing on 12 January 2006, the Federal Court of Justice (third senate) dismissed the applicants' appeal on points of law by judgment of 7 February 2006. It found that the applicants' complaint that the Regional Court had made a procedural error in using the telephone lists in evidence was ill-founded because the time and duration of the telephone calls in question had been confirmed by different witnesses who had been confronted at the hearing with the data contained in the telephone list.

30. Moreover, the Federal Court of Justice found that the length of the proceedings did not warrant a mitigation of the applicants' sentence of life imprisonment.

31. The lapse of time since its decision of 10 February 1999 was not automatically attributable to the judicial authorities only because the Federal Constitutional Court had subsequently quashed that decision. It argued that, as a rule, the fact that a decision was quashed and the case remitted to the

lower court did not entail a violation of the right to have one's case heard within a reasonable time, but was a necessary consequence of the possibility to rectify mistakes on appeal. Only delays caused by decisions which disclosed a flagrant breach of the law could therefore be considered as having delayed the proceedings contrary to the rule of law. As in the present case its decision of 10 February 1999 did not disclose such a flagrant breach of the law, there had not been a delay which was attributable to the judicial authorities since then.

32. Moreover, the Federal Court of Justice considered that it could leave open the question whether the Federal Constitutional Court had failed to treat the applicants' constitutional complaints without undue delay. Even assuming that there had been such a delay, the applicants could not claim redress therefor. Pursuant to Article 211 of the Criminal Code (see paragraph 43 below) a person acting with criminal responsibility who was found guilty of murder had to be sentenced to life imprisonment. The court further left open whether an exception to this rule had to be made in exceptional cases in which there had been an extreme delay, as this was not the case in the proceedings against the applicants. As their convictions and their sentence had been final according to the provisions of the Code of Criminal Procedure already on 10 February 1999, the uncertainty arising from the applicants' mere hope that the Federal Constitutional Court would allow their constitutional complaints did not entail a strain which necessitated compensation. In these circumstances, there was no reason for a mere declaration that there had been a violation of the Convention.

33. The judgment was served on the applicants' counsels on 9 March 2006.

#### *6. Renewed proceedings before the Federal Constitutional Court*

34. In April 2006 the applicants lodged a constitutional complaint with the Federal Constitutional Court against the judgment of the Federal Court of Justice of 7 February 2006. Invoking their right to liberty and to be heard within a reasonable time, they argued in particular that due to the excessive delays in the proceedings, in particular between 10 February 1999 and 7 February 2006, their sentences of life imprisonment should have been reduced to fixed terms of imprisonment.

35. On 21 June 2006 the Federal Constitutional Court, sitting as a panel of three judges, declined to consider the applicants' constitutional complaints (file no. 2 BvR 750/06 and no. 2 BvR 752/06) as these were manifestly ill-founded.

36. Even though the Federal Constitutional Court was not convinced that the duration of proceedings before it could be added to the length of criminal proceedings, as it was not part of the ordinary system of legal remedies, it left this question open. It found that it was not necessary to

examine whether there had been undue delays contrary to the rule of law in the proceedings before it or before the Federal Court of Justice.

37. Even assuming such delays, a reduction of the applicants' sentences was excluded because in cases of murder, the sentence of life imprisonment was mandatory according to Article 211 of the Criminal Code. Therefore, a violation of the right to be heard within a reasonable time could not, as a rule, lead to a mitigation of this sentence. The court reiterated that the unreasonable duration of criminal proceedings could reduce an offender's guilt and could, in exceptional cases, even warrant compensation by dispensing with punishment or by discontinuing the proceedings. However, Article 211 of the Criminal Code did not authorise the courts to consider any aspects reducing a murderer's guilt such as the excessive duration of the proceedings against him or her. This finding was confirmed by Article 78 § 2 of the Criminal Code (see paragraph 44 below). By ruling that murder was not subject to the statute of limitations, the legislator showed that even long delays between the commission and the conviction of this offence should not be taken into consideration as a mitigating factor.

38. The Federal Constitutional Court found that it could be left open whether in cases in which decades had passed between the commission of the offence and the murderer's final conviction a mitigation of the sentence of life imprisonment was necessary for reasons of proportionality. Even assuming that there had been unreasonable delays in the present proceedings after the Federal Court of Justice's decision of 10 February 1999, these had not been so long as to justify a mitigation of the mandatory life sentence prescribed by law for murder.

39. The court, disagreeing with the applicants, further found that the rights of a murderer were not less protected than those of other offenders. Unreasonable delays during the proceedings before the criminal courts could, for example, lead to his or her release from detention pending trial.

40. The decision was served on the applicants' counsel on 5 July 2006.

#### *7. Renewed proceedings before the Verden Regional Court*

41. On 6 November 2006 the Verden Regional Court resumed the proceedings concerning the question whether the applicants' guilt was of a particular gravity, which it had suspended at the applicants' request.

42. In its judgment delivered on 15 December 2006 the Verden Regional Court found that, having regard to the circumstances in which the murder had been committed, the applicants' guilt was not of a particular gravity (Article 57a § 1 of the Criminal Code).

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### *1. Relevant provisions of the Criminal Code*

43. Under Article 211 of the Criminal Code, the intentional killing of a person is to be qualified as murder if certain aggravating elements are present. A murderer is notably a person who kills another out of cupidity or other base motives (Article 211 § 2). Murder is punishable by life imprisonment (Article 211 § 1).

44. Murder is not subject to the statute of limitations (Article 78 § 2 of the Criminal Code).

45. A declaration by the sentencing court which imposed a life sentence that the offender's guilt was of particular gravity has a bearing on a subsequent decision of the court dealing with the execution of sentences as to whether or not to suspend the remainder of the offender's prison sentence on probation. Pursuant to Article 57a § 1 of the Criminal Code, that court suspends the remainder of a life sentence on probation if the convicted person has served fifteen years of his or her sentence, provided that this can be justified in the interests of public safety and provided that the particular gravity of the offender's guilt does not warrant the continued execution of the sentence.

46. Article 49 and Article 51 of the Criminal Code contain rules on the fixing of sentences. Pursuant to Article 49 § 1 no. 1 of the Criminal Code, the courts are to reduce a life sentence to a term of imprisonment of not less than three years if the mitigation of the penalty under this provision is either prescribed or authorised by law. Article 51 § 1 of the Criminal Code prescribes that the time a convicted offender has spent in detention pending trial for the offence at issue in the proceedings shall, as a rule, be deducted from the term of imprisonment imposed on him. If a period of time spent in detention abroad is to be deducted from the sentence, the court shall determine the period to be deducted at its discretion (Article 51 § 4 of the Criminal Code).

### *2. Case-law of the domestic courts on complaints of excessive length of criminal proceedings*

#### **a. Case-law at the time of the proceedings against the applicants**

47. According to the settled case-law of the Federal Constitutional Court, which is applied by the criminal courts, 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; 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; and decision of 21 January 2004, no. 2 BvR 1471/03, § 28).

48. 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 proceedings' length 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; and decision of 21 January 2004, no. 2 BvR 1471/03, §§ 31-32).

49. If there was a violation of the right to expeditious proceedings, the criminal courts, in their judgments, expressly had to determine the extent of the delays and their cause. If redress was afforded by a mitigation of the penalty, the courts then had to fix the extent of the compensation granted by indicating the penalty which they would have imposed without the delay and by fixing the penalty mitigated because of the delays. Only the latter, mitigated penalty appeared in the operative part of the judgment (see, *inter alia*, Federal Constitutional Court, decision of 7 March 1997, no. 2 BvR 2173/96, *Neue Zeitschrift für Strafrecht (NStZ)* 1997, p. 591; Federal Court of Justice, decision of 21 December 1998, no. 3 StR 561/98, *NJW* 1999, pp. 1198-1199 with further references).

#### **b. New case-law of the Federal Court of Justice**

50. In its decision of 17 January 2008 the Federal Court of Justice, sitting as Grand Senate for Criminal Matters, reversed its previous case-law on the way in which compensation should be granted for excessive delays in criminal proceedings (file no. GSSSt 1/07).

51. The Federal Court of Justice held that in cases in which criminal proceedings had been excessively delayed, the criminal courts should no longer directly reduce the penalty imposed on the convicted person (so-called mitigation of penalty approach – *Strafabstragslösung*), but should instead state in the operative part of the judgment that a specified part of the penalty imposed was to be considered as having been executed (so-called “execution approach” – *Vollstreckungslösung*).

52. The Federal Court of Justice considered that in certain cases, mitigating the penalty in order to compensate for the excessive length of proceedings, which was called for by the Basic Law and the Convention, was not compatible with the provisions of the Criminal Code and of the Code of Criminal Procedure. Notably in cases in which compensation could be granted only by reducing a minimum penalty prescribed by law, the “mitigation of penalty approach” could not be reconciled with the provisions of the Criminal Code. For instance, it was not possible under the provisions of that Code to dispense with imposing a mandatory life sentence in order to compensate for the undue duration of proceedings.

53. By contrast, the “execution approach”, which could be derived from the principle of compensation enshrined in the Convention and from Article 51 §§ 1 and 4 of the Criminal Code (see paragraph 46 above) and which was compatible with Articles 6 and 13 of the Convention, made it possible to afford compensation in all cases of excessive duration of proceedings. It allowed the criminal courts both to impose the minimum sentence prescribed by law and nevertheless to afford compensation by declaring that a fixed part of that penalty had to be considered as already executed. In the case of a life sentence, for instance, the courts could afford compensation by declaring that a part of the minimum sentence to be served (see Article 57a § 1 of the Criminal Code, paragraph 45 above) had to be considered as having been served. Moreover, by separating the fixing of the penalty in accordance with the defendant’s guilt and the granting of compensation, the penalty maintained its function with respect to other provisions of criminal law (concerning, for instance, probation or preventive detention) and provisions concerning civil servants and foreigners.

54. When applying the “execution approach”, the criminal courts first had to determine the extent and causes of undue delays in the proceedings. In fixing the sentence in accordance with the defendant’s guilt, they had to take into consideration as a mitigating factor that a long lapse of time between the offence and the judgment in general reduced the necessity to punish the offender. Moreover, the undue duration of the proceedings could play a role in that the defendant was subjected to a greater burden as a result of lengthy proceedings. In a further step the criminal courts, having regard to all the circumstances of the case, then had to determine which part of the penalty was to be considered as having already been executed in order to compensate the defendant for the delay caused by the State authorities and courts contrary to the rule of law. Both the penalty and the part of it which had to be considered as executed had to be taken up in the operative part of the judgment.

## THE LAW

### I. JOINDER OF THE APPLICATIONS

55. Given that the two applications both concern questions related to the same set of criminal proceedings, instituted against the first and the second applicant as co-defendants, the Court decides that the applications shall be joined (see Rule 42 of the Rules of Court).

### II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

56. The applicants complained that the criminal proceedings against them had lasted an unreasonably long time. They relied on Article 6 § 1 of the Convention, which, in so far as relevant, provides:

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

57. The Government contested that argument.

#### A. Admissibility

58. The Court notes that this complaint 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*

59. The applicants took the view that the proceedings until the second decision of the Federal Constitutional Court of 21 June 2006 had not been terminated within a reasonable time as required by Article 6 § 1. The proceedings, which could not be considered particularly complex, had not been duly furthered from April 1999 onwards. Their duration could not be justified by reference to the Federal Constitutional Court's workload as it was for the State sufficiently to staff its courts so that these were in a position to dispose of the cases brought before them within a reasonable time. The excessive duration of the proceedings had put a strain on the applicants as they remained in a state of uncertainty as to the outcome of the proceedings. The first applicant further submitted that she had been subjected to changing detention regimes throughout the proceedings. In

particular, she had initially lost certain relaxations in the conditions of her detention due to the fact that following the Federal Constitutional Court's decision of 25 January 2005, she had no longer been detained as a convicted offender, but had been placed again in detention pending trial. The second applicant submitted that the outcome of the proceedings had been of particular importance for him as he had not been granted any relaxations in the conditions of his detention throughout the proceedings, during which his state of health had deteriorated.

60. The Government conceded that the proceedings before the Federal Constitutional Court following the applicants' first constitutional complaint had lasted a long time. However, the proceedings had been quite complex as that court had had to adjudicate for the first time on the interpretation of the conditions of admissibility for an appeal on points of law by the Federal Court of Justice. Referring to statistical material, the Government stressed that the senate having jurisdiction to decide on the applicants' complaints had faced a heavy workload during the relevant period, to which it had responded by employing further registry staff. In view of its special role as guardian of the Constitution, it had had to give priority to ten other cases pending before it which raised more important issues for the general public. The Government further argued that the duration of the proceedings before the Federal Constitutional Court had put a lesser burden on the applicants than the duration of proceedings before the criminal courts, in which the applicants had been finally convicted as early as 10 February 1999. Only two per cent of complaints to the Federal Constitutional Court were successful, so the applicants must have been in less doubt about the outcome of the proceedings against them. The Government further contested that the applicants' detention regimes had been related to the duration of the proceedings.

## *2. The Court's assessment*

61. The Court finds that the period to be taken into consideration started on 9 May 1996, the day of the applicants' arrest. The applicants complained about the duration of the proceedings until the second decision of the Federal Constitutional Court of 21 June 2006, which was served on the applicants' counsel on 5 July 2006. These proceedings lasted ten years and almost two months, at the investigation stage and at three levels of jurisdiction, including one remittal.

62. The Court considers that, whereas the proceedings were duly furthered by the domestic authorities and courts otherwise, they have been pending before the Federal Constitutional Court for more than six years and one month as regards the applicants' first constitutional complaint. It observes in this connection that according to its well-established case-law, Article 6 § 1 applies to proceedings before the German Federal Constitutional Court because their result could affect the outcome of

proceedings against a complainant before the criminal courts (see *Gast and Popp v. Germany*, no. 29357/95, §§ 64-66, ECHR 2000-II, with further references). It would add that, were the proceedings before the Federal Constitutional Court generally considered as not being capable of affecting the outcome of the proceedings before the criminal courts, a complaint to that court could not be considered as an effective remedy which an applicant had to exhaust for the purposes of Article 35 § 1 of the Convention before lodging an application with the Court.

63. 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 subject-matter of the proceedings before the Federal Constitutional Court, in which the senate of that court gave a leading decision on the constitutionality of the conditions of admissibility for an appeal on points of law, was not simple. However, the applicants cannot be considered to have caused any delays in the proceedings before that court. In particular, they sent their observations in reply after expiry of the time-limit set by that court after having been informed that their case could in any event not yet be considered. Although the Court is not convinced that the duration of the proceedings before the Federal Constitutional Court as such had negative repercussions on the conditions of the applicants' detention, it further accepts that the outcome of the proceedings, which could have had a bearing on the applicants' criminal conviction for murder, was important for them.

64. As to the conduct of the proceedings by the domestic courts, the Court observes that there have been substantial periods of delay in the first proceedings before the Federal Constitutional Court. In particular, more than two years passed between the receipt of the applicants' constitutional complaints and their communication to the domestic authorities for observations. Furthermore, there was a delay of more than two and a half years between the receipt of the second applicant's observations and the day on which the decision of the Federal Constitutional Court was served on the applicants. The Court accepts that the Federal Constitutional Court, as guardian of the Constitution, plays a special role in the domestic legal system and faced a heavy workload at the relevant time. Nevertheless, Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time (see, *inter alia*, *Gast and Popp*, cited above, §§ 75, 78; *Kirsten v. Germany*, no. 19124/02, § 45, 15 February 2007), which, in view of the foregoing, has not been the case here.

65. There has accordingly been a violation of Article 6 § 1 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

66. In the applicants' submission, the domestic courts refused to afford them adequate redress for the breach of the reasonable time requirement. They complained that the German courts had argued that, even assuming that the proceedings had been unreasonably long, they were not authorised under the provisions of German law to mitigate the applicants' life sentences by commuting them into fixed terms of imprisonment.

67. The Court considers that the applicants' complaint falls to be examined under Article 13 of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

68. The Government contested that argument.

#### A. Admissibility

69. The Government objected that the applicants had not expressly relied on Article 13 of the Convention in their applications to the Court and that Article 13 therefore was not the subject of the present application.

70. According to its well-established case-law, the Court has jurisdiction to review in the light of the entirety of the Convention's requirements circumstances complained of by an applicant. In the performance of its task, it is free to attribute to the facts of the case, as found to be established on the evidence before it, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner (see, *inter alia*, *Camenzind v. Switzerland*, 16 December 1997, § 50, Reports of Judgments and Decisions 1997-VIII; and *Rehbock v. Slovenia*, no. 29462/95, § 63, ECHR 2000-XII).

71. The Court notes that in the present case the applicants complained that the domestic courts had refused to afford them redress for the unreasonable length of the proceedings against them, arguing that they were not authorised to do so under German law. It considers that this factual complaint is to be legally qualified as a complaint under Article 13 of the Convention, and not under Article 34 of the Convention, which it has jurisdiction to do.

72. The Court finds that this complaint 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**

73. The applicants claimed that at the relevant time, there had not been an effective remedy to obtain redress for the excessive length of the criminal proceedings against them. The first applicant further argued that the decision of the Federal Court of Justice of 17 January 2008 (see paragraphs 50-54 above) did not apply to the present case. This decision presupposed that the domestic courts had expressly recognised a breach of the reasonable time requirement, but neither the Federal Court of Justice in its decision of 7 February 2006 nor the Federal Constitutional Court in its decision of 21 June 2006 had done so. Moreover, it only applied *ex nunc* and was not applicable to proceedings which had previously been terminated by final decision.

#### **b. The Government**

74. The Government argued that, as a rule, there was an effective remedy under German law to complain about the excessive length of criminal proceedings. The domestic courts had jurisdiction to either mitigate the penalty or discontinue the proceedings to compensate for unreasonable delays. In the present case, however, it had not been possible under German legislation and case-law as it stood at the relevant time, for the reasons given by the Federal Court of Justice in its judgment of 7 February 2006 and by the Federal Constitutional Court in its decision of 21 June 2006, to mitigate the applicants' sentences by commuting the life sentences for murder into fixed terms of imprisonment. In fixing a mandatory penalty for murder – a life sentence – in Article 211 of the Criminal Code, the legislator had made clear that any mitigating circumstances could not be taken into account. Moreover, there had been no extraordinary circumstances in which the offenders' actual guilt had not corresponded to the degree of wrongdoing attached to the offence by law. It had therefore not been possible exceptionally to reduce the life sentences by commuting them into fixed terms of imprisonment pursuant to Article 49 § 1 no. 1 of the Criminal Code (see paragraph 46 above).

75. In the Government's submission, Article 13 did not, however, require an effective remedy against the processing of a case by the court of last instance. This would result in a never-ending chain of domestic remedies.

76. The Government further submitted that the Grand Senate of the Federal Court of Justice, in its leading decision of 17 January 2008, had introduced a new method to afford compensation for the excessive duration

of criminal proceedings (see paragraphs 50-54 above). Redress should no longer be granted by mitigating the penalty imposed, but by declaring that a certain period of the penalty imposed had to be considered as served. This made it possible to afford redress also in such cases as the present one, in which a defendant had to be sentenced to a minimum penalty, such as life imprisonment. The Government conceded that this new case-law did not apply to the present proceedings, which had previously been terminated by final judgment.

## 2. *The Court's assessment*

### a. General principles

77. By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 140, ECHR 2006-...).

78. Article 13 of the Convention guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time. It is therefore necessary to determine in each case whether the means available to litigants in domestic law are “effective” in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see *Kudła*, cited above, §§ 156-158; and *Hartman v. Czech Republic*, no. 53341/99, § 81, ECHR 2003-VIII (extracts)).

79. Article 13 therefore offers an alternative: a remedy is “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-...).

### b. Application of these principles to the present case

80. In view of the fact that the applicants' complaints about the length of the criminal proceedings against them have been declared admissible (see paragraph 58 above), the Court considers that the applicants have an “arguable claim” to be victim of a violation of Article 6 § 1 for the purposes of Article 13 of the Convention (compare, *inter alia*, *Powell and Rayner v. the United Kingdom*, 21 February 1990, §§ 31-33, Series A no. 172; and *Ivison v. the United Kingdom (dec.)*, no. 39030/97, 16 April 2002).

81. As to the Government's argument that Article 13 did not require an effective remedy against the processing of a case by a court of last instance, the Court considers that there is nothing in the letter of Article 13 to support such a restriction of its scope of applicability. Accordingly, the Court has previously rejected that argument (see, for instance, *Kirsten*, cited above, §§ 55 and 56). It sees no reason to depart from that finding.

82. The Court notes that in the Government's submission, it had only exceptionally not been possible under the provisions of German law, as interpreted by the German courts at the relevant time, to afford redress for the undue duration of the criminal proceedings in the applicants' case.

83. The Court accepts that, in principle, the means available to applicants under German law for raising a complaint about the length of criminal proceedings can be considered as "effective" for the purpose of Article 13 in that they are capable of providing adequate redress for a violation of the reasonable time requirement which has occurred. According to the well-established case-law of the German courts, the criminal courts and the prosecution authorities, if necessary on direction of the Federal Constitutional Court, are to draw consequences from the excessive duration of criminal proceedings (see paragraphs 47-49 above). These notably include 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. The Court has, consequently, considered that an applicant has to avail himself of these effective remedies, in particular of a complaint to the Federal Constitutional Court, prior to lodging a complaint about the length of the criminal proceedings against him with this Court (see *Weisert v. Germany* (dec.), no. 14374/03, 3 April 2007; 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; and *Sprotte v. Germany* (dec.), no. 72438/01, 17 November 2005, for a discontinuance of the proceedings).

84. 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 providing redress in the circumstances of the case.

85. The Court notes that the applicants in the present case have been found guilty of an offence, murder. According to the findings of both the Federal Court of Justice, in its judgment of 7 February 2006 (see paragraph 32 above) and of the Federal Constitutional Court, in its decision of 21 June 2006 (see paragraphs 37 and 38 above) a reduction of the

applicants' sentences was excluded by the provisions of the Criminal Code in these circumstances. The domestic courts found that in cases of murder the sentence of life imprisonment was mandatory according to Article 211 of the Criminal Code and could be reduced, if at all, only in exceptional circumstances in which there had been an extreme delay; such circumstances had not been present in the applicants' case. Thus, the remedies at the disposal of the domestic courts at the relevant time had not been capable, in the circumstances of the present case, of providing the applicants with adequate redress for a violation of the reasonable time requirement. The Government indeed conceded this.

86. The Court further takes note of the recent reversal in the case-law of the Federal Court of Justice on the way in which criminal courts should afford redress in cases of a violation of the reasonable time requirement (see paragraphs 50-54 above). As expressly stated by the Federal Court of Justice in its decision of 17 January 2008, under the new so-called "execution approach" the criminal courts would also be able, in compliance with the provisions of the Criminal Code, to afford redress to litigants in cases such as the present one, in which a mandatory life sentence had to be imposed under the applicable provisions of the Criminal Code. The courts could afford compensation by declaring that a specified part of the life sentence – which is executed for at least fifteen years (see paragraph 45 above) – had to be considered as having been served.

87. The Court welcomes this initiative. It is in keeping with the subsidiary character of the machinery of complaint to the Court articulated in Articles 1, 35 § 1 and 13 of the Convention, which lays the primary responsibility for implementing and enforcing the rights and freedoms of the Convention on the national authorities. However, as is indeed uncontested between the parties, this new case-law postdates the decisions of the domestic courts in the present case, which have become final. It cannot, therefore, alter the conclusion that at the relevant time, the applicants had not had at their disposal an effective remedy capable of affording redress for a violation of the reasonable time requirement in the circumstances of their cases.

88. Accordingly, there has been a violation of Article 13 of the Convention.

#### IV. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

89. The first applicant also complained that the duration of her detention pending trial was excessive. She relied on Article 5 § 3 of the Convention which, in so far as relevant, reads:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

90. The Court has examined the first applicant’s complaint as submitted by her, having regard to all material in its possession and to the fact that detention under Article 5 § 3 comes to an end for the purposes of the Convention with the finding of guilt and the sentence imposed at first instance (see, *inter alia*, *Solmaz v. Turkey*, no. 27561/02, §§ 24-26, ECHR 2007-... (extracts)). It finds that, even assuming the exhaustion of domestic remedies, the complaint does not disclose any appearance of a violation of the rights and freedoms set out in Article 5 § 3.

91. It follows that this part of the first applicant’s application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The first applicant, referring to the burden put on her by the lengthy proceedings (see paragraph 59 above), claimed 29,557 euros (EUR) in respect of non-pecuniary damage, considering compensation of EUR 11 for each of the 2,687 days in which the proceedings had not been duly furthered as adequate.

94. The second applicant claimed EUR 24,640 in respect of non-pecuniary damage, equally considering compensation of EUR 11 for each of the 2,240 days in which the proceedings before the Federal Constitutional Court had not been duly furthered as adequate. He submitted that he had particularly suffered from having to wait for the Federal Constitutional Court’s decision and had not been granted any relaxations in the execution of his sentence during that period. Moreover, his state of health had been irreparably damaged as a result of the protracted length of the proceedings and he had suffered a heart attack in December 2005.

95. The Government, referring to their submissions as to the limited burden put on the applicants due to the duration of the proceedings before the Federal Constitutional Court (see paragraph 60 above), argued that the applicants’ claims in respect of non-pecuniary damage were excessive. Moreover, the second applicant had failed to demonstrate that there was a

causal link between the length of the proceedings against him and the deterioration of his state of health or his conditions of detention.

96. The Court, referring to its above findings as to the importance of the outcome of the proceedings for the applicants (see paragraph 63 above), considers that the applicants must have suffered distress from the unreasonable length of the proceedings against them and from the lack of an effective remedy to complain about that length. Making its assessment on an equitable basis, the Court awards EUR 3,000 to each of the applicants in respect of non-pecuniary damage, plus any tax that may be chargeable.

### **B. Costs and expenses**

97. Submitting documentary evidence, the first applicant claimed EUR 1,964.58 (including value-added tax (VAT)) for the costs and expenses incurred in the renewed proceedings before the Federal Constitutional Court and EUR 3,638.06 (including VAT) for those incurred before the Court (comprising EUR 2,975 for the drafting of the submissions and EUR 663.06 for their translation into English).

98. The second applicant, submitting documentary evidence, claimed EUR 1,385.58 for the costs and expenses incurred in the renewed proceedings before the Federal Constitutional Court and EUR 5,750 for those incurred before the Court (comprising EUR 5,000 for the drafting of the submissions and EUR 750 for their translation into English).

99. As regards the first applicant, the Government considered that under the provisions of the Regulation on Lawyers' Fees, only EUR 490.28 could be considered as adequate costs and expenses for the proceedings before the Federal Constitutional Court; the same amount was adequate for the costs and expenses incurred in the proceedings before this Court. As to the second applicant, who, in the Government's submission, was not subjected to VAT, only EUR 412 could be considered as adequate costs and expenses for the proceedings before the Federal Constitutional Court and again for the proceedings before this Court.

100. 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 were reasonable as to quantum. The Court observes in the present case that the renewed proceedings before the Federal Constitutional Court were essentially aimed at preventing or redressing a breach of the reasonable time requirement. Regard being had to the information in its possession and the above criteria, it considers it reasonable to award the sum of EUR 4,000 to each of the applicants, plus any tax that may be chargeable to them, covering costs and expenses under all heads.

### C. Default interest

101. 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 the applications;
2. *Declares* the complaint concerning the length of the first applicant's detention pending trial inadmissible and the remainder of the applications admissible;
3. *Holds* that there has been a violation of Article 6 of the Convention;
4. *Holds* that there has been a violation of Article 13 of the Convention;
5. *Holds*
  - (a) that the respondent State is to pay to each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention:
    - (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
  - (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;
6. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 22 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips  
Deputy Registrar

Peer Lorenzen  
President