CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32460/96
by Andreas KELLING
against Denmark

The European Court of Human Rights (Second Section) sitting on 2 February 1999 as a Chamber composed of

Mr C. Rozakis, *President*,
Mr M. Fischbach,
Mr G. Bonello,
Mrs V. Strážnická,
Mr P. Lorenzen,
Mr A.B. Baka,
Mr E. Levits, *Judges*,

with Mr E. Fribergh, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 July 1996 by Andreas Kelling against Denmark and registered on 30 July 1996 under file no. 32460/96;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a German citizen, born in 1965. He resides at Malente, Germany. Before the Court he is represented by Anders Boelskifte, a lawyer practising in Copenhagen, Denmark.

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

On 7 August 1994 the applicant was arrested in Copenhagen and charged with smuggling a large quantity of drugs, including approximately 1 kg of cocaine and 29 kg of hashish, which was found in the car used for the purpose when he was arrested by the police.

On 8 August 1994 the applicant and three other presumed accomplices were heard by the City Court of Copenhagen (*Københavns Byret*). The applicant admitted having participated in two incidents of smuggling hashish and was detained pursuant to Section 762, subsection 1, of the Administration of Justice Act (*retsplejeloven*) on the basis of a fear that he would otherwise impede the investigation or evade prosecution.

On 28 October 1994 during a remand hearing the applicant confessed to having participated in the smuggling of hashish into Denmark on four occasions. He denied all knowledge of the cocaine found in the car on 7 August 1994.

On 6 July 1995 yet another accomplice to the applicant was heard by a court in Berlin in order to obtain evidence to be used in the case before the Danish courts involving the applicant.

Despite the applicant's protests on 21 July and 18 August 1995 before the City Court and on 20 November and 6 and 18 December 1995 before the High Court of Eastern Denmark (*Østre Landsret*) the courts decided to prolong his detention on remand. Whereas the first three of these decisions were based on the fear that the applicant would impede the investigation as well as on the fear that he would evade prosecution, the two last decisions were based solely on the latter. The applicant appealed against the High Court decisions of 6 and 18 December 1995 to the Supreme Court (*Højesteret*), invoking *inter alia* Articles 5 and 6 of the Convention. On 12 January 1996, however, the Supreme Court upheld the High Court's decisions.

In the meantime, on 3 October 1995, an indictment was served on the applicant. Following an amendment on 21 May 1996 he was charged with drug trafficking, having participated on five occasions from the end of June until 7 August 1994 in the smuggling of a total of approximately 120 kg of hashish into Denmark, and having participated, on the latter date, in the smuggling of approximately 1 kg of cocaine into Denmark.

From 20 to 23 May 1996 the applicant and two accomplices were heard by the High Court, sitting with a jury. The applicant pleaded guilty as regards the smuggling of what he had believed amounted to a total of approximately 30 kg of hashish. He denied, however, all knowledge of the cocaine found in the car. On 23 May 1996 the jury found the applicant guilty only to the extent to which he had pleaded guilty. He was convicted in accordance with the jury's verdict and sentenced to one year's imprisonment. The following day, 24 May 1996, the applicant was expelled to Germany as he was considered as having served his sentence in detention on remand.

The applicant did not appeal against the High Court judgment but subsequently, he brought a claim for compensation before the City Court of Copenhagen against the prosecution authorities, pursuant to Section 1018a of the Administration of Justice Act, for the time spent in detention on remand in excess of the sentence ultimately imposed on him. He claimed primarily 272,006.98 Danish Crowns (DKK) based on an assumption that he would have been released on parole after a certain period in accordance with usual practice. Alternatively, he claimed 211,817.42 DKK for the time spent in detention on remand in excess of his one year prison sentence without deduction. He invoked *inter alia* Articles 5 and 6 of the Convention.

On 5 September 1997 the City Court, sitting with a professional judge and two lay judges, decided as follows:

(Translation)

> "The Court finds, as argued by the prosecution, that the plaintiff has shown a considerable degree of contributory negligence by having smuggled several times without assuring himself of which drugs and quantities [of drugs] he smuggled. The plaintiff ought to have assured himself thereof in the light of his kingpin's remark that he risked being charged for more than [the smuggling of] hashish and in the light of the fact that the car used the last time could contain more drugs than the car used the first times...
>
> The Court finds, furthermore, that in calculating a possible amount of compensation a fictitious date for release on parole cannot be taken into consideration.
>
> Two judges find that the proceedings before the prosecution authorities and the courts have been of such length that it would be unreasonable to refuse totally the plaintiff's claim for compensation by reason of the contributory negligence which he has shown. These judges vote in favour of awarding [the applicant] 70,000 DKK in compensation plus interest, which is equivalent to approximately one third of his alternative claim.
>
> One judge finds that [the applicant's] claim for compensation be refused by reason of his contributory negligence.
>
> Judgment will be pronounced in accordance with the opinion of the majority.
>
> It is held:
>
> Within 14 days the State must pay 70,000 DKK to [the applicant].
> ..."

The applicant did not appeal against this judgment.

COMPLAINTS

The applicant complains that he did not have a hearing within a reasonable time. He invokes Article 5 § 1 and § 3 and Article 6 § 1 of the Convention.

THE LAW

The applicant complains that he did not have a hearing within a reasonable time. He invokes Article 5 § 1 and § 3 and Article 6 § 1 of the Convention.

The Court recalls that Article 5 § 3 of the Convention prescribes that a person who is arrested or detained in accordance with § 1 of that Article "... shall be entitled to trial within a reasonable time or to release pending trial. ..." and that according to Article 6 § 1 "... everyone is entitled to a ... hearing within a reasonable time ..." in the determination of any criminal charge against him.

Before examining these issues the Court notes that an applicant's status as a "victim" within the meaning of Article 34 of the Convention may depend on compensation being awarded on the basis of the facts about which he or she complains before the Court. In cases concerning complaints of length of proceedings the domestic authorities must have acknowledged, either expressly or in substance, the alleged infringement of the Convention and, if necessary, provided redress in relation thereto. Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see Eur. Court HR, Eckle v. Germany judgment of 15 July 1982, Series A no. 51, p. 32 §§ 69 et seq., application no. 10868/84, decision of 21 January 1987, DR 51, p. 62 and application no. 13156/87, decision of 16 February 1993, DR 74, p. 5).

In the present case the Court recalls that the applicant was arrested on 7 August 1994 and detained on remand. His detention as well as his trial came to an end on 23 May 1996 when the High Court of Eastern Denmark pronounced judgment in the case. Thus, the Court notes that the period of time involved under Article 5 § 3 of the Convention equals that to be considered under Article 6 § 1. Whereas it is true that different criteria may apply in determining the reasonableness of the length of the proceedings under Article 5 § 3 and Article 6 § 1 the Court finds that in the circumstances of the present case the question of "victim" may in either case be determined in accordance with the case-law referred to above.

In this case the Court notes that following his return to Germany, the applicant instituted proceedings in order to obtain damages caused by the length of the proceedings. Pursuant to the applicable provisions of the Administration of Justice Act the City Court decided to award the applicant compensation in the amount of 70,000 DKK therefor. The City Court expressly acknowledged that the applicant ought to be compensated due to the length of the proceedings and that it would be unreasonable to refuse entirely his claim for damages by reason of contributory negligence. The Court also notes that the applicant chose not to appeal against this judgment to the High Court, a possibility open to him under Danish law. In these circumstances the Court finds that the City Court, as a final instance, in substance acknowledged an infringement of the right to trial within a reasonable time and afforded redress therefor by awarding the applicant damages.

Accordingly, the Court finds that the applicant may no longer claim to be a victim of a violation of his right to trial within a reasonable time as guaranteed by Articles 5 § 3 and 6 § 1 of the Convention. It follows that the application must be rejected under Article 35 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Erik Fribergh
Registrar

Christos Rozakis
President