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

THIRD SECTION

DECISION

Application no. 4861/17
Ali HEDAYATZADEH ROUDSARI
against Germany

The European Court of Human Rights (Third Section), sitting on 12 October 2021 as a Committee composed of:
Georgios A. Serghides, *President,*
Anja Seibert-Fohr,
Frédéric Krenc, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*
Having regard to the above application lodged on 12 January 2017,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Ali Hedayatzadeh Roudsari, is an Iranian national, who was born in 1989 and lives in Hannover. He was represented before the Court by Mr H. Wächtler, a lawyer practising in Munich.

A. The circumstances of the case

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

1. The demonstration, its dispersal and the site clearance

3. During the appeal proceedings, the Munich I Regional Court held an oral hearing, during which it examined the applicant and several witnesses. In its judgment of 23 February 2015 (see paragraphs 10-12 below) it established the facts as follows. The applicant did not dispute those facts in his application to the Court.

4. From 22 to 30 June 2013 a demonstration took place at a street in inner city Munich. The authorities had imposed certain conditions. The

participants, some fifty asylum-seekers and refugees, demonstrated against asylum legislation and asylum procedures. The demonstration took the form of a hunger strike and the participants also refrained from drinking. By choosing this form, the participants sought to attach weight to their political message. Towards the public a perception was created that participants might die; however, the hunger-striking participants did accept medical aid at all times in order to address dehydration through infusions and to restore their health to an extent that allowed them to continue their participation in the demonstration. At no point in time was there a real risk for the life of any of the participants. A team of medical doctors, composed of both emergency doctors requested by the authorities as well as volunteers, was present at all times; in the final days of the demonstration, the doctors checked on the participants every fifteen to twenty minutes.

5. On 27 June 2013 the administrative authority amended the conditions to the effect that, *inter alia*, staff of emergency medical services, firefighters and medical doctors had to be given access to the site at all times. The amended order was handed over to the organiser of the demonstration. On 29 June 2013 the administrative authority asked Dr S., a medical doctor, to assess the situation. Dr S. was initially refused access by the organiser of the demonstration since he could not prove his identity; shortly thereafter, he was allowed access, accompanied by police officers. Dr S. then assisted with the infusion of one dehydrated participant and subsequently reported that there were some thirty to forty persons lying around in a more or less apathetic and disinterested manner, as well as one person who was in a life-threatening state. Based on that report, the administrative authority ordered the dispersal of the demonstration on 30 June 2013 at 00.07 a.m. The order stated that the participants prevented a comprehensive assessment of all hunger-striking participants by emergency doctors, contrary to the condition set out in the above-mentioned amended order, and that it had to be assumed that there was an imminent risk for the life of the hunger-striking participants. The order recalled that the organiser of the demonstration had threatened that deaths might occur, that participants had refused to eat or drink for several days, and that many of them had to be referred to hospital already. The balancing of the competing interests of freedom of expression and of assembly on the one hand and in protecting the right to life of the hunger-striking participants on the other clearly came down in favour of the latter, the order concluded.

6. From 5.05 a.m. onwards the participants were informed about the dispersal of the demonstration through megaphone announcements. The participants were also requested to clear the site. The announcements were repeated several times. Police officers, who had surrounded the scene prior to the announcements, then arrested the organiser of the demonstration and went on to clear the site. In this connection, the applicant – who had participated in the demonstration – was found sitting on the ground, linking

arms with the persons sitting next to him. The police officers requested the applicant to detach himself; he refused to comply with that request, including after being threatened with the use of force, and actively resisted being removed. He was eventually immobilised by three police officers and moved to a nearby police car. During this action, the applicant moved his body and kicked. The police officer who carried his feet could block the kicks and was not hurt.

2. The criminal proceedings against the applicant

7. On 18 February 2014 the Munich District Court issued a penal order against the applicant, finding him guilty of resistance to enforcement officers (Article 113 §§ 1 and 3 of the Criminal Code, see paragraph 15 below) in conjunction with attempted bodily harm (Article 223 of the Criminal Code, see paragraph 15 below). In respect of the attempted bodily harm, the public prosecutor's office had determined there to be a special public interest in prosecution which called for *ex officio* intervention (Article 230 § 1 of the Criminal Code, see paragraph 15 below). The applicant was sentenced to 60 day-fines of five euros (EUR) each.

8. The applicant lodged a timely objection against the penal order. The Munich District Court held an oral hearing and by judgment of 7 May 2014 convicted the applicant of resistance to enforcement officers in conjunction with attempted bodily harm, sentencing him to 70 day-fines of EUR five each.

9. The applicant, represented by a lawyer, appealed the District Court's judgment, seeking to be acquitted. The public prosecutor appealed the judgment in respect of the sentence, requesting that the applicant's pecuniary fine be increased.

10. By judgment of 23 February 2015, the Munich I Regional Court upheld the District Court's judgment, while reducing the sentence to 40 day-fines of EUR eight each. It considered that the order to disperse the demonstration had been unlawful in terms of administrative law, both on formal (the wrong authority had ordered the dispersal) and material grounds. Having regard to the credible witness testimony of the medical doctors who had been present at the scene, medical supervision of the participants had been ensured at all times. Contrary to what the dispersal order stated, there had thus not been a breach of the conditions set by the authorities, notably the constant medical supervision of the participants, nor had there been a serious risk for the life or the health of the participants.

11. The Regional Court considered that the acting enforcement officers' perspective was decisive for determining whether an official act was "lawful" for the purposes of Article 113 § 3 of the Criminal Code (see paragraph 15 below). Regardless of the unlawfulness of an earlier administrative act, enforcement officers acted lawfully if, upon consideration of all circumstances they could be aware of, they could

consider the action to be necessary and justified. This was the case here, as the three police officers, whom the applicant resisted, had been placed, as a part of a support squad, a few hundred meters away from the demonstration. All they could rely on to evaluate the situation was the information made available, such as the existence of the dispersal order, or known to them, such as the duration and nature of the demonstration, including the presence of cars of emergency medical services and the alleged readiness to accept the death of participants. Based on the information they had, the three police officers could not readily conclude that the dispersal order was unlawful. Rather, they could legitimately consider their actions – which were based on the instructions given to them – to be lawful, also given the fact that their leadership had instructed the use of de-escalating measures, such as taking off helmets.

12. The Regional Court went on to find that the applicant had satisfied the subjective constitutive elements of the offences at issue: he had been aware of the police officers' task and deliberately resisted them and had accepted to cause pain or injury to them by attempting to kick them. In respect of sentencing, the court considered that the applicant had rather strongly assaulted the police officers; the lack of an injury was owed only to the conduct of the police officer concerned and to his protective equipment. Moreover, the applicant had committed two offences at the same time. By contrast, the court considered it a mitigating factor that the applicant had mistakenly assumed the action of the police officers to have been unlawful in view of the dispersal order's unlawfulness. His error was comprehensible, given that he knew the conditions at the site, notably that medical supervision of the participants was ensured at all times, and hence that the dispersal order which was based on the contrary premise had to be erroneous. As a person without legal training he could not easily understand that this did not necessarily render all subsequent enforcement actions unlawful; however, he could have avoided such error if he had sought legal advice. Lastly, given that the applicant had previously been convicted of another offence, it was not justified to dispense with a sentence altogether.

13. By order of 12 October 2015, the Munich Court of Appeal rejected the applicant's appeal on points of law. It referred to the well-established case-law of domestic courts, according to which the action and the subjective assessment of the officer enforcing a measure was decisive for the determination of the lawfulness of an official act for the purposes of Article 113 § 3 of the Criminal Code (see paragraph 16 below), and found that the Regional Court had not erred in law when it determined that the police officers enforcing the dispersal order and the order to clear the site had not erred in a culpable manner about the lawfulness of the measures they were enforcing. The police were competent for the enforcement measures following the demonstration's dispersal (which was a distinct issue from that of competence for issuing the dispersal order). The said

case-law of the domestic courts also applied, in essence, to acts of physical resistance to enforcement officers occurring in connection with assemblies, despite the protection afforded by the fundamental right to freedom of assembly under Article 8 of the Basic Law. Notably, also in connection with assemblies it was not a requirement that the police officer's act was lawful under administrative law for criminal liability under Article 113 of the Criminal Code to be engaged (see paragraph 16 below). Lastly, the Court of Appeal distinguished the present case from another one, on which the applicant had sought to rely and in which the Federal Constitutional Court had found that a conviction under Article 113 § 1 of the Criminal Code had breached constitutional rights: in that case, there had been no dispersal of the assembly prior to the enforcement actions carried out by the police.

14. On 4 August 2016 the Federal Constitutional Court declined to accept the applicant's constitutional complaint of 5 November 2015 for adjudication, without providing reasons (no. 1 BvR 2815/15).

B. Relevant domestic law and practice

15. Articles 113, 223 and 230 of the Criminal Code, in so far as relevant, read:

Article 113 [Resistance to enforcement officers]

"(1) Whoever, by force or threat of force, resists a public official or a soldier in the Federal Armed Forces charged with enforcing laws, statutory instruments, judgments, judicial decisions or directions in the performance of such an official act incurs a penalty of imprisonment for a term not exceeding three years or a fine.

...

(3) The offence is not punishable under this provision if the official act is not lawful. This also applies if the offender mistakenly assumes that the official act is lawful.

(4) If, when committing the act, the offender mistakenly assumes that the official act is not lawful and if the offender could have avoided the mistake, the court may, at its discretion, mitigate the penalty (Article 49 (2)) or dispense with imposing a penalty pursuant to this provision if the offender's guilt is minor. If the offender was unable to avoid the mistake and, under the circumstances known to him or her, could not reasonably be expected to use legal remedies to defend himself or herself against the presumed unlawful official act, then the act is not punishable under this provision; if the offender could reasonably be expected to do so, the court may, at its discretion, mitigate the penalty (Article 49 (2)) or dispense with imposing a penalty pursuant to this provision."

Article 223 [Intentional bodily harm]

"(1) Whoever physically assaults or damages the health of another person incurs a penalty of imprisonment for a term not exceeding five years or a fine.

(2) The attempt is punishable."

Article 230 [Request to prosecute]

"(1) Causing intentional bodily harm under section 223 and negligent bodily harm under section 229 are prosecuted only upon request, unless the prosecuting authority deems there to be a special public interest in prosecution which calls for *ex officio* intervention. ..."

16. The official act, to which Article 113 § 3 of the Criminal Code refers, is the one to which the individual resists. Where there are two official acts, such as, firstly, an order to disperse an assembly, and, secondly, an order by the police that the assembly's participants clear the site following the dispersal order, and the individual resists the order to clear the site, then it is that latter measure which constitutes the "official act" for the purposes of Article 113 § 3 of the Criminal Code. It is the well-established case-law of the domestic courts that the term "lawful" in Article 113 § 3 of the Criminal Code is not understood as requiring the enforcement officer's action be lawful under administrative law (see Federal Constitutional Court, no. 1 BvR 1090/06, order of 30 April 2007, at paras. 26, 31 and 33-34). However, the criminal courts have to take into account the fundamental right to freedom of assembly under Article 8 of the Basic Law when they interpret and apply Article 113 § 3 of the Criminal Code and certain legal errors on the part of the acting officer will rule out a conviction under Article 113 § 1 of the Criminal Code (see ibid., at paras. 35 et seq.). Notably, for a conviction under Article 113 § 1 of the Criminal Code, it will be required that the acting officer was competent to act, that essential formal requirements have been complied with, and that the acting officer could legitimately consider his or her action to be necessary and justified (see ibid., at para. 37). Where criminal liability under Article 113 § 1 of the Criminal Code is ruled out, the person resisting the enforcement officer may nonetheless be liable for another offence committed through his act of resistance, such as bodily harm (see ibid., at paras. 38 and 53-54).

COMPLAINT

17. The applicant complained under Article 11 of the Convention that his criminal conviction breached his right to freedom of assembly.

THE LAW

18. Article 11 of the Convention reads as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the

protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

19. The applicant argued that his criminal conviction was an interference with his right to freedom of peaceful assembly that was not "prescribed by law", as required by Article 11 § 2 of the Convention. According to him, the interpretation of Article 113 § 3 of the Criminal Code by the domestic courts had not been foreseeable. According to that provision, resistance to enforcement officers was not punishable if the official act was not lawful. In the criminal proceedings it was established that the order to disperse the demonstration had been unlawful on both formal and material grounds. As a person without legal training he could not know that the lawfulness of the official act in Article 113 § 3 of the Criminal Code referred to the subsequent enforcement measures of the police rather than to the order to disperse the demonstration. It had not been possible for him to obtain respective legal advice at the time the demonstration was being dispersed and he could not reasonably have been expected to obtain such advice in advance. The applicant moreover argued that his criminal conviction had been disproportionate. By resisting the police officers, he had aimed at continuing to express his opinion in the framework of a demonstration. Article 11 of the Convention had to be interpreted in the light of the Article 10 of the Convention. Being criminally convicted for having resisted the unlawful dispersal of a demonstration had a chilling effect on others who considered participating in demonstrations in the future and allowed for arbitrary dispersals of assemblies.

20. The Court reiterates that restrictions of the exercise of the right to freedom of peaceful assembly under Article 11 of the Convention, including subsequent convictions of participants, may have a chilling effect that must be taken into account when considering the proportionality of the measure (see *Knežević v. Montenegro* (dec.), no. 54228/18, §§ 80 and 88, 2 February 2021, with further references). That being said, the applicant was not prosecuted and convicted for having organised and/or participated in an assembly, but for having resisted and physically assaulted police officers after the dispersal of the demonstration.

21. The applicant's arguments – in respect of both the foreseeability and proportionality of his conviction – centre around the fact that the order to disperse the assembly had been wrongful under administrative law. Yet, the Court observes that the applicant was not only convicted of resistance to enforcement officers but also of attempted bodily harm. As established by the domestic courts, and not disputed by the applicant, he had accepted to cause pain or injury to the police officer whom he had kicked. The Court considers that it is this use of violence by the applicant which is central for the assessment whether his conviction constituted a justified interference

with his rights under Article 11 of the Convention. Attempted bodily harm was a criminal offence under Article 223 of the Criminal Code and its application to the act of kicking a police officer was foreseeable to the applicant. Notably, even if criminal liability for resistance to enforcement officers under Article 113 of the Criminal Code had been ruled out, this did not per se rule out criminal liability for another offence committed through his act of resistance, such as bodily harm (see paragraph 16 above). The applicant's conviction was therefore in accordance with the law and it pursued legitimate aims, notably "prevention of disorder or crime" and "protection of the rights and freedoms of others" (see also *Knežević*, cited above, § 88).

22. The Court thus has to determine whether the applicant's conviction was "necessary in a democratic society". It reiterates that Article 11 of the Convention does not give immunity against prosecution for violent actions during public gatherings or after their dispersal and that the authorities enjoy a wider margin of appreciation in respect of situations where individuals are involved in acts of violence (see *Knežević*, cited above, § 87; and *Chernega and Others v. Ukraine*, no. 74768/10, §§ 261 et seq., 18 June 2019). The Court notes that the domestic courts considered it a mitigating factor that the applicant had mistakenly assumed the action of the police officers to have been unlawful (see paragraph 12 above) and that they gave him a very lenient sentence (a pecuniary fine consisting of 40 day-fines of EUR eight each). Reiterating that the applicant was convicted for having used violence against a police officer, that is to say, for having attempted to harm or injure another person, the Court rejects the applicant's submission that his conviction had a chilling effect.

23. In view of the foregoing, the Court considers that the domestic authorities adduced relevant and sufficient reasons to justify the applicant's conviction and that they did not overstep their margin of appreciation. The interference was therefore proportionate to the legitimate aim pursued and was thus "necessary in a democratic society".

24. Accordingly, the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 18 November 2021.

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Olga Chernishova
Deputy Registrar

Georgios A. Serghides
President