

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

FIFTH SECTION

DECISION

Application no. 19488/09
Luis Angel GARCIA CANCIO
against Germany

The European Court of Human Rights (Fifth Section), sitting on 29 May 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Ann Power-Forde,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 8 April 2009,

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

Having noted that the Government of Spain do not wish to intervene in the case as a third party,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Luis Angel Garcia Cancio, is a Spanish national who was born in 1952 and lives in Madrid. He is represented before the Court by Ms A. Haucke-D'Aiello, a lawyer practising in Munich.

The respondent Government were represented by their agent Mr H.- J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice.

A. The circumstances of the case

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

1. Pre-trial investigations

3. On 5 August 1994 investigations in relation to contraband trade of cigarettes were instituted by the Lindau Custom Investigation Office (*Zollfahndungsamt*). On 15 April 2002 the prosecution registered the applicant as an accused in these proceedings; on 27 March 2003 he was questioned as an accused.

2. First indictment

4. On 30 August 2004 the applicant and several co-accused were charged with a violation of the Foreign Trade Act (*Außenwirtschaftsgesetz*) in conjunction with UN Resolution No. 757 (1992) concerning the embargo against Serbia and Montenegro (see relevant domestic and international law below), with regard to a total of 559 shipments of cigarettes in 1994 and 1995.

5. On 1 October 2004 the Augsburg Regional Court asked the prosecution for clarification regarding its territorial jurisdiction. On 10 November 2004 the prosecution returned the file to the Regional Court with additional submissions.

6. On 6 July 2005 the prosecution withdrew the first indictment.

3. Second indictment

7. On 25 July 2005 the prosecution submitted a new indictment. On 24 August 2005 this indictment was served on the applicant's counsel. In September 2005 the Regional Court ordered a translation of the indictment to be served on the applicant.

8. Between September 2005 and November 2006 the applicant's counsel requested nine extensions of time-limits to submit further observations, which were all granted.

9. On 26 June 2007 the Regional Court decided to open the main proceedings against the applicant and one other co-accused regarding one part of the indictment.

10. On 11 July 2007 the prosecution and the applicant appealed this decision.

11. On 7 August 2007 the Regional Court dismissed the applicant's appeal arguing that his right to be heard before the opening of criminal proceedings was not interfered with.

12. On 30 November 2007 the Munich Court of Appeal rejected the appeal of the prosecution for the most part.

13. On 6 May 2008 the Regional Court dismissed the applicant's motion for reconsideration.

14. On 27 August 2008 the Court of Appeal dismissed the applicant's appeal against the decision of the Regional Court of 7 August 2007.

15. On 29 September 2008 the dates of the trial were fixed for 3 and 10 December 2008. On the first day of trial the proceedings against the applicant, who at that time was imprisoned in Italy, were disjointed.

16. On 25 March 2009 the Regional Court provisionally stayed the proceedings on request of the prosecution in view of pending criminal proceedings against the applicant in Switzerland pursuant to Article 154 paragraph 2 of the Code of Criminal Procedure.

4. Constitutional complaint

17. On 14 June 2008 the applicant lodged a constitutional complaint against the decision of the Regional Court of 26 June 2007 to open the main proceedings against him. He raised the issue of the length of the proceedings, an alleged lack of fairness of the proceedings and the infringement on the principle of double-jeopardy.

18. On 8 October 2008 the Federal Constitutional Court declared the complaint inadmissible, finding that the impugned decision was a mere intermediate decision and thus did not constitute a suitable object of a constitutional complaint.

5. The creation of a new domestic remedy

19. On 7 December 2011 the Government informed the Court that in response to the pilot judgment *Rumpf v. Germany* (no. 46344/06, 2 September 2010) a federal Act against Protracted Court Proceedings and Criminal Investigations had entered into force on 3 December 2011.

20. In December 2011 the Court informed the applicant in the present case and other applicants in the same position of the enactment of a new domestic remedy. The Court referred to the case *Brusco v. Italy* ((dec.), no. 69789/01, ECHR 2001-IX) and invited him to inform the Court whether he intended to make use of the new remedy within the time-limit set by the transitional provision of that Act (see for details § 36 et seq below).

21. By letter of 29 February 2012 the applicant informed the Court that the domestic remedy might not apply in his particular case, as the criminal proceedings were stayed. He suggested that the Court should invite the German Government to give further explanations on the new remedy in

comparison to the situation in *Brusco v. Italy* (dec.), cited above. He nevertheless requested that his application before this Court be maintained while the proceedings according to the new remedy were pending. Lastly, he doubted that the costs for the proceedings before this Court would be reimbursable as damages in the domestic proceedings.

B. Relevant domestic and international law

1. Section 34 (4) of the Foreign Trade Act

> "(4) A prison sentence of no less than two years shall be imposed on anyone who violates a statutory order ... which serves the implementation of an economic sanction imposed by the Security Council of the United Nations in accordance with Chapter VII of the United Nations Charter. ..."

22. In 2006 the statutory range of punishment (*Strafrahmen*) provided for in section 34 (4) was reduced to an imprisonment from six months up to five years.

2. United Nations Security Council Resolutions

23. United Nations Security Council Resolution 757 (1992) of 30 May 1992 demanded that all Member States should prevent the sale of all products and commodities to the Federal Republic of Yugoslavia (Serbia and Montenegro), except for humanitarian causes.

24. With United Nations Security Council Resolution 1022 (1995) of 22 November 1995 the measures imposed by, *inter alia*, resolution 757 were suspended with immediate effect.

3. Section 154 of the Code of Criminal Procedure

25. Section 154 of the Code of Criminal Procedure provides for the provisional stay of criminal proceedings in the following terms:

> "...
>
> (2) Once proceedings have been instituted, the court may provisionally stay them at any stage at the request of the Public Prosecutor's Office.
>
> ...
>
> (4) If the proceedings have been provisionally terminated on account of a penalty or measure of reform and prevention which is to be expected for another offence, the proceedings may be resumed, unless barred by limitation in the meantime, within three months after the judgment imposed for the other offence has entered into force.
>
> (5) If the court has provisionally terminated the proceedings, a court order is required for their resumption."

4. The Act on Protracted Court Proceedings and Criminal Investigations

26. The Act on Protracted Court Proceedings and Criminal Investigations (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren,* henceforth: the Remedy Act) was published in the Federal Law Gazette - Part I, 2011, page 2302 et seq. - on 2 December 2011 and entered into force the next day.

a. Relevant features of the remedy

27. The Remedy Act introduces general provisions for civil and criminal cases in sections 198 to 201 of the Courts Constitution Act (*Gerichtsverfassungsgesetz,* henceforth: CCA).

28. The new remedy combines an instrument to expedite the proceedings, an objection to delay (*Verzögerungsrüge*), which has to be raised before the court whose proceedings are allegedly unduly delayed (henceforth: trial court), with a subsequent compensation claim to be lodged at the Court of Appeal (henceforth: compensation court), see section 198 paragraph 1 and 3 CCA.

29. According to section 198 paragraph 1 CCA a party to proceedings (*Verfahrensbeteiligter*) who suffers a disadvantage from protracted proceedings is entitled to adequate compensation. The amount depends on the length of the individual case taking into account its difficulty and importance as well as the conduct of the parties and relevant third persons. A compensation award is not dependent on the determination of fault.

30. The compensation is awarded in monetary form, if other forms of compensation for lengthy proceedings are not appropiate, see section 198 paragraph 4 and section 199 CCA. The compensation for one year of protraction amounts to 1,200 euros. If this amount is not equitable due to the circumstances of the case, the court may allow for a higher or lower sum.

31. A prior objection to delay before the trial court is a prerequisite for a subsequent compensation claim. The action for compensation may not be lodged with a compensation court until six months after the objection had been raised, see section 198 paragraph 5 CCA. The compensation claim must at the latest be lodged within six months of the final judicial decision of the trial court.

32. For protracted criminal proceedings or investigations the Remedy Act stipulates in section 199 CCA special provisions, as criminal courts and the prosecution have already established a standard practice compensating for unreasonable length which this Court considered to be in line with the requirements of Articles 6 § 1 and 13 of the Convention (see *Kaemena and Thöneböhn v. Germany*, nos. 45749/06 and 51115/06, § 87, 22 January 2009). In criminal cases the courts may either afford compensation by declaring that a specified part of the sentence had to be

considered as having already been served or they may terminate proceedings with the consent of the prosecution.

33. In circumstances where the criminal trial court cannot compensate for the excessive length of proceedings, e.g. in cases of acquittal or discontinuance of proceedings for other reasons than length (see *Ommer v. Germany (no. 1)*, no. 10597/03, § 67 et seq., 13 November 2008), the provisions of section 198 CCA apply (see official motivation of the draft law: record of Bundestag 17/3802 page 24) and redress will be granted by monetary compensation.

34. Proceedings for compensation are subject to court fees. However, the plaintiff will be reimbursed according to the quota of his success in court.

35. The judgment of the compensation court is subject to appeal on points of law (*Revision*) only.

b. Transitional provision

36. According to its Article 23 the Remedy Act applies to pending as well as to terminated proceedings whose duration may still become or have already become the subject of a complaint with this Court.

37. In pending proceedings the objection to delay (*Verzögerungsrüge*) should be raised without delay when the Remedy Act entered into force. In these cases the objection preserves a subsequent compensation claim even for the past.

38. For terminated proceedings whose duration may still become or have already become the subject of a complaint with this Court it is not necessary to raise the objection prior to filing a compensation claim. The claim based on Article 23 of the Act has to be lodged with the competent court on 3 June 2012 at the latest.

COMPLAINTS

39. The applicant complained under Article 6 § 1 of the Convention about the length of the criminal proceedings and investigations against him.

40. He further complained under Article 6 § 1 of the Convention that the proceedings against him were not fair, in particular that the indictment lacked sufficient clarity, that important documents were provided too late, and that the proceedings against him violated the principle of *ne bis in idem*.

THE LAW

A. Alleged violation of Article 6 § 1 of the Convention on account of the length of proceedings

41. The Court will first determine whether the applicant complied with the rule of exhaustion of domestic remedies set out in Article 35 of the Convention, which provides, in so far as relevant:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

1. General principles

42. The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body until they have had the opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights, (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV; and *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 *et al*., § 69, ECHR 2010-...).

43. Nevertheless, the only remedies which Article 35 of the Convention requires to be used are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, cited above, § 66, and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). In addition, according to the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see *Van Oosterwijck v. Belgium*, 6 November 1980, § 36, Series A no. 40, A, and *Akdivar and Others*, cited above, § 67).

44. An assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, this rule is subject to exceptions, which

may be justified by the particular circumstances of each case (see *Brusco*, cited above and *Fakhretdinov and others v. Russia* (dec.), nos. 26716/09, 67576/09 and 7698/10, 23 September 2010).

2. Application to the present case

45. The Court notes at the outset that the applicant declared that he would bring proceedings according to sections 198 and 199 CCA within the time-line set out in Article 23 of the Remedy Act. He doubted, however, that his application would be admitted due to the fact that the Augsburg Regional Court did not rule on the length of proceedings and investigations.

46. The Court does not see any reason to doubt the applicant's entitlement to lodge a compensation claim with the competent domestic court pursuant to Article 23 of the Remedy Act. The German legislator explicitly pointed out in the official reasoning of the draft law that for criminal cases where redress for excessive length of proceedings cannot be granted in the established way (see above § 32), the provisions on monetary compensation become applicable.

47. In view of this element, the Court accepts that the Remedy Act was enacted to address the issue of excessive length of domestic proceedings in an effective and meaningful manner, taking account of the Convention requirements. At this stage, the Court does not see any reason to believe that the new remedy would not afford the applicant the opportunity to obtain adequate and sufficient compensation for his grievances or that it would offer no reasonable prospect of success.

48. The Court's position may be subject to review in the future depending, on the domestic courts' capacity to establish consistent case-law under the Remedy Act in line with the Convention requirements (see *Korenjak*, cited above, § 73).

49. Therefore, the Court finds that the applicant's complaint is premature.

50. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. The remainder of the applicant's complaints

51. The Court has examined the remainder of the applicant's complaint as submitted by him. However, having regard to all the material in its possession, the Court finds that, even assuming exhaustion of domestic remedies in all respects, these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

52. It follows that the remainder of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3(a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President