



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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 22978/05  
by Magnus GÄFGEN  
against Germany

The European Court of Human Rights (Fifth Section), sitting on 10 April 2007 as a Chamber composed of:

Mr P. LORENZEN, *President*,  
Mrs S. BOTOCHAROVA,  
Mr V. BUTKEVYCH,  
Mrs M. TSATSA-NIKOLOVSKA,  
Mr R. MARUSTE,  
Mr J. BORREGO BORREGO,  
Mrs R. JAEGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 15 June 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Magnus Gäfgen, is a German national who was born in 1975 and is currently detained in Schwalmstadt, Germany. He was represented before the Court by Mr M. Heuchemer, a lawyer practising in Bendorf. The respondent Government were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

## A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

### *1. The kidnapping of J. and the police investigation*

J. was the youngest son of a renowned banking family in Frankfurt am Main. He got to know the applicant, a law student, as an acquaintance of his sister.

On 27 September 2002 the applicant lured J., aged eleven, into his flat in Frankfurt am Main by pretending that the child's sister had left a jacket there. He then suffocated J.

Subsequently, the applicant deposited a letter at J.'s parents' place of residence, stating that J. had been kidnapped by several persons. Only if the kidnappers received one million euros (EUR) and managed to leave the country would the child's parents see their son again. The applicant then drove to a pond at a private property near Birstein, one hour's drive from Frankfurt, and hid J.'s corpse under a jetty at the pond.

On 30 September 2002 around 1 a.m. the applicant picked up the ransom at a tram station. From then on he was secretly observed by the police. He paid part of the ransom into his bank accounts and hid the remainder of the money in his flat. That afternoon, the police arrested him at Frankfurt am Main airport.

After having seen a doctor at the airport's hospital on account of circulation trouble and skin lesions, the applicant was taken to the Frankfurt am Main Police Headquarters. He was informed by detective officer M. that he was suspected of having kidnapped J. and was instructed about his rights as a defendant, notably the right to remain silent and to consult a lawyer. He was then questioned by M. with a view to finding J. In reply, he suggested that the child was being held by another kidnapper. He was allowed to consult a lawyer, Z., for thirty minutes at his request. He subsequently stated that F.R. and M.R. had kidnapped the boy and had hidden him in a hut by a lake. M. and the applicant thereupon agreed to resume the questioning the following morning.

Early in the morning of 1 October 2002, before M. came to work, detective officer E., acting on the orders of the deputy chief of the Frankfurt police, D., told the applicant that he would suffer considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According to the applicant, the officer further threatened to lock him in a cell with two huge black people who would sexually abuse him. The officer also shook him so that his head hit the wall on one occasion. The Government disputed that the applicant had been threatened with sexual abuse. They stressed that he had not raised this allegation in the criminal proceedings against him.

For fear of being subjected to the threatened measures, the applicant disclosed the precise whereabouts of the child after approximately ten minutes of questioning.

As the applicant had declared that he would only agree to go to the place where he had hidden J. in the presence of detective officer M., he was then driven with M. and other police officers to Birstein, without detective officer E. being present any longer. The police found J.'s corpse under the jetty at the pond near Birstein as indicated by the applicant. They recorded the discovery of the corpse on videotape.

The applicant claimed that he had been forced to walk without shoes following his arrest for one and a half days, notably on a farm track to the place where he had hidden the corpse, in order to humiliate him. This had resulted in his feet being injured, as documented by the medical examination he had undergone in prison on 2 October 2002. This was contested by the Government, who submitted that the judges who had seen the videotape recorded at that time had not confirmed that the applicant had walked barefoot.

The police detected tyre tracks left by the applicant's car at the pond near Birstein. When questioned by detective officer M. on the way back from Birstein to the police station, the applicant confessed to having kidnapped and killed J. The police further secured J.'s school exercise books, a backpack, clothes worn by J. at the time of the kidnapping and the typewriter used for the blackmail letter in containers indicated by the applicant on the way back to Frankfurt am Main. They further found almost all the ransom money and a note concerning the planning of the crime in the applicant's flat. According to the autopsy carried out on J.'s corpse on 2 October 2002, the boy had died of suffocation.

The applicant consulted his lawyer, En., who had been instructed by his mother and had tried in vain to contact and advise the applicant at the police station on the morning of 1 October 2002 on his return from Birstein.

In a note for the police file dated 1 October 2002, the deputy chief of the Frankfurt police, D., stated that that morning J.'s life had been in great danger, if he was still alive at all, given his lack of food and the temperature outside. In order to save the child's life, he had therefore ordered the applicant to be questioned by police officer E. under the threat of pain which would not cause any injuries. The treatment itself was to be carried out under medical supervision. D. further stated that he had ordered another police officer to obtain a "truth serum" to be administered to the applicant. According to the note, the applicant's questioning was exclusively aimed at saving the child's life rather than furthering the criminal proceedings concerning the kidnapping. As the applicant had already made a confession after having been threatened with pain by detective officer E., no such measures had been carried out.

The applicant maintained his confession when questioned by the police on 4 October 2002, by a public prosecutor on 4, 14 and 17 October 2002, and by a district court judge on 30 January 2003.

## 2. *The criminal proceedings against the applicant*

### (a) **Proceedings in the Frankfurt am Main Regional Court**

#### (i) *The decisions on the continuation of the proceedings and on the admissibility of evidence*

On 9 April 2003, the first day of the trial, the applicant, represented by counsel, lodged an application for the proceedings to be discontinued. He claimed that he had been threatened by detective officer E., acting on instructions from the deputy chief of the Frankfurt am Main police, D., with being subjected to severe pain and with being sexually abused. He argued that his treatment had been in breach of section 136a of the Code of Criminal Procedure and Article 3 of the Convention and warranted the discontinuation of the proceedings against him.

The applicant further lodged an application for a declaration that owing to the continuous effect (*Fortwirkung*) of the threat of violence against him on 1 October 2002, all further statements which he had made to the investigation authorities until the beginning of the hearing could not be relied upon in the criminal proceedings. Moreover, the applicant requested a declaration to the effect that on account of the violation of section 136a of the Code of Criminal Procedure, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the statements extracted from the applicant – the so-called “fruit of the poisonous tree” – was prohibited (“*Fernwirkung*”).

On 9 April 2003 the Frankfurt am Main Regional Court dismissed the applicant's application for the criminal proceedings against him to be discontinued. It found that the applicant had been threatened with considerable pain if he refused to disclose the victim's whereabouts. However, the court did not find it established that the applicant had also been threatened with sexual abuse or had been otherwise influenced. The mere threat to cause the applicant pain had been illegal pursuant to section 136a of the Code of Criminal Procedure, and also pursuant to Article 1 and Article 104 § 1, second sentence, of the Basic Law (see “Relevant domestic law” below) and Article 3 of the Convention, which underlay that provision.

However, this breach of constitutional rights did not bar criminal proceedings as such. In accordance with section 136a (3) of the Code, statements obtained through the use of prohibited methods of investigation could not be relied upon in the criminal proceedings against the defendant.

In the present case, the use of such investigation methods had not restricted the rights of the defence to such an extent that the criminal proceedings could no longer be conducted. Having regard to the seriousness of the charges against the applicant on the one hand, and to the severity of the unlawful conduct in the investigation proceedings on the other hand, there had not been such an exceptional and intolerable breach of the rule of law in the investigation proceedings as to bar the continuation of criminal proceedings.

In a separate decision delivered on 9 April 2003 the Frankfurt am Main Regional Court, granting the applicant's application to that effect, decided that pursuant to section 136a (3), second sentence, of the Code of Criminal Procedure, all confessions and statements hitherto made by the applicant before the police, a public prosecutor and a district court judge could not be used as evidence in the criminal proceedings against him.

The court found that on 1 October 2002 detective officer E. had used prohibited methods of investigation within the meaning of section 136a (1) of the Code by threatening that the applicant would suffer pain if he did not disclose the child's whereabouts. Therefore, it was prohibited to use as evidence statements which the applicant had made as a consequence of the use of this forbidden investigative measure. This exclusion of evidence (*Beweisverwertungsverbot*) did not only comprise the statements made immediately after the threat on 1 October 2002. Owing to the continuous effect (*Fortwirkung*) of the violation of section 136a of the Code, all further statements which the applicant had made to the investigation authorities since then could not be relied upon in the criminal proceedings.

The procedural irregularity which had been caused by the use of a prohibited method of investigation could only have been remedied if the applicant had been informed before his subsequent questioning that the earlier statements he had made as a consequence of the use of forbidden methods of investigation could not be used as evidence against him. However, the applicant had merely been instructed about his right as an accused not to testify, without having additionally been informed about the exclusion of the evidence improperly obtained. He had therefore not been given the necessary "qualified instruction" (*qualifizierte Belehrung*) in the course of any of his hearings until then.

On the contrary, the Regional Court rejected the applicant's application for a declaration that on account of the violation of section 136a of the Code of Criminal Procedure, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the statements extracted from the applicant – the so-called "fruit of the poisonous tree" – was prohibited ("*Fernwirkung*"). It argued that the severity of the infringement of the applicant's human rights – by means of a threat of physical violence – had to be weighed against the seriousness of the offence he was charged with,

namely the murder of a child. Balancing these factors, it was proportionate to use the items of evidence obtained as a result of the confession extracted from the applicant, notably the child's corpse and the results of the autopsy, in the criminal proceedings against him.

(ii) *The Regional Court's judgment*

On 28 July 2003 the Frankfurt am Main Regional Court convicted the applicant, *inter alia*, of murder and kidnapping with extortion causing the death of the victim. It sentenced the applicant to life imprisonment and declared that his guilt was of a particular gravity (*besondere Schwere der Schuld*; see "Relevant domestic law" below).

The court found that at the hearing the applicant had been instructed anew about his right as a defendant to remain silent and about the fact that all his earlier statements could not be used as evidence against him, and had thereby been given the necessary qualified instruction. The applicant had nevertheless again confessed that he had kidnapped and killed J. His statements at the trial formed the essential, if not the only basis for the court's findings of fact. They were supported by the testimony of J.'s sister, the blackmail letter and the note concerning the planning of the crime found in the applicant's flat. The truth of the applicant's confession concerning the execution of the crime was also proved by other items of evidence. These included the findings of the autopsy on the cause of the child's death, the tyre tracks left by the applicant's car near the pond where the child's corpse had been found, and the discovery of money from the ransom which had been found in his flat or paid into his bank accounts.

In assessing the gravity of the applicant's guilt, the court observed that the applicant had killed his eleven-year-old victim in order to be able to live in luxury with his wealthy friends and his girlfriend and to preserve his self-created image of a rich and successful young lawyer. It found that the fact that the applicant had volunteered a full confession at the trial, even though all his earlier confessions could not be used as evidence pursuant to section 136a (3) of the Code of Criminal Procedure, was a mitigating factor. However, even without his confession, the applicant would have been found guilty of kidnapping with extortion causing the death of the victim. The applicant had been kept under police surveillance after he had collected the ransom, which had later been found in his flat or paid into his accounts. Furthermore, it was proved by the autopsy on J.'s corpse that the boy had been suffocated, and tyre tracks left by the applicant's car had been detected at the place where J.'s body had been found.

The court further observed that in questioning the applicant, methods of investigation prohibited under section 136a of the Code of Criminal Procedure had been employed inasmuch as the applicant had been threatened with pain in order to make him disclose the child's whereabouts. Whether and to what extent detective officer E. and the deputy chief of the

Frankfurt police, D., were guilty of an offence because of these threats had to be determined in the pending criminal investigations in respect of them. However, their possibly illegal acts did not mitigate the applicant's own guilt. The misconduct of police officers, belonging to the executive power, could not prevent the judiciary from assessing the findings of fact in accordance with the law.

**(b) Proceedings in the Federal Court of Justice**

On 29 July 2003 the applicant lodged an appeal on points of law with the Federal Court of Justice, submitting his grounds of appeal on 1 December 2003. He complained in particular that the Regional Court, in its decision of 9 April 2003, had refused to discontinue the criminal proceedings against him. He argued that on 9 April 2003 he had lodged an application for the proceedings to be discontinued. At the same time, he had applied for a declaration that due to the continuous effect (*Fortwirkung*) of the threat of violence on 1 October 2002, all further statements which he had made to the investigation authorities until then could not be relied upon in the criminal proceedings. He had also requested the court to declare that as a result of the extraction of his confession by threats, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the statements extracted from him was prohibited ("*Fernwirkung*"). The applicant included a full copy of these applications of 9 April 2003, including the grounds given for them, in his submissions giving reasons for his appeal on points of law. He further included a copy of the Regional Court's decision of 9 April 2003 dismissing his application for the proceedings to be discontinued and argued in respect of the police's threats against him that, developing the case-law of the Federal Court of Justice, such conduct had "skipped over" the exclusion of evidence and led to an impediment to the proceedings ("*dass ein derartiges Verhalten das Verwertungsverbot 'überspringt' und ein Verfahrenshindernis begründet*").

On 21 May 2004 the Federal Court of Justice, without giving further reasons, dismissed the applicant's appeal on points of law as ill-founded.

**(c) Proceedings in the Federal Constitutional Court**

On 23 June 2004 the applicant lodged a complaint with the Federal Constitutional Court. Summarising the facts underlying the case and the content of the impugned decisions, the applicant complained under Article 1 § 1 and Article 104 § 1, second sentence, of the Basic Law about the way in which he had been questioned by the police on the morning of 1 October 2002. He argued that he had been threatened with being subjected to severe pain and being sexually abused if he did not disclose the child's whereabouts. In the circumstances of the case, this treatment amounted to torture within the meaning of Article 3 of the Convention and infringed

Article 104 § 1 of the Basic Law. It also violated his absolute right to human dignity under Article 1 of the Basic Law, which lay at the heart of the provisions in question. Because of these unjustifiable human-rights violations there was both a bar to the criminal proceedings against him and a prohibition on using the items of evidence obtained as a consequence of the confession extracted from him in the course of proceedings.

On 14 December 2004 the Federal Constitutional Court, sitting as a panel of three judges, refused to accept the applicant's constitutional complaint for examination as it was inadmissible.

Firstly, in so far as the applicant complained about the failure of the criminal courts to discontinue the proceedings against him, the court found that he had not sufficiently substantiated his complaint. It observed that the Regional Court had already stated that the police's threat to inflict pain on the applicant had violated section 136a of the Code of Criminal Procedure and Article 3 of the Convention. Because of this threat, the applicant's rights under Article 1 § 1 and Article 104 § 1, second sentence, of the Basic Law had been disregarded in the investigation proceedings.

However, the violation of fundamental rights outside the trial did not necessarily warrant the conclusion that the judgment delivered by a criminal court, which was based on the findings in the trial, had breached constitutional law. In the present case, the criminal courts had found that the methods of investigation used by the police had been prohibited, but had differed from the applicant as to the legal conclusions drawn from this finding. They had taken the view that the use as evidence of the statements obtained as a result of the measures in question had been prohibited but that there had been no bar to the criminal proceedings altogether.

According to the Federal Constitutional Court, there would not have been a violation of fundamental rights if the procedural flaw of having applied prohibited methods of investigation could be regarded as having been remedied by the criminal courts, because they had prohibited the use as evidence of the statements obtained thereby. Such a prohibition was prescribed by section 136a (3) of the Code of Criminal Procedure in order to compensate for a prior infringement of the rights of the person concerned. On the contrary, the circumstances in which substantial procedural irregularities might entail a bar to criminal proceedings were not laid down in law. In these circumstances, the applicant had failed to explain why the contested methods of investigation had not only entailed a prohibition on using the statements obtained thereby as evidence, but had led to a bar to criminal proceedings against him.

Secondly, the Federal Constitutional Court found that, in so far as the applicant complained that the Regional Court had refused to exclude the use in the proceedings of all items of evidence obtained as a result of the confession extracted from him by threats ("*Fernwirkung*"), his

constitutional complaint was equally inadmissible. The applicant had failed to raise this issue in the proceedings before the Federal Court of Justice.

The decision was served on the applicant's lawyer on 22 December 2004.

### 3. *Subsequent developments*

#### (a) **The criminal proceedings against the police officers**

On 20 December 2004 the Frankfurt am Main Regional Court convicted detective officer E. of coercion committed by an official in the course of his duties. It cautioned the defendant and imposed a suspended fine amounting to 60 daily payments of EUR 60, which the defendant would be required to pay if he committed another offence during the probation period. Furthermore, the court convicted the deputy chief of the Frankfurt police, D., of having induced E., a subordinate, to commit coercion in the course of his duties. It also cautioned D. and imposed a suspended fine amounting to 90 daily payments of EUR 120. The applicant had given evidence as a witness in these proceedings.

The Regional Court found that on the morning of 1 October 2002 D. had ordered that the applicant was to be questioned while being subjected to pain in the manner set out in his subsequent note for the police file. By doing so, he had acted against the advice of all his subordinate heads of department entrusted with the investigation into the child's kidnapping. The heads of department had disapproved of the measure he had ordered and had proposed to proceed with an approach entailing further questioning and confrontation of the applicant with third persons instead. D. had personally ordered detective officer E. to threaten the applicant with physical violence, which was to be carried out by another specially trained police officer. The measure had been aimed at finding out immediately where the applicant had hidden J., whose life he had considered to be at great risk. In order to save J.'s life, E. had threatened the applicant in the manner ordered by D.

The Regional Court observed that the method of investigation had not been justified as an act of necessity, because it violated human dignity as codified in Article 1 of the Basic Law. Respect for human dignity also lay at the heart of Article 104 § 1, second sentence, of the Basic Law and Article 3 of the Convention. The protection of human dignity was absolute. Allowing exceptions or a balancing of interests would breach a taboo.

In determining the sentences, the Regional Court notably took into consideration the fact that the defendants' sole concern had been to save J.'s life and that they had been under extreme pressure because of their respective responsibilities *vis-à-vis* the superior authority and the public. They had been completely exhausted at the relevant time and had acted in a very tense and hectic situation. Moreover, D. had openly taken responsibility for his acts by admitting and explaining them in a note for the

police file on the same day. The proceedings had lasted a long time and had attracted immense media attention. Both defendants had suffered prejudice in their professional career: D. had been transferred to the Hessian Ministry of the Interior, and E. had been prohibited from carrying out measures relevant to the prosecution of criminal offences. Furthermore, it was the first time that a conflict situation such as the one in the defendants' case had been assessed by a German criminal court.

The judgment became final on 20 December 2004.

D. was subsequently transferred to the Police Headquarters for Technology, Logistics and Administration and was appointed its chief.

**(b) The official liability proceedings brought by the applicant**

On 28 December 2005 the applicant lodged an application with the Frankfurt am Main Regional Court, seeking legal aid to bring official liability proceedings against the *Land* of Hesse with a view to obtaining compensation. He claimed that he had been traumatised by the methods of police investigation applied against him, among them the threat of being subjected to pain if he did not disclose J.'s whereabouts, further threats of sexual abuse and slaps, and was in need of psychological treatment.

In its submissions dated 27 March 2006 the Frankfurt am Main Police Headquarters disputed that E.'s conduct when questioning the applicant on the morning of 1 October 2002 was to be legally qualified as coercion and amounted to a breach of official duties.

On 28 August 2006 the Frankfurt am Main Regional Court dismissed the applicant's application for legal aid to bring official liability proceedings. It argued that his intended action did not have sufficient prospects of success as the applicant was not entitled to damages for breach of official duties from the *Land* of Hesse.

The Regional Court found that the police officers D. and E. had breached their official duties in committing the offences of which they had been convicted. However, the applicant had already obtained sufficient redress in a manner other than by the payment of damages. The Frankfurt am Main Regional Court had found in its decision of 9 April 2003 that the threat of pain against the applicant had been illegal and had qualified the threat as a prohibited method of questioning in its judgment convicting the applicant. Moreover, the police officers who had threatened him had been criminally convicted by a different division of the Frankfurt am Main Regional Court because of these threats. That division had, for its part, clearly stated that threatening the applicant with torture had been illegal and unconstitutional. This assessment, which the present division of the Regional Court endorsed, had afforded the applicant sufficient satisfaction in the circumstances of the case, even if the further threats and minor bodily injury alleged by him, which the criminal courts had not found to be proved, had in fact occurred. As to the pecuniary damage claimed, the applicant had failed sufficiently to

substantiate that his psychological problems were caused by the short period of questioning by E. and not by the commission and detection of his offence.

## **B. Relevant domestic law**

### *1. The Basic Law*

Article 1 § 1 of the Basic Law, on the protection of human dignity, reads as follows:

“Human dignity shall be inviolable. To respect and protect it shall be the duty of all State authority.”

Article 104 § 1, second sentence, of the Basic Law, on rights of persons in detention, provides:

“Persons taken into custody may neither be subjected to mental nor to physical ill-treatment.”

### *2. The Code of Criminal Procedure*

Section 136a of the Code of Criminal Procedure, on prohibited methods of examination (*verbotene Vernehmungsmethoden*), provides:

“(1) The freedom of the accused to make decisions and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, the administration of drugs, torment, deception or hypnosis. Coercion may be used only in so far as it is permitted by the law on criminal procedure. Threatening the accused with measures that are not permitted under the law on criminal procedure or holding out the prospect of an advantage that is not contemplated by statute shall be prohibited.

(2) Measures which impair the accused’s memory or ability to understand and accept a given situation (*Einsichtsfähigkeit*) shall not be permitted.

(3) The prohibition under subsections (1) and (2) shall apply even if the accused has consented [to the proposed measure]. Statements obtained in breach of this prohibition shall not be used [in evidence], even if the accused has agreed to their use.”

Under section 137(1) of the Code of Criminal Procedure, an accused may avail himself of the assistance of defence counsel at any stage of the proceedings.

### *3. The Criminal Code*

By section 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, treacherously or in order to cover up another offence. Murder is punishable by life imprisonment.

A declaration by the sentencing court that the defendant’s guilt was of particular gravity may, among other things, have a bearing on a subsequent

decision as to whether or not to suspend the remainder of the defendant's prison sentence on probation. Pursuant to section 57a of the Criminal Code, the court must suspend the remainder of a life sentence on probation if the convicted person has served fifteen years of his sentence, provided that this can be justified in the interests of public safety and the particular gravity of the person's guilt does not warrant the continued execution of the sentence.

## COMPLAINTS

The applicant complained that he had been subjected to torture prohibited by Article 3 of the Convention while being questioned by the police on 1 October 2002. This violation of Article 3 had not subsequently been remedied.

The applicant further submitted that his right to a fair trial as guaranteed by Article 6 § 1 of the Convention, encompassing the right not to incriminate oneself, had been violated. He had been tortured for the purpose of making him confess to having kidnapped J. As a result of his confession and the items of evidence which the authorities had been able to secure only on account of these statements and which had been used as evidence in the criminal proceedings against him, he had been irretrievably deprived of his right to defend himself effectively. The proceedings against him should therefore have been discontinued.

Moreover, the applicant complained under Article 6 of the Convention that he had deliberately been refused access to his lawyer when being questioned by the police on 1 October 2002 until he had confessed to his offence and had disclosed all the decisive items of evidence.

## THE LAW

### **A. The Government's objections**

#### *1. The parties' submissions*

##### **(a) The Government**

In the Government's submission, the applicant had not exhausted domestic remedies in respect of his complaints under Article 6 of the Convention.

Firstly, in so far as he had alleged that his trial had been unfair as the criminal courts had refused to discontinue the proceedings on account of the threats against him, the applicant – as the Federal Constitutional Court had

expressly stated – had failed sufficiently to substantiate his constitutional complaint. He had not explained why his fundamental rights under the Basic Law precluded the continuation of the proceedings.

Secondly, the applicant had failed to satisfy the requirements of Article 35 § 1 of the Convention in so far as he had complained under Article 6 about the refusal to exclude the use in the proceedings of items of evidence obtained as a result of the confession extracted from him. As confirmed in the Federal Constitutional Court's judgment, he had failed to properly raise before the Federal Court of Justice the issue of a breach, in the trial against him, of the rules on the taking and use of evidence obtained as a result of the confession extracted from him ("*Fernwirkung*"). The Government conceded that the applicant had mentioned this issue in his appeal to the Federal Court of Justice. However, he had done so only in connection with his request to discontinue the proceedings. This request did not include an application for the judgment to be quashed on account of the use of evidence obtained following a confession obtained under duress.

Thirdly, the Government argued that the applicant had not complained at all in the proceedings before the domestic courts that his lawyer had not been present when he had been questioned by the police on 1 October 2002.

**(b) The applicant**

The applicant contested those submissions.

Firstly, he claimed that he had exhausted domestic remedies in so far as he had complained under Article 6 about the refusal to discontinue the criminal proceedings against him because of the confession obtained from him by threats. He had sufficiently substantiated his complaint to the Federal Constitutional Court, explaining in detail that the failure to discontinue the proceedings had breached his rights under Articles 1 and 104 of the Basic Law.

Secondly, the applicant argued that he had complied with the requirements of Article 35 § 1 of the Convention as regards his complaint under Article 6 about the refusal to exclude the use in the proceedings of items of evidence obtained as a result of the confession extracted from him ("*Fernwirkung*"). In the proceedings before the Federal Court of Justice, he had lodged the broadest possible application, aimed at discontinuing the proceedings because of the confession, which had made it possible to secure further items of evidence. This application contained a more restricted request at least not to use evidence obtained in an illegal manner at his trial. He had based his application, *inter alia*, on the prohibition under section 136a (1) and (3) of the Code of Criminal Procedure on using any evidence obtained as a result of this confession, and had therefore raised the issue in question. He stressed that the Federal Court of Justice itself had not given any reasons for dismissing his appeal on points of law as ill-founded, so that the true reasons for it were a matter of pure speculation. He

submitted reports drafted at his request by the author of a book on the law of criminal procedure and by a lawyer, both of whom confirmed his view.

Thirdly, the applicant claimed that he had not been able to prove at the time of his own trial that the police had deliberately impeded the lawyer of his choice from contacting him on 1 October 2002 until after he had fully confessed to the offences of which he was suspected and had been forced to disclose all decisive items of evidence. These facts had only become clear during the criminal proceedings against the police officers who had threatened him. As these proceedings had been delayed by the prosecution authorities, he had obtained this information only at a time when he had already been convicted. The fact that he had been prevented from consulting a lawyer could only be proved by documentary evidence – which was necessary for substantiating an appeal on points of law – after his lawyer had been granted access to the case files in the proceedings against the police officers in February 2006.

## *2. The Court's assessment*

The Court notes that the Government based their objection that the applicant had not fully exhausted domestic remedies with respect to his complaints under Article 6 of the Convention mainly on three arguments. The Government argued that the applicant had failed to comply with the requirements of Article 35 § 1 of the Convention in so far as he had complained about the failure of the criminal courts to discontinue the proceedings against him (first argument) and about the courts' refusal to exclude the use in the proceedings of items of evidence obtained as a result of the confession extracted from him by threats (second argument).

The Court observes with regard to the Government's first argument that the Federal Constitutional Court raised – at least partly – issues relating to the merits of the applicant's constitutional complaint in a detailed statement of reasons before coming to the conclusion that the applicant had failed sufficiently to substantiate his complaint in so far as he objected to the failure of the criminal courts to discontinue the proceedings. As to the Government's second argument, the Court notes that there is a complex legal debate between the parties on the exact scope of the applicant's appeal on points of law to the Federal Court of Justice, which did not express an opinion on this point. It concerns in particular the possible legal consequences of the fact that a confession was obtained from the applicant by threats in the subsequent criminal proceedings and is therefore likewise related to the merits of the applicant's complaint, as well as to the Government's first objection.

In the Court's view, the examination of the issue whether the requirement to exhaust domestic remedies has been satisfied in the instant case in these two respects is thus closely linked to the merits of the complaint under Article 6 concerning the fairness of the applicant's trial in

view of the failure to exclude certain items of evidence. It therefore considers that the preliminary objection raised by the Government under Article 6 in these respects should be joined to the merits of the case for examination at a later stage.

The Court further observes that the Government argued, thirdly, that the applicant had not fully exhausted domestic remedies in that he had not complained at all in the proceedings before the domestic courts that he had been refused access to his lawyer on 1 October 2002. The Court notes that the applicant did not deny as such that he had not raised this issue in the course of the domestic court proceedings against him, but claimed that he had not been able to prove by documentary evidence at the time of his trial that the police had deliberately impeded his access to the lawyer of his choice.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the effective remedies provided by the national legal system (see, among many other authorities, *Hartman v. the Czech Republic*, no. 53341/99, § 56, ECHR 2003-VIII). An applicant is excused from pursuing domestic remedies which are bound to fail, but has to show either by providing relevant court decisions or by presenting other suitable evidence that a remedy available to him would in fact have been of no avail. The existence of doubt as to the chances of success of a domestic remedy does not exempt an applicant from the obligation to exhaust it (see, among other authorities, *T.A. and Others v. Germany* (dec.), no. 44911/98, 19 January 1999, and *Storck v. Germany* (dec.), no. 61603/00, 26 October 2004).

The Court observes that the accused had the right under the German Code of Criminal Procedure (section 137(1) – see “Relevant domestic law” above) to avail himself of the assistance of a lawyer in the investigation proceedings. Since the circumstances of his questioning on 1 October 2002 were known to him from the outset, the Court is not convinced that he was unable to complain – successfully or unsuccessfully – in the criminal proceedings against him about the failure to allow him to confer with his lawyer on that day. He therefore failed to demonstrate that such a complaint would have been to no avail.

It follows that the objection raised by the Government on this point must be allowed, the applicant having failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention as regards his complaint concerning consultation of his defence counsel.

## **B. Complaint under Article 3 of the Convention**

The applicant claimed that he had been subjected to torture when questioned by the police on 1 October 2002. He relied on Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

### *1. The parties' submissions*

#### **(a) The Government**

The Government conceded with regret that Article 3 of the Convention had been violated during the applicant's questioning by the police on 1 October 2002. They stressed that the applicant had been threatened that severe pain would be inflicted on him if he did not inform the police about J.'s whereabouts on the morning of 1 October 2002, that is, at a time when the policemen involved believed that J. could still be alive but that his life would be at great risk.

However, in the Government's view the applicant had lost his status as the victim of a violation of Article 3. In the criminal proceedings against him the German courts had formally acknowledged that the applicant's treatment had contravened Article 3. Whereas the Regional Court, in its decision of 9 April 2003, had stated that there had been a breach of Article 3, the Federal Constitutional Court had indirectly found that the applicant's treatment contrary to Article 3 amounted to torture. Moreover, the Frankfurt am Main Regional Court, in the criminal proceedings against the police officers, had expressly confirmed that there had been a violation of Article 3 of the Convention.

The Government further stressed that the violation of Article 3 of the Convention had entailed legal consequences. In particular, the Frankfurt am Main Regional Court, in accordance with section 136a of the Code of Criminal Procedure, had excluded the use as evidence not only of the confession of 1 October 2002, but also of all subsequent confessions made by the applicant until the trial before it. However, the applicant, after having been instructed that his previous confessions could not be used in evidence, had made a new full confession during his trial. In addition to that, the police officers involved in threatening him had been convicted and sentenced in the criminal proceedings against them. The applicant had the right to claim damages in an official liability action under section 839 of the Civil Code, read in conjunction with Article 34 of the Basic Law.

#### **(b) The applicant**

In the applicant's submission, the police had extracted a confession from him on 1 October 2002 by methods of interrogation which had to be

qualified as torture. In addition to that, he had then been taken against his will to the place where he had hidden J.'s corpse and forced, as a result of the continuing effect of the threats to torture him and the great number of policemen present, to disclose further evidence. He claimed that he had been threatened by the police with being subjected to severe pain at a time where the police had already been aware that J. was dead. Therefore, he had been threatened and forced to incriminate himself solely in order to obtain a confession from him and to further the criminal investigations against him.

The applicant argued that he had not lost his status as the victim of a violation of Article 3. The domestic courts had failed to acknowledge a breach of his Convention right in a clear and legally binding manner in simply mentioning Article 3 in their decisions dismissing the applicant's applications and complaints. Moreover, the Frankfurt am Main Police Headquarters had openly justified the methods of interrogation used against him and had claimed that they did not amount to a breach of official duties.

Furthermore, in the applicant's submission there had not been any redress for the breach of the prohibition of torture. The exclusion of some of his statements pursuant to section 136a of the Code of Criminal Procedure was not sufficient to afford him adequate compensation. The items of evidence which were obtained as a result of his extorted confession and were vital for securing his conviction had been admitted at the outset of his trial following the Regional Court's decision of 9 April 2003. His application for the proceedings to be discontinued had been rejected, he had been sentenced to the maximum applicable penalty and his constitutional complaint had been to no avail. The criminal conviction of the police officers who had threatened him had not afforded him redress either, because the officers had not even had to pay their fines and one of them, D., had subsequently been promoted. His application for legal aid to bring an official liability action had been dismissed and he had not been paid compensation for the damage resulting from his treatment in breach of Article 3.

## *2. The Court's assessment*

The Court considers, in the light of the criteria established in its case-law and having regard to all the information in its possession, that an examination of the merits of this complaint is required. It therefore concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

## **C. Complaint under Article 6 of the Convention**

The applicant further considered that his right to a fair trial had been violated notably by the use at his trial of items of evidence obtained only as

a result of the confession extracted from him under duress. Article 6, in so far as relevant, provides:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing ...”

### *1. The parties' submissions*

#### **(a) The Government**

In the Government's submission, the criminal proceedings against the applicant had been fair and had not breached his defence rights. They stressed that the confession extracted from the applicant had not been used as evidence at his trial. After having been instructed by the Frankfurt am Main Regional Court at the outset of the trial that his previous confessions could not be used in evidence the applicant had, however, freely chosen not to avail himself of his right to remain silent and had made a full confession. This confession had been the decisive, if not the only, basis for the domestic court's findings of fact on the planning and execution of his offences, including his premeditation of the murder of J. This proved that the applicant could have defended himself at his trial other than by making a full confession.

The Government conceded that the Regional Court had also used evidence obtained as a result of the applicant's initial questioning by the police (notably the results of the medical examination of J.'s corpse and the tyre tracks left by the applicant's car close to the place where J.'s corpse was found), but solely in order to confirm his confession. However, neither the Convention nor public international law prohibited the use during the trial of items of evidence (as opposed to the confession itself) obtained by means of treatment proscribed by Article 3.

Referring to the criteria for a trial's fairness as reiterated in the Court's judgment of 11 July 2006 in the case of *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-...), the Government further stressed that the applicant had been able to challenge the use of the items of evidence in question at the trial and had availed himself of that opportunity. Moreover, there had been a vital public interest, both in saving J.'s life and in convicting the applicant of his murder, which might have justified the use of items of evidence obtained through a measure in breach of Article 3. The items of evidence used to confirm the applicant's confession had not been decisive for his conviction. In any event, as a result of police observation after he had picked up the ransom the applicant had been strongly suspected

of being involved in J.'s kidnapping. It was likely that J.'s corpse and further items of evidence would have been found at a later stage anyway.

**(b) The applicant**

The applicant claimed that the use during his trial of evidence obtained by forcing him to incriminate himself had rendered the trial unfair *ab initio* and had deprived him of the possibility of effectively defending himself, in breach of Article 6 § 1 of the Convention. As the Regional Court had decided at the outset, in its decisions of 9 April 2003, not to discontinue the proceedings and to authorise the use during the trial of all items of evidence directly obtained by extortion (such as the results of the autopsy on J.'s corpse or the tyre tracks left by his car at the pond where the corpse was found), an effective defence had been impossible.

The applicant submitted that it was only due to the fact that these items of evidence were to be used to prove that he had committed the offences he had been charged with that he had subsequently made a confession at his trial. He had been prejudged in any event because of a media campaign conducted against him by the prosecution authorities. It had been clear that he would be convicted and sentenced to ten years' or life imprisonment on the basis of the items of evidence obtained as a result of the confession extracted from him even if he remained silent throughout his trial. By making a confession at the trial, he at least had a chance that this would, as usual, be taken into consideration as a mitigating factor when his sentence was determined. Without the confession and without his having been forced actively to disclose evidence, J.'s corpse, which he had hidden on isolated private property some 60 kilometres from his place of residence, and all the other items of evidence would never have been found.

Relying on the Court's judgment in the above-mentioned case of *Jalloh v. Germany*, the applicant further argued that the confession extracted from him and all items of evidence used at the trial against him had been obtained as a result of torture contrary to section 136a of the Criminal Code and Article 3 of the Convention. As this evidence had been decisive for his conviction and as he had not been able effectively to oppose its use, his trial had been unfair.

*2. The Court's assessment*

The Court considers, in the light of the criteria established in its case-law and having regard to all the evidence before it, that the complaint raises serious issues of fact and law, the determination of which requires an examination of the merits. Thus, the Court concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

*Decides* to join to the merits the question whether the applicant exhausted domestic remedies in respect of his complaint concerning the fairness of his trial in view of the failure to discontinue the criminal proceedings and the failure to exclude certain items of evidence;

*Declares* admissible, without prejudging the merits, the applicant's complaint under Article 3 and his complaint under Article 6 in so far as it relates to the fairness of his trial in view of the failure to discontinue the criminal proceedings and the failure to exclude evidence;

*Declares* inadmissible the remainder of the application.

Claudia WESTERDIEK  
Registrar

Peer LORENZEN  
President