CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 33555/96
by Josef KEMPTER
against Germany

The European Court of Human Rights (Fourth Section) sitting on 4 May 1999 as a Chamber composed of

Mr A. Pastor Ridruejo, *President*,
Mr G. Ress,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr I. Cabral Barreto,
Mrs N. Vajić,
Mrs S. Botoucharova, *Judges*,

with Mr V. Berger, *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 25 January 1996 by Josef KEMPTER against Germany and registered on 29 October 1996 under file no. 33555/96;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1950, is a German national. He is a businessman by profession. When lodging his application, he was detained in a prison at Landsberg/Lech.

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

In October 1991 criminal proceedings were commenced against, *inter alia*, the applicant on charges of drug trafficking. In these proceedings, he was assisted by defence counsel.

The applicant was arrested on 2 November 1991 on the basis of an arrest warrant issued by the Munich District Court (*Amtsgericht*) on 31 October 1991 and taken into detention on remand. His detention was suspended on 24 February 1992. On 3 March 1992 he was again arrested and detained on remand until 23 March 1993.

On 24 April 1992 the Munich Public Prosecutor's Office (*Staatsanwaltschaft*) preferred the indictment (*Anklageerhebung*) against the applicant. He was charged with two counts of drug trafficking.

On 8 October 1992 the Munich I Regional Court (*Landgericht*) partly rejected the indictment. It refused in particular to open the trial proceedings as to one count of drug trafficking. The court considered that, having regard to the evidence presented by the Prosecutor’s Office, there was not sufficient suspicion to justify committing the applicant for trial. On 5 April 1993 the Munich Court of Appeal (*Oberlandesgericht*), on the Public Prosecutor's appeal, committed the accused for trial on all counts. It further directed that the trial was to open before the Regional Court.

On 28 March 1995 the Munich I Regional Court, following trial hearings between January and March 1995, convicted the applicant of one count of drug trafficking. Having regard to two previous convictions, it fixed a cumulative sentence of three years and six months' imprisonment. The court found in particular that the applicant and his co-accused had sold cocaine to an undercover agent of the German police. The Court considered that their defence, namely that they had themselves intended to arrange for a fictitious deal and the subsequent prosecution of the purchaser, was in itself inconclusive and refuted by the evidence. The applicant's contacts with the police authorities had only served the purpose of finding out whether the purchaser was an undercover agent. Medical expert evidence had confirmed the applicant's full criminal responsibility.

On 28 November 1995 the Federal Court of Justice (*Bundesgerichtshof*) dismissed the applicant's appeal on points of law. In his statement of appeal, the applicant’s counsel had complained about the violation of substantive law in general and also about a point of procedural law, namely the alleged taking into account of evidence not produced at the trial. The applicant’s request for leave to file supplementary reasons out of time was rejected on the ground that he had failed to submit these reasons together with his request. The applicant received the decision on 7 December 1995.

Sitting as a panel of three members, on 16 January 1996 the Second Chamber of the Second Division (*zweite Kammer des Zweiten Senats*) of the Federal Constitutional Court

(*Bundesverfassungsgericht*) declined to entertain the applicant's constitutional appeal of 17 December 1995.

COMPLAINTS

1. The applicant complains about his conviction and the severity of his sentence. He also considers that the trial was unfair and raises in particular the following points. According to him, the Bavarian police authorities had instructed him to get involved in the offence. He further alleges that his counsel's statements had not been properly recorded. Moreover, the trial should have taken place before a district court or another department of the Munich I Regional Court.

2. He further complains about the length of the criminal proceedings against him.

3. He invokes Articles 3, 5, 6, 7, 8 and 17 of the Convention.

THE LAW

1. The applicant raises various complaints about his conviction and also of the proceedings concerned. He relies on Articles 3, 5, 6, 7, 8 and 17 of the Convention.

With regard to the judicial decisions of which the applicant complains, the Court recalls that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among many other authorities, the Pérez de Rada Cavanilles v. Spain judgment of 25 September 1998, *Reports of Judgments and Decisions* 1998-.., p. .., § 43). Moreover, as a general rule, the assessment of the facts is within the province of the national courts (see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, pp. 19-20, § 60).

2. The applicant further complains that in several respects the proceedings at issue were unfair. He relies on Article 6 of the Convention, of which the following provisions are relevant in the instant case:

> "1. In the determination of … any criminal charge against him, everyone is entitled to a fair … hearing within a reasonable time by an independent and impartial tribunal …
> …
> 3. Everyone charged with a criminal offence has the following minimum rights:
> …
> (b) to have adequate time and facilities for the preparation of his defence;
> …"

a. The Court observes at the outset that under Article 35 § 1 of the Convention, it may only deal with the matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The Court recalls that Article 35 §1 (former Article 26) requires that the complaints intended to be made subsequently before the European Court of Human Rights should have

been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 66).

In the present case, the applicant's appeal on points of law related only to substantive issues and to a procedural matter which was not addressed in the Strasbourg proceedings. The remainder of his procedural complaints were rejected by the Federal Court of Justice for failure to have raised them in time and due form.

The Court therefore finds that the applicant did not, as required under Article 35 § 1, exhaust the remedies available to him under German law with regard to his complaints about the recording of his counsel's pleadings and the competence of the Regional Court.

Accordingly, this part of the application must be rejected under Article 35 § 4 of the Convention.

b. With regard to the applicant's general complaints about the alleged unfairness of the proceedings, the Court finds nothing to show that the applicant, assisted by defence counsel, could not duly present his defence or that the proceedings were not truly adversarial. His submissions do not disclose any appearance of a breach of his right to a fair trial or of his rights of defence under Article 6 §§ 1 and 3. This aspect of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

3. The applicant further complains under Article 6 of the Convention about the length of the criminal proceedings against him.

The period to be taken into consideration began at the latest on the date when the applicant, in the context of the investigations which had started in October 1991, was arrested on 2 November 1991.

With regard to the end of the period concerned, the Court notes that that the Federal Court of Justice rendered its decision on 28 November 1995 and the ensuing proceedings before the Federal Constitutional Court terminated on 16 January 1996.

The proceedings therefore lasted altogether about four years and two months.

The Court reiterates that the reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and that of the competent authorities (see, among many other authorities, the Reinhardt and Slimane-Kaïd v. France judgment of 31 March 1998, *Reports* 1998-II, p. 662, § 97, and the I.A. v. France judgment of 27 August 1998, *Reports* 1998-.., p. .., § 119).

Having regard to these criteria, the Court observes that the preliminary investigations were concluded and the indictment was preferred end of April 1992, in other words six months after the applicant's arrest.

As to the length of the court proceedings following the close of the pre-trial investigation, it is to be noted that, in an intermediate phase, the Munich I Regional Court examined the question whether the reasons advanced in the bill of indictment were sufficient to justify the opening of main trial proceedings. This matter was dealt with at two instances and settled within less than one year. Subsequently, the case was pending before the Munich I Regional Court for about two years. Though the case was of some complexity, having regard in particular to the involvement of undercover agents and the applicant's defence that he himself had intended to arrange for a fictitious deal, there appears to have been some delay in preparing the case for the trial. Nevertheless, considering that the remainder of the period for disposing of the case by the criminal courts, at three instances, was two years and eight months, this period cannot on the whole be regarded as excessive. Moreover, the proceedings before the Federal Constitutional Court did not considerably contribute to the overall length of the proceedings.

In these circumstances, the Court finds that there is no appearance of a breach of Article 6 § 1.

Consequently, this part of the application is likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Antonio Pastor Ridruejo
President