CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 66491/01
by Jürgen GRÄSSER
against Germany

The European Court of Human Rights (Third Section), sitting on 16 September 2004 as a Chamber composed of

Mr I. CABRAL BARRETO, *President*,
Mr G. RESS,
Mr L. CAFLISCH,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs A. GYULUMYAN, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 2 February 2001,

Having deliberated, decides as follows:

THE FACTS

The applicant, Jürgen Gräßer, is a German national, who was born in 1940 and lives in Pforzheim, Germany. When lodging his application, he was represented before the Court by Mr B. Sauber, a lawyer practising in Saarbrücken, Germany. He is now represented by Mr A. Keller and Mr D. Sauer, lawyers of the law firm Keller, Rainer & Kollegen practising in Heidelberg, Germany.

The respondent Government are represented by Mr K. Stoltenberg, *Ministerialdirigent*.

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

A. The circumstances of the case

1. Background to the case

In 1971, the applicant and a company engaged in negotiations with the city of Saarbrücken to obtain a building permit for a piece of land they had bought. In the course of these negotiations, the applicant and the said company undertook to pay 2,535,000 Deutschmarks (DEM) (approximately 1,296,000 Euros (EUR)) of the costs for the provision of the local public infrastructure (*Erschließung*). The applicant also undertook to construct a shopping centre within two years following the grant of the building permit.

On 1 April 1974 the applicant applied for the building permit with the competent municipal authorities. He offered to submit a bank security to cover the costs for the provision of the local public infrastructure concerning the shopping centre, estimated to amount to some 1,5 million DEM. He also suggested that a contract on this point be signed by him and the city.

In August 1974, following municipal elections, the city requested the applicant to submit a bank security of 4,500,000 DEM (approximately 2,300,813 EUR) to cover the costs for the provision of the local public infrastructure for the piece of land as a whole. Upon his refusal to do this, the city refused its consent to his request for a building permit. It also refused to conclude a contract concerning the building of the shopping centre and the costs for the provision of the local public infrastructure.

2. First trial of the applicant's case

On 23 August 1974 the applicant brought an official liability action (*Amtshaftungsklage*) for compensation in the Saarbrücken Regional Court against the city of Saarbrücken. He complained that the city's sudden decision to request a bank security of 4,500,000 DEM, thereby setting up

further inequitable conditions for its agreement to the applicant's building project, was a result of informal negotiations between different local political parties before the municipal elections. It constituted a voluntary breach of the principle of continuity in administrative actions.

On 24 February 1975 the local building authorities refused to grant a building permit to the applicant. This decision was later confirmed by the competent administrative courts.

On 21 March 1975 the Saarbrücken Regional Court dismissed the applicant's action. According to the Regional Court, nothing suggested that the city of Saarbrücken had acted in breach of its obligations as a public organ.

On 27 June 1975 the applicant lodged an appeal against this decision with the Saarbrücken Court of Appeal (Fourth Senate).

In autumn 1976 the applicant's real estate concerned was sold by compulsory auction.

On 3 February 1978 the Saarbrücken Court of Appeal (Fourth Senate) dismissed the applicant's appeal as ill-founded.

On 7 February 1980, following the applicant's appeal on points of law, the Federal Court of Justice quashed this decision and remitted the matter to the Court of Appeal (Fourth Senate). It requested the Court of Appeal to examine whether the city abruptly discontinued the contractual negotiations with the applicant for arbitrary reasons, in the case of which it was liable to pay damages to him.

3. First retrial of the applicant's case

On 23 October 1981 the Saarbrücken Court of Appeal (Fourth Senate) again dismissed the applicant's appeal. It found that, even assuming that the city had breached its duty as a public organ to act in a consistent manner, the applicant did not establish that there was a causal link between the city's conduct and the damage sustained by him.

On 14 October 1982 the Federal Court of Justice decided to entertain a part of the applicant's renewed appeal on points of law.

On 5 May 1983 the Federal Court of Justice quashed this part of the Court of Appeal's decision and remitted it to the Seventh Senate of that court. It found that the Court of Appeal, in its finding that a causal link was missing between the city's conduct and the damage sustained by the applicant, erroneously did not assess the evidence offered by him.

4. Second retrial of the applicant's case

On 10 July 1984 the Saarbrücken Court of Appeal (Seventh Senate) amended the Regional Court's decision of 21 March 1975. It found that the applicant was entitled to compensation, but did not yet assess the exact amount of the damages payable (*Grundurteil*). The Court of Appeal found that the city of Saarbrücken had unforeseeably and without legitimate reasons requested the applicant to submit a bank security of 4,5 million

DEM, thereby willingly causing the breakdown of the negotiations about the grant of a building permit. Therefore, it breached its duty as a public organ to act in a consistent manner.

On 11 July 1985 the Federal Court of Justice refused to entertain the appeal on points of law lodged by the city of Saarbrücken.

On 19 December 1985 the Federal Constitutional Court refused to entertain the city's constitutional complaint.

On 8 July 1986 the Saarbrücken Court of Appeal ordered the city of Saarbrücken to pay 5,798,142 DEM (approximately 2.964.543 EUR) plus interest to the applicant and dismissed the remainder of his claim.

On 22 June 1989, following both parties' appeals on points of law, the Federal Court of Justice quashed the Court of Appeal's decision as far as the amount of damages was concerned and remitted the matter to the Court of Appeal.

5. Third retrial of the applicant's case

On 9 January 1995 the Court of Appeal (renamed Saarland Court of Appeal) ordered that an expert opinion be prepared on the amount of damages sustained by the applicant.

On 12 January 1999 the Court of Appeal ordered that a further expert report be prepared on the amount of damages sustained by the applicant, taking into consideration further tax-related aspects.

On 24 February 2000 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He filed the motion to hold that his right to a hearing within a reasonable time was violated in that the Court of Appeal kept refusing to fix the amount of damages payable to him, whereas the decision that he was entitled to compensation had become final on 11 July 1985. In his reasoning, he complained that the Court of Appeal, by not rendering a decision upon his appeal lodged in June 1975 against the Saarbrücken Regional Court's judgment of 21 March 1975, violated his right to a hearing within a reasonable time guaranteed by the Basic Law. Setting out the course of the proceedings from the lodging of his action in August 1974 until the lodging of his constitutional complaint, he complained in particular that the proceedings were pending before the Court of Appeal since they had been remitted by the Federal Court of Justice in June 1989.

On 20 July 2000 the Federal Constitutional Court, complying with the applicant's motion, held that the applicant's basic rights were violated in that the Saarland Court of Appeal did not render a decision on the amount of compensation to be granted to the applicant within a reasonable time. In its reasoning, it found that, despite the complexity of the case, the length of the proceedings, which had been pending since 1974, was obviously excessive. It concluded that, pursuant to Section 95 para. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*), it was restricted to the finding of a violation of the Basic Law. The Court of

Appeal was now obliged to take effective measures in order to terminate the proceedings as soon as possible.

On 25 and 26 September 2000, two different Senates of the Court of Appeal rejected the applicant's challenges of the judges of the Court of Appeal on grounds of bias as ill-founded.

On 24 April 2001 the applicant brought another official liability action under Article 34 of the Basic Law (*Grundgesetz*) taken in conjunction with Section 839 of the Civil Code (*Bürgerliches Gesetzbuch*) against the *Land* Saarland with the Karlsruhe Regional Court. He applied for a declaration (*Feststellungsklage*) that the *Land* Saarland was liable to compensate him for the damage which has been and will be caused by the excessive length of the proceedings before the Saarland Court of Appeal.

On 9 November 2001 the Karlsruhe Regional Court allowed the applicant's action.

On 20 November 2001 the Saarland Court of Appeal (Seventh Senate) dismissed the applicant's action for compensation. It found that it was not established that the applicant would have been in a financial position to realise his building project if he had been granted the building permit, regardless of the city's behaviour. The city's actions thus had not caused any financial losses to him.

On 20 December 2001 the *Land* Saarland lodged an appeal against the judgment of the Karlsruhe Regional Court of 9 November 2001 with the Karlsruhe Court of Appeal. The proceedings, which had been suspended on the motion of both parties awaiting the outcome of the official liability proceedings against the city of Saarbrücken, are to date still pending.

On 24 April 2003 the Federal Court of Justice refused to entertain the applicant's appeal on points of law against the Saarland Court of Appeal's judgment of 20 November 2001. It fixed the value in dispute (*Streitwert*) at some 109 million EUR.

On 28 May 2003 the applicant lodged a constitutional complaint with the Federal Constitutional Court, claiming that his property rights, his rights to be heard, to a fair trial and to a decision by the legally competent court (*gesetzlicher Richter*) had been violated.

On 28 July 2003 (decision served on 4 August 2003) the Federal Constitutional Court refused to entertain the applicant's constitutional complaint. It found that he failed sufficiently to substantiate his complaint, which therefore was inadmissible.

On 24 February 2004 the Saarbrücken District Court decided to commence insolvency proceedings against the applicant.

B. Relevant domestic law and practice

1. The Federal Constitutional Court Act

Section 95 para. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) provides as follows:

> "If the complaint of unconstitutionality is upheld, the decision shall state which provision of the Basic Law has been infringed and by which act or omission. The Federal Constitutional Court may at the same time declare that any repetition of the act or omission complained of will infringe the Basic Law."

The said Act does not contain a provision entitling the Federal Constitutional Court to award pecuniary compensation for damage sustained by a violation of a right guaranteed by the Basic Law.

2. Provisions governing State liability

Pursuant to Article 34 of the Basic Law (*Grundgesetz*) taken in conjunction with Section 839 of the Civil Code (*Bürgerliches Gesetzbuch*), an individual has the right to be compensated by the State for any damage arising from a breach of official duty committed by an official. These provisions are also applicable to a breach of duty in giving judgment in an action, if the breach consists of a refusal or delay in the exercise of the office.

Damages are afforded to the individual concerned in accordance with Sections 249 et seq. of the Civil Code. Pursuant to Section 253 para. 1, non-pecuniary damages can only be claimed if a right to such damages is explicitly recognised by law. Under Section 847 para. 1 of the Civil Code (in its version in force until 31 July 2002 and applicable to damage caused before that date), damages for pain and suffering can only be claimed in the case of injury to the body or health, or in the case of deprivation of liberty.

3. Jurisprudence of the Federal Constitutional Court in respect of the length of civil proceedings

The jurisprudence of the Federal Constitutional Court, as regards the protection of the right to a hearing within a reasonable time by the Basic Law and as regards the consequences if the Constitutional Court finds that this right has been violated in civil proceedings, is laid down in detail in the Court's admissibility decision in the case of *Surmeli v. Germany* (dec.), no. 75529/01, 29 April 2004. In particular, reference is made to the Constitutional Court's case-law set out in the said case in respect of compensation claims in length-of-proceedings-cases. According to that case-law, a constitutional complaint, in which the applicant does not only complain about the length of the proceedings, but also claims compensation for the damages sustained by the undue delay, is inadmissible with respect to the compensation claim. Damages must first be claimed in the civil courts, in particular under the provisions governing State liability.

COMPLAINTS

The applicant complained under Article 6 of the Convention about the length of the official liability proceedings against the city of Saarbrücken before the German courts.

THE LAW

The applicant's complaint related to the duration of the official liability proceedings against the city of Saarbrücken. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

A. Exhaustion of domestic remedies

The Government contended that the applicant did not exhaust domestic remedies as required by Article 35 § 1 of the Convention.

Firstly, as regards the length of the official liability proceedings against the city of Saarbrücken as a whole, the Government took the view that the applicant, in his constitutional complaint of 24 February 2000, had only complained about the duration of the proceedings before the Saarland Court of Appeal between 1989 and 2001. As the Federal Constitutional Court, in its decision of 20 July 2000, had also only rendered a judgment concerning this stage of the proceedings, the applicant did not exhaust all effective domestic remedies with respect to the length of the remaining stages of the proceedings.

Secondly, as regards the length of the proceedings before the Saarland Court of Appeal between 1989 and 2001, the Government pointed out that the applicant instituted fresh official liability proceedings against the *Land* Saarland to obtain damages due to the excessive length of the said proceedings before the Saarland Court of Appeal. These new official liability proceedings, which constituted an effective remedy to be exhausted, were, however, still pending before the Karlsruhe Court of Appeal.

The applicant contested this view. He claimed that he had complained with the Federal Constitutional Court about the length of the official liability proceedings against the city of Saarbrücken as a whole, irrespective of the fact that the said court had only found a violation of his right to a hearing within a reasonable time since 1989. Thereby, he had exhausted domestic remedies. The further official liability proceedings in the

Karlsruhe courts could not be regarded as an adequate and effective remedy, as he could not be granted non-pecuniary damages in these proceedings.

As regards the first branch of the Government's objection, the Court observes that it could be asked whether, in the light of the recent developments in the Court's case-law (see, in particular, *Hartman v. The Czech Republic*, no. 53341/99, §§ 67-69, ECHR 2003-VIII), a complaint to the Federal Constitutional Court complaining about the excessive length of civil proceedings can still be regarded as an effective remedy which the applicant had to exhaust. However, this question does not need to be resolved at this stage, if the applicant, who filed his complaint with the Constitutional Court and this Court while his proceedings in the civil courts were still pending, in any event did lodge such a complaint with respect to the length of the official liability proceedings.

The Court notes in this respect that the question whether the official liability proceedings against the city of Saarbrücken as a whole had been examined by the Federal Constitutional Court could be left open in deciding on the merits, having regard to the length of the proceedings before the Saarland Court of Appeal between 1989 and 2001 alone (see, *mutatis mutandis*, *Janssen v. Germany*, no. 23959/94, § 42, 20 December 2001).

Nonetheless, the Court recalls that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. It requires that the complaints intended to be made subsequently to the Court have been made in substance to the appropriate domestic courts (see, *inter alia*, *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34; *Akdivar and Others v. Turkey* [GC], judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1210 et seq., §§ 66, 69; *Thieme v. Germany* (dec.), no. 38365/97, 15 November 2001). Taking into consideration both the reasoning of the applicant's constitutional complaint and the reasons the Federal Constitutional Court gave for its decision, the Court is of the opinion that in substance, the duration of the official liability proceedings as a whole had been dealt with in the proceedings before the Constitutional Court.

As regards the second branch of the Government's objection, the Court recalls that under Article 35 of the Convention, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. 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, *inter alia*, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII; *Hartman*, cited above, § 57). A remedy which will not bear fruit in sufficient time cannot be regarded as effective (see *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 22, § 47; *Belinger v. Slovenia*, no. 42320/98, 2 October 2001).

Furthermore, in the area of exhaustion of domestic remedies, Article 35 apportions the burden of proof. It is incumbent on the Government claiming non-exhaustion to convince the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *inter alia*, *Horvat v. Croatia*, no. 51585/99, § 39, ECHR 2001-VIII; *Hartman*, cited above, § 58).

The Court notes that official liability proceedings brought against the *Land* whose courts allegedly failed to hear a case within a reasonable time can, in principle, provide redress by awarding pecuniary compensation for damage caused by undue delays in judicial proceedings. In the present case, the Karlsruhe Regional Court, in its judgment of 9 November 2001, declared that the applicant was, in principle, entitled to compensation payable by the *Land* Saarland for the damage which has been and will be caused by the excessive length of the proceedings before the Saarland Court of Appeal, without fixing the amount of damages payable (*Feststellungsurteil*). However, these proceedings have since then been pending on appeal and have been suspended awaiting the outcome of the main official liability proceedings against the city of Saarbrücken (see Facts, A.5., above).

The Court recalls in this respect that, in deciding on the effectiveness of a remedial action, particular attention should be paid to the speediness of this action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (see, *mutatis mutandis*, *Doran v. Ireland*, no. 50389/99, § 57, 31 July 2003). Having regard to the course of the fresh official liability proceedings, the Court finds that there are no guarantees that these proceedings could be heard without undue delay.

Furthermore, the Court recalls that it has not regarded official liability actions as an effective remedy providing adequate redress for a violation of the right to a hearing within a reasonable time, if in these proceedings compensation for non-pecuniary damage cannot be obtained. Having regard to the difficulties for applicants to prove a causal link between an undue delay in judicial proceedings and pecuniary damage sustained, the possibility to be awarded non-pecuniary damages is to be considered as decisive for the effectiveness of such a remedy (see, *mutatis mutandis*, *Havala v. Slovakia* (dec.), no. 47804/99, 13 September 2001; *Hartman*, cited above, § 68).

The Court notes that under Sections 253 and 847 (in its version in force until 31 July 2002) of the Civil Code, compensation for non-pecuniary

damage can only be claimed in exceptional circumstances explicitly recognised by law (see Relevant domestic law and practice, B.2., above). These Sections apparently do not award a right to damages for pain and suffering sustained due to an excessive length of proceedings. The Government, on whom the burden of proof falls in this respect, have therefore not succeeded in establishing that compensation for non-pecuniary damage can be awarded through an official liability action.

The Court is therefore not convinced that this action constitutes an effective remedy to complain about the excessive length of civil proceedings.

The Court concludes that, irrespective of the question whether a complaint to the Federal Constitutional Court is to be regarded as an effective remedy, the applicant in any event has exhausted domestic remedies as required by Article 35 § 1 of the Convention.

B. Status of victim

The Government further maintained that the applicant lost the status of victim within the meaning of Article 34 of the Convention. They pointed out that in its decision of 20 July 2000, the Federal Constitutional Court found that the proceedings before the Saarland Court of Appeal, which had been pending since 1989, lasted unreasonably long and breached the applicant's Basic Law rights. Thereby, the Constitutional Court also implicitly established a violation of Article 6 of the Convention.

The Government argued in particular that a constitutional complaint was to be regarded as an effective remedy affording adequate redress for an excessive duration of civil proceedings. On the one hand, it was capable of preventing the alleged violation or its continuation. Both the communication of a constitutional complaint and the finding of a violation by the Federal Constitutional Court, combined with a call on the civil courts to take suitable measures to speed up and terminate the proceedings, were capable of expediting the proceedings.

On the other hand, the Government took the view that a complaint to the Federal Constitutional Court was capable of providing redress for a violation of the right to a hearing within a reasonable time that had already occurred. It conceded that the Federal Constitutional Court lacked the competence to award damages for a breach of a Basic Law right. However, in accordance with this Court's case-law, the finding of a violation of the said right was to be considered as providing sufficient redress. In any event, the applicant brought an official liability action against the *Land* Saarland for damages sustained because of the excessive length of the proceedings, which had been successful at first instance. The constitutional complaint, at least taken in conjunction with an official liability action against the *Land* Saarland, therefore constituted an effective remedy.

The applicant contested this view. He pointed out that the Federal Constitutional Court did not expressly find a violation of Article 6 § 1 of the Convention. Moreover, that court was not entitled to award him compensation for the damage sustained by the breach of his right to a hearing within a reasonable time.

In the Court's view, the issue whether the applicant is deprived of his status of victim within the meaning of Article 34 of the Convention is closely linked to the questions raised with respect to his complaint under Article 6 § 1 of the Convention as to the length of the proceedings. It therefore joins this issue to the merits of the application.

C. Merits

The Government, having regard to the Federal Constitutional Court's decision of 20 July 2000, declined to comment on the reasonableness of the length of the official liability proceedings at the present stage of the proceedings.

The applicant claimed that the length of the official liability proceedings against the city of Saarbrücken as a whole, which lasted for almost thirty years, was excessive. He complained in particular that the Saarland Court of Appeal, both before and after the Federal Constitutional Court had found that his right to a hearing within a reasonable time had been violated, refused to take any measures to expedite the proceedings. This would have been of the essence as in the proceedings, in which the value in dispute had been fixed at some 109 million EUR, the applicant's financial existence was at stake.

The Court considers, in the light of the criteria established in its case-law on the question of "reasonable time" (the complexity of the case, the significance of the case for the applicant, the applicant's conduct and that of the competent authorities), 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.

For these reasons, the Court unanimously

Decides to join to the merits the question whether the applicant has lost his status of victim;

Declares the remainder of the application admissible, without prejudging the merits of the case.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President