

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

FIFTH SECTION

DECISION

Application no. 17603/07
Andrej BATUZOV
against Germany

The European Court of Human Rights (Fifth Section), sitting on 22 May 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Ganna Yudkivska,
Angelika Nußberger, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 24 April 2007,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Andrej Batuzov, is a national of Latvia and Greece who was born in 1964 and lives in Riga. His application was lodged on 24 April 2007. He was represented before the Court by Mr A. Küster and Mr O.Wallasch, lawyers practising in Wiesbaden.

The circumstances of the case

1. Investigation proceedings

On 14 February 2000 the Koblenz District Court issued a warrant of arrest against the applicant on the ground that there was a strong suspicion that he had offered to instigate a third person to commit a murder of a public prosecutor and that he had agreed with a third person to commit a further murder. The warrant was further based on the strong suspicion that he had committed six offences under the Federal Weapons Act. The court found that the applicant was likely to abscond as he had to expect a severe sentence and had family ties in Eastern Europe.

On 17 February 2000 the applicant was arrested.

On 28 August 2000, 23 April 2001 and 25 July 2001 the Koblenz Court of Appeal ordered that the applicant's detention on remand was to continue.

On 2 November 2000 the Koblenz District Court extended the facts of the warrant of arrest to the suspicion that the applicant had been dealing with drugs (500 kg of cannabis) to a considerable extent (*Handeltreiben mit Betäubungsmitteln in nicht geringer Menge*).

On 29 January 2001 the Koblenz Public Prosecutor's Office charged the applicant with attempting to instigate a third person to commit a murder and with conspiracy to commit a murder (*Verabredung eines Mordes*). He was further accused of dealing with drugs to a considerable extent and with five offences under the Federal Narcotics Act. Moreover, he was charged with four offences under the Federal Weapons Act and three counts of human trafficking committed by a gang. Finally he was charged with five counts of forging official documents. The bill of indictment consisted of some 230 pages and named 73 witnesses living in five different countries.

2. Trial before the Koblenz Regional Court

On 25 May 2001 the Koblenz Regional Court admitted the indictment without modifications and decided to open the trial against the applicant and two other accused. The trial started on 14 August 2001.

On 13 January 2004 the Koblenz Regional Court adapted the warrant of arrest. It found that the applicant was likely to abscond as his son and partner had moved to Lithuania and as he had to expect a severe prison sentence.

On 1 September 2004, after the trial had taken place on 156 days, the Koblenz Public Prosecutor's Office and the applicant came to an agreement. They agreed on a minimum sentence of eight years and six months′ imprisonment and that all other pending criminal proceedings against the applicant were to be terminated. Further, the Prosecutor's Office agreed to apply for the conditional release of the applicant when he would have served two thirds of his sentence provided that the applicant's conduct

during the detention would be without reproach and that he would not commit any further offences. The agreement was noted in the minutes.

On the same day the Koblenz Regional Court sentenced the applicant to eight years and six months′ imprisonment for conspiracy to commit a murder, for drug trafficking with a considerable amount of drugs and for three offences under the Federal Weapons Act. The Koblenz Regional Court took into consideration the length of the criminal proceedings as well as the length of the applicant's detention on remand as mitigating factors. The applicant was acquitted of the remaining offences he had been accused of. Simultaneously, the Koblenz Regional Court ordered that the applicant's detention on remand was to continue.

On 8 September 2004 the applicant appealed on points of law against the Koblenz Regional Court's judgment.

On 4 May 2005 the complete reasoning of the judgment was taken to the file. On 3 June 2005 the minutes were completed and taken to the file.

3. First appeal against the detention on remand after the pronouncement of the verdict

On 12 May 2005 the applicant appealed against the arrest warrant. On 14 June 2005 the Koblenz Regional Court dismissed the appeal against the arrest warrant. On 23 June 2005 the Koblenz Court of Appeal confirmed this decision. On 19 July 2005 the applicant filed a request for reconsideration (*Gegenvorstellung*). On 27 July 2005 the Koblenz Court of Appeal dismissed the request. On 6 July 2005 the Federal Constitutional Court refused to admit the applicant's constitutional complaint against the decision of the Koblenz Court of Appeal, finding it inadmissible due to the applicant's failure to submit all court decisions.

4. Second appeal against the detention on remand after the pronouncement of the verdict and the applicant's subsequent release

On 14 September 2005 the applicant applied again to the Koblenz Regional Court and requested to lift the warrant of arrest or to suspend its execution.

On 29 September 2005 the Koblenz Regional Court ordered that the applicant's detention on remand was to continue.

On 21 November 2005 the Koblenz Court of Appeal dismissed the applicant's appeal against this decision.

On 29 December 2005 the Federal Constitutional Court quashed the decision of the Koblenz Court of Appeal and remitted the case to that court. It stated that the detention on remand violated the applicant's constitutional right to liberty as the courts had failed to adhere to the principle to hear cases more speedily in which the accused is detained (*Beschleunigungsgebot in Haftsachen*). The Federal Constitutional Court

scrutinized the various stages of the applicant's trial that had taken place so far. It had regard to the fixing of the hearing schedule by the Koblenz Regional Court and found that the conduct of one hearing per week only contradicted the case-law of the Koblenz Court of Appeal in similar voluminous cases which disclosed that two hearings per week had to be conducted. The Federal Constitutional Court found that the scheduling of the trial alone was likely to constitute a violation of the constitutional principle to have one's case heard more speedily. The Federal Constitutional Court evaluated the further delays that had occurred after the pronouncement of the verdict as a whole. It noted, *inter alia*, that the Regional Court had taken the reasoning of its judgment to the case file only after 35 weeks had passed since its pronunciation. It attributed a further delay of six weeks to the judicial authorities as the applicant was notified of the judgment only after this period. The Federal Constitutional Court stated that the Koblenz Court of Appeal had therefore failed to strike a fair balance between the applicant's right to liberty under Article 2 § 2 second sentence of the German Basic Law on the one hand and the state's duty to prosecute crimes on the other hand. Referring to the case of *Erdem v. Germany* (no. 38321/97, ECHR 2001-VII (extracts)) the Federal Constitutional Court argued that the more the detention on remand lasted the more reasoning it required. It stressed, *inter alia*, that the applicant's detention on remand had lasted already more than two thirds of the sentence imposed on him and that the Koblenz Prosecutor's Office had agreed to favour his release when 2/3 of the sentence had been executed. It further ordered the Koblenz Court of Appeal to reconsider the applicant's appeal. Simultaneously it stressed that the established breaches of the principle to more speedily hear cases in which the accused is detained did not justify a further detention on remand.

On 3 January 2006 the Koblenz Court of Appeal quashed the decision of the Koblenz Regional Court dated 29 September 2005. The applicant was released.

5. Appellate proceedings before the Federal Court of Justice

On 17 July 2005 counsel filed the reasons for the applicant's appeal. On 22 July 2005 the Regional Court sent the case file to the Koblenz Prosecutor's Office. However, some parts of the case file had not been attached by mistake and were sent later on demand of the Public Prosecutor's Office. On 4 August 2005 the Public Prosecutor received the missing parts of the case file. On 20 September 2005 the Koblenz Public Prosecutor finished his observations on the applicant's appeal on points of law (*Revisionsgegenerklärung*). On 24 September 2005 the case file was sent to the Federal Public Prosecutor General. On 2 November 2005 the case file was sent to the Koblenz Regional Court in order to rectify errors in the minutes. The Koblenz Regional Court returned the case file on 11 November 2005.

On 24 April 2006 the Federal Court of Justice confirmed the judgment of the Koblenz Regional Court as to the conviction. Simultaneously, it reduced the cumulative sentence imposed on the applicant from eight years and six months to eight years and two months of imprisonment. The remainder of the applicant's appeal was dismissed

The Federal Court of Justice found that the law enforcement authorities had violated Article 6 § 1 of the Convention by unreasonably delaying the criminal proceedings against the applicant. It referred in so far to the judgment of the Federal Constitutional Court dated 29 December 2005. The Federal Court of Justice also stressed that the main proceedings before the Regional Court had lasted very long. It noted that although the Regional Court had taken account of the length in its fixing of the sentence it could not have considered any delays which had occurred after the pronouncement of the verdict. In order to compensate for the delay in the proceedings, the Federal Court of Justice reduced each separate sentence imposed on the applicant for one month and the cumulative sentence for four months.

6. Proceedings before the Federal Constitutional Court

The applicant lodged a constitutional complaint against the judgment of the Federal Court of Justice. On 27 September 2006 the Federal Constitutional Court found that the constitutional complaint was inadmissible and refused to admit it for consideration. The Federal Constitutional Court found that the applicant had failed to challenge the length of the proceedings before the Federal Court of Justice in a sufficient manner.

COMPLAINTS

The applicant complained under Article 5 § 3 of the Convention about the length of his detention on remand and under Article 6 § 1 of the Convention of unreasonably long criminal proceedings.

The applicant argued that the courts had failed to display any special diligence to accelerate the proceedings despite him having been remanded in custody. He was further of the opinion that the trial before the Koblenz District Court, which had lasted more than three years, had been unreasonably long, which could have been avoided by a tighter hearing schedule.

The applicant claimed that he had not lost his status as a victim although the Federal Court of Justice had reduced his cumulative sentence in order to compensate for the unreasonable length of the criminal proceedings. In respect of Article 5 § 3 the applicant relied on the Court's judgment in the case of *Dzelili v. Germany* (no. 65745/01, 10 November 2005) and asserted

that a violation of Article 5 § 3 had neither been expressively acknowledged nor had a compensation been awarded. In respect of Article 6 § 1 the applicant claimed that the compensation had been awarded solely for the delays after the pronunciation of the judgment of the Koblenz Regional Court.

THE LAW

THE ALLEGED VIOLATIONS OF ARTICLES 5 § 3 AND 6 § 1 OF THE CONVENTION

Firstly, the applicant asserted that the length of his detention on remand had been excessive and that there had accordingly been a breach of Article 5 § 3 of the Convention, which, in so far as relevant, provides:

> " 3. 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."

Secondly, the applicant considered the length of the criminal proceedings against him excessive. He alleged a violation of Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by a ... tribunal ..."

A. The exhaustion of domestic remedies

The Court notes at the outset that the Act on Remedies for Protracted Court Proceedings and Criminal Investigations (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*) entered into force in Germany with effect from 3 December 2011. Currently it has not yet been determined whether this Act provides an effective remedy against an unreasonably long detention on remand which is – at least to some extent – the result of unreasonably long proceedings.

The Court, however, can leave this question undecided as the application as a whole is inadmissible for the reasons outlined below.

B. Periods to be taken into consideration

The period to be considered under Article 5 § 3 of the Convention started on 17 February 2000, when the applicant was arrested. The Court, having regard to its case-law (see, amongst others, *Labita v. Italy* [GC], no. 26772/95, § 147, ECHR 2000-IV), finds that for the purposes of Article 5 § 3 the period of detention on remand ended on 1 September 2004, when the Koblenz Regional Court pronounced its judgment. The total period for the purposes of Article 5 § 3 thus amounted to four years, four months and sixteen days.

The period to be considered under Article 6 § 1 started on 17 February 2000, when the applicant was arrested and became aware of the criminal proceedings instituted against him. The period ended on 27 September 2006 with the decision of the Federal Constitutional Court. The proceedings thus lasted six years, four months and twenty one days at the investigation level and at three levels of jurisdiction.

C. Loss of status as a victim

The Court reiterates that the mitigation of a sentence on the ground of the excessive length of the proceedings can deprive the individual concerned of his status of victim within the meaning of Article 34 of the Convention provided that the national authorities have acknowledged either expressly or in substance the breach of the Convention and then afforded sufficient redress for it (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Cordier v. Germany (dec.)*, no. 71741/01, 19 January 2006). In such circumstances, to duplicate the domestic process with proceedings before the Court would hardly appear compatible with the subsidiary character of the machinery of protection established by the Convention. The Convention leaves to each Contracting State, in the first place, the task of securing the enjoyment of the rights and freedoms it enshrines (see *Eckle*, cited above, § 66). In the Court's view, such a mitigation of the sentence is also capable of affording adequate redress for a violation of Article 5 § 3 in cases in which the national authorities had failed to hear the case of an applicant held in detention on remand within a reasonable time (see *Dzelili*, cited above, § 83).

The Court notes that the decisions of the Federal Court of Justice of 24 April 2006 and of the Federal Constitutional Court dated 29 December 2005 explicitly acknowledged a violation of Article 6 § 1 of the Convention in view of the length of criminal proceedings, but not of Article 5 § 3 of the Convention as regards the applicant's detention on remand. However, by referring to the Court's decision in *Erdem v. Germany* (no. 38321/97, ECHR 2001-VII (extracts)) the Federal Constitutional Court relied explicitly on the case-law of the Court concerning the length of pre-trial detention in order to justify a violation of the applicant's constitutional right

to liberty. By interpreting the applicant's right to liberty under the domestic constitution in light of his right under Article 5 § 3 of the Convention the authorities brought the violation of the Convention to bear in a sufficient manner. The Court is therefore satisfied that the domestic courts had found in substance also a violation of Article 5 § 3 of the Convention.

Hence, the Court has to assess whether the redress afforded by the Federal Court of Justice and the Federal Constitutional Court properly remedied the breaches of Articles 5 § 3 and 6 § 1 of the Convention. The Court reiterates that whether a reduction of the sentence is adequate to remedy a violation depends notably on the extent of the breach and on a sufficient consideration of the breach by the authorities. A sufficient consideration requires a reduction of the sentence in an express manner that is measurable and that has a decisive impact on its length *(*see *Dimitrov and Hamanov v. Bulgaria*, nos. 48059/06 and 2708/09, § 66, 10 May 2011; *Cordier*, cited above).

The Court notes that the judgment of the Federal Constitutional Court dated 29 December 2005 declared the applicant's detention on remand unlawful and found that the applicant's right to liberty under Article 2 § 2 of the German Basic Law had been violated by the unreasonable length. Although the decision, in view of further delays which had occurred after the delivery of the judgment of the Regional Court, refrained from ultimately evaluating whether the fixing of the hearing schedule of the Regional Court alone established a violation, the decision discloses unmistakably and in detail the failures of the Regional Court to accelerate the proceedings. The Court also notes that the applicant was released from detention on remand five days later by decision of the Koblenz Court of Appeal.

The Court observes that the Federal Court of Justice reduced the applicant's sentence by four months in order to remedy the violation of Article 6 § 1. The Court considers, however, that the unreasonable length of the proceedings was simultaneously reflected – at least to a large extent – in the excessive duration of the applicant's remand in custody as concerns Article 5 § 3 of the Convention (four years and four months out of some six years and seven months).

Having regard to these circumstances the Court is satisfied that the reduction of the sentence was measurable and had a decisive impact on the applicant's actual sentence. Accordingly the Court considers that the domestic courts have acknowledged the breach of the Convention and awarded sufficient redress to the applicant. Consequently, the Court finds that the applicant has ceased to be a victim within the meaning of Article 34 of the Convention.

There has accordingly been no violation of Articles 5 § 3 and 6 § 1 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President