CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71598/01
by Ursula MAASS
against Germany

The European Court of Human Rights (Third Section), sitting on 15 September 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs R. JAEGER,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON *judges*,
and Mr V. BERGER, *Section Registrar,*

Having regard to the above application lodged on 3 May 2001,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Ursula Maaß, is a German national, who was born in 1948 and lives in Neckarsulm, Germany. She is represented before the Court by Mr R. Andreß, a lawyer of the law firm Herrmann, Gass & Kollegen practising in Heilbronn. The respondent Government are represented by Mrs A. Wittling-Vogel, *Ministerialrätin*, of the Federal Ministry of Justice.

A. The circumstances of the case

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

1. Penal order proceedings

In a questionnaire dated 17 March 1999 the Neckarsulm Police Station informed the applicant that she was suspected of having damaged Mr W.'s car on 13 or 14 March 1999. The police informed her that she was free to make a statement on this accusation in writing or to remain silent.

On 23 March 1999 the Neckarsulm Police Station received the questionnaire completed by the applicant, in which she stated that she did not admit the crime she was suspected of. She wrote that she did not wish to make a statement herself and that she left it to her lawyer to deal with the matter. She went on claiming that she considered the behaviour of Mr W. to be an act of revenge on her.

In a letter dated 8 April 1999 the applicant's lawyer K. notified the Neckarsulm Police Station that he represented the applicant and requested to grant him access to the case file. Although he stated in this letter that a power of attorney was enclosed, the letter did not contain this document.

On 20 May 1999 the public prosecutor applied to the Heilbronn District Court to issue a penal order against the applicant.

In a letter dated 9 June 1999 addressed to the Neckarsulm Police Station the applicant's lawyer K. repeated his request to inspect the case file.

On 10 June 1999 the Heilbronn District Court issued a penal order (*Strafbefehl*) against the applicant in a summary procedure. The applicant was convicted of damage to property and sentenced to a fine of 50 Deutschmarks per day for 30 days.

On 16 June 1999 counsel K.'s letter recalling his motion to be granted access to the case file reached the Heilbronn District Court.

On 23 June 1999 the penal order was served on the applicant by way of a notice in her letter-box to collect a letter deposited at the Neckarsulm Post Office, as the postman had not found anyone at the applicant's home. The applicant did not collect this letter. The applicant's counsel was not sent a copy of the penal order.

On 8 July 1999 the penal order became final, since no objection had been lodged by the applicant within the two-week time-limit under the relevant provisions of the Code of Criminal Procedure (*Strafprozeßordnung* – see 'Relevant domestic law' below).

On 10 August 1999 the Heilbronn Public Prosecutor's Office issued a payment order (*Zahlungsaufforderung*) against the applicant in respect of the fine.

On 20 September 1999 the Heilbronn Public Prosecutor's Office ordered the imprisonment of the applicant for default of payment of the fine (*Ersatzfreiheitsstrafe*). The order was served on the applicant on 22 September 1999, again by way of a notice in her letter-box to collect a letter deposited at the Neckarsulm Post Office. The applicant also did not collect this letter.

On 26 October 1999 the Heilbronn Public Prosecutor's Office issued a warrant to bring the applicant before the competent authority (*Vorführungsbefehl*). The warrant contained a reference to the date and file-number of the penal order, to the offence the applicant was convicted of and to the amount of the fine.

On 29 October 1999 an officer of the police station which had been instructed to execute this warrant phoned the applicant, informed her of the warrant and requested her to come to the police station. The applicant did so and was informed by a police officer about the warrant and the existence of the underlying penal order. In the following discussion the applicant denied having damaged the car of Mr W., her former partner. She paid the fine in order to prevent the execution of the warrant.

In a letter dated 29 October 1999, which reached the Heilbronn Public Prosecutor's Office on 3 November 1999, the applicant's new lawyer, who has represented the applicant since then, requested the Heilbronn Public Prosecutor's Office to grant him access to the case file. He stated that he had been informed by the applicant of the measures taken to enforce a sentence without her having received a penal order or a judgment.

On 4 November 1999 the Heilbronn Public Prosecutor's Office granted the applicant's new lawyer access to the case file. The file reached the lawyer on 5 November 1999.

2. Objection and application for reinstatement of the proceedings

By a letter dated 10 November 1999, which reached the Heilbronn District Court on 11 November 1999, the applicant's new lawyer lodged an objection against the penal order after having inspected the case file. At the same time, he submitted an application for reinstatement of the proceedings (*Wiedereinsetzung in den vorigen Stand*) with respect to the two-week time-limit for lodging the objection. He argued that it was not the applicant's fault that she did not comply with this time-limit. She had not received the penal order. Since she had instructed a counsel, she was confident that services would be effected on her lawyer, and that she did not have to attend to the observance of any time-limits herself.

On 28 December 1999 (decision served on 4 January 2000) the Heilbronn District Court dismissed the applicant's request for reinstatement as inadmissible. Consequently, it dismissed her objection against the penal order as inadmissible. It found that the request for reinstatement was filed out of time. According to the court, the applicant was informed of the

content of the penal order when she came to the police station on 29 October 1999. Neither she nor her new counsel applied for reinstatement of the proceedings within the one-week time-limit running from that date. The court found that, in any event, the application for reinstatement of the proceedings was ill-founded. It was not credible that the applicant had neither received the penal order nor any of the other documents served on her, because the address to which the documents had been sent was correct. Therefore, it was the applicant's fault that she did not comply with the time-limit to lodge an objection against the penal order.

On 10 January 2000 the applicant lodged an appeal (*sofortige Beschwerde*) against the decision of the Heilbronn District Court. She stated that in 1999 several letters to her or her neighbours did not reach their addressees. She claimed in particular that, even assuming that the notification of the penal order was valid, it was contrary to her right to a fair trial and to be heard that the District Court had neither granted her lawyer access to the case file nor informed him that it had issued a penal order. She therefore had to be granted reinstatement. She disputed that she had been informed of the contents of the penal order by the police on 29 October 1999. In fact, the competent police office was unable to explain to the applicant's lawyer who had called him on the same day why the applicant had to pay a fine. Therefore, the time-limit of one week to apply for reinstatement of the proceedings did not start running before the applicant's counsel had inspected the case files and was consequently observed.

On 23 February 2000 (decision served on 1 March 2000) the Heilbronn Regional Court, endorsing the reasons given by the Heilbronn District Court, dismissed the applicant's appeal as ill-founded.

On 30 March 2000 the applicant lodged a constitutional complaint with the Federal Constitutional Court. She claimed that her right to be heard had been violated by the Heilbronn District Court by not granting access to the case file to her lawyer, not hearing her *via* counsel before issuing the penal order, not informing the latter that a penal order had been issued and not granting reinstatement of the proceedings.

On 30 October 2000 the Federal Constitutional Court, without giving reasons, refused to admit the applicant's constitutional complaint. The decision was served on the applicant's lawyer on 9 November 2000.

By a letter dated 27 April 2001, which was posted on 3 May 2001, the applicant sent her first submissions to the Court. In these she set out the object of her application, including the underlying facts and her complaints, and enclosed copies of all relevant court decisions. The completed application form dated 13 June 2001, in which the applicant referred to her first submissions, reached the Court on 25 June 2001.

B. Relevant domestic law

Sections 407 *et seq.* of the Code of Criminal Procedure (*Strafprozeßordnung*) provide for the imposition of a penal order, without a trial, in cases concerning minor offences. The Public Prosecutor's Office may lodge a motion to the District Court to issue a penal order, setting out the offence the accused is charged with and fixing the sentence. The judge must issue the penal order if there are no grounds for refusing it, that is, if he has no objections to deciding without a trial hearing, agrees with the legal assessment of the case and does not wish to impose a different sentence. The written penal order must contain a reference to the fact that the penal order should be final, binding and enforceable if the accused fails to lodge a written objection with the District Court or have such an objection taken down in writing at the court's registry within two weeks of service.

If the objection reaches the court within the prescribed time-limit, normal trial proceedings are instituted, and the District Court conducts a hearing. If the accused was prevented from complying with the time-limit through no fault of his own, a motion to have the proceedings reinstated may be brought. According to Sections 44 and 45 of the Code of Criminal Procedure this motion must reach the District Court within one week from the cessation of the impediment due to which the objection could not be lodged in time. The facts justifying the motion shall be substantiated at the time the motion is filed or during the proceedings concerning the motion.

Pursuant to Section 37 of the Code of Criminal Procedure the service of documents is governed by Sections 181 and 182 of the Code of Civil Procedure (*Zivilprozeßordnung*). If a document cannot be served personally, it may be deposited, *inter alia*, at the local post office. In that case a written notice of deposit must be left at the recipient's address in the manner customary for ordinary letters.

Section 145a of the Code of Criminal Procedure provides that if a decision is served on the accused, the defence counsel must be informed thereof at the same time and must be provided with a copy of this decision, even if there is no written power of attorney in the case file.

The defence counsel's right of access to the case file is governed by Section 147 of the Code of Criminal Procedure. A defence counsel is entitled to consult the case file as a whole as soon as the preliminary investigation has been terminated and, in principle, also during the preliminary investigation, if the purpose of the investigation is not endangered thereby. During the preliminary investigation, it is for the Public Prosecutor's Office to decide whether or not to grant access to the file; thereafter it is for the president of the trial court.

COMPLAINTS

The applicant complained under Article 6 of the Convention that the proceedings before the District Court had violated her rights to a fair trial and to defend herself through a lawyer. In particular, she submitted that the District Court had not granted her lawyer access to the case file before issuing the penal order and had not informed him about the penal order served on the applicant. She also maintained that the District Court's failure to hear her *via* counsel before issuing the penal order amounted to a violation of her Convention right to be heard.

THE LAW

The applicant argued that the criminal proceedings against her had been unfair, because her lawyer had neither been granted access to the case file nor been awarded an opportunity to make a statement before the penal order was issued, of which her counsel also did not receive a copy. She invoked Article 6 of the Convention, the relevant part of which provides:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing by [a] ... 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;
>
> (c) to defend himself in person or through legal assistance of his own choosing ...;
>
> ..."

A. The parties' submissions

1. Exhaustion of domestic remedies

The Government argued that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. She had failed to avail herself of the opportunities to lodge an objection against the penal order and to apply for reinstatement of the proceedings in due form and within the prescribed time-limits.

The Government further argued that, even though the Federal Constitutional Court had refused to admit the applicant's constitutional complaint without giving reasons, that complaint had presumably been inadmissible. In particular, the applicant had failed to set out at any moment which factual or legal submissions she would have made in respect of the

offence she had been accused of, if she had been heard before the penal order was issued or in a subsequent hearing.

The applicant contested this view. She stressed that she did not have any legal knowledge. It had therefore been sufficient for her to authorize counsel to represent her. Her new counsel neither knew which court had ordered measures of execution against her, nor had a file number from which he could extract that information. He therefore had to have access to the case file before being able to lodge an objection and a motion for reinstatement of the proceedings, which he did within one week after having inspected the file.

2. Compliance with the six-month time-limit

The Government further argued that the applicant had failed to lodge her complaint within six months from the date on which the final decision by the domestic courts was taken, as prescribed by Article 35 § 1 of the Convention. They argued that the application form filled in by the applicant, together with further written submissions, reached the Court only on 25 June 2001, that is, more than six months after the decision of the Federal Constitutional Court had been served on the applicant on 9 November 2000.

The applicant contested this view.

3. Merits

The Government took the view that the applicant had had a fair hearing within the meaning of Article 6 §§ 1 and 3 (c). She had been afforded an opportunity to comment on the accusations against her, but did not avail herself of that opportunity within the forms and time-limits prescribed by law. Even though it would have been useful for the Public Prosecutor's Office or the District Court to alert the applicant's first counsel that he had not submitted a written power of attorney, it had been correct to serve the penal order on the applicant in these circumstances.

The Government conceded that, by an inadvertence, the applicant's lawyer had not been granted access to the case file before the penal order was issued, as prescribed by Section 147 of the Code of Criminal Procedure. He also had not been sent a copy of the penal order at the time the order was validly served on the applicant, as prescribed by Section 145a of the said Code. However, the applicant altogether failed to make proper use of the prescribed objection and reinstatement procedures, which would have remedied these procedural flaws. This was not imputable to the respondent State.

The Government argued that the duty of care incumbent on the applicant in this respect had not been unreasonable. She should have been aware at the latest on 29 October 1999, when she had been informed of the warrant

and the underlying penal order, that she had to resort to a remedy against the penal order, either in person or *via* counsel. It had not been sufficient for the applicant to employ a new counsel without informing him properly about the previous proceedings. Furthermore, the applicant had failed to substantiate throughout the proceedings why she had not received any of the notifications concerning the criminal proceedings against her. It was not credible that none of these letters reached her. In any event, she was obliged to take the necessary precautions that messages addressed to her could reach her. Moreover, it had not been necessary for her lawyer to inspect the case file before lodging an objection and a motion for reinstatement of the proceedings, as it had been possible to lodge such motions immediately on the condition that there had been a penal order.

The applicant argued that she did not have a fair trial, because her counsel had not received a copy of the penal order at the time the order had been served on her. Neither the Public Prosecutor's Office nor the District Court had taken notice that she had been represented by counsel in the proceedings. This omission rendered the proceedings unfair, irrespective of possible subsequent omissions on her part.

B. The Court's assessment

The Court does not consider it necessary in the present case to rule on the Government's objections since, in any event, it considers that the complaint as a whole is inadmissible for the following reasons.

The Court observes that the case raises issues under Article 6 §§ 3 (b) and (c), laying down specific rights of the defence in criminal proceedings, as well as under Article 6 § 1, guaranteeing the right to a fair trial. It recalls that the guarantees in paragraph 3 of Article 6 are particular aspects of the right to a fair trial set out in paragraph 1 (see, *inter alia*, *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277, p. 13, § 29; *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 59, ECHR 2000-II). It will, therefore, examine the complaints under both provisions taken together.

It is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see, *inter alia*, *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, pp. 27-28, §§ 66-67; *Ruiz-Mateos v. Spain*, judgment of 23 June 1993, Series A no. 262, p. 25, § 63; *Rowe and Davis*, cited above, § 60).

The Court further recalls that penal order proceedings, just as proceedings conducted in the defendant's absence (see, among others, *Poitrimol*, cited above, p. 13, § 31; *Sejdovic v. Italy*, no. 56581/00, § 39, ECHR 2004-...), are not incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact (see *Salinga v. Germany*, no. 22543/93, Commission decision of 7 December 1994; *Hennings v. Germany*, judgment of 16 December 1992, Series A no. 251, pp. 11-12, §§ 26-27).

In order to determine whether there has been a breach of Article 6 §§ 1 and 3, the Court will examine separately each limb of the applicant's complaint and then make an overall assessment (see, *mutatis mutandis*, *Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, p. 11, § 28).

As regards the proceedings preceding the issuing of the penal order, the applicant complained that her counsel had neither been granted access to the case file nor been awarded an opportunity to make a statement before the penal order was issued. The Court notes that, whereas the applicant had been questioned in person, neither the Public Prosecutor's Office nor the District Court had rendered a decision on and granted the motion lodged by the applicant's counsel to inspect the case file. Her counsel was entitled to do so pursuant to Section 147 of the Code of Criminal Procedure. This was in fact not disputed by the Government. As a consequence, the applicant had not been given the opportunity to have full knowledge of and comment on the observations and evidence adduced in the case file *via* her counsel. She therefore had not been able to defend herself effectively through legal assistance before the penal order was issued.

However, it remains to be determined whether these shortcomings were capable of being cured at a later stage of the proceedings (see, *mutatis mutandis*, *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, Series A no. 99, p. 18, § 46; *Goddi*, cited above, p. 13, § 32; *Steck-Risch and Others v. Liechtenstein*, no. 63151/00, § 56), notably in the proceedings following the applicant's objection to the penal order.

As regards these proceedings following the issuing of the penal order, the applicant complained that her counsel had not received a copy of the penal order when it was served on her. Consequently, she had also not been able to defend herself effectively through a lawyer at this stage of the proceedings. The Court observes that the applicant's request for reinstatement of the proceedings and her objection against the penal order were finally dismissed as inadmissible, without a fresh examination of her case on the merits. Consequently, she had not had access to and been heard in court, and had not been able to defend herself effectively. However, in order to hold the respondent State responsible under Article 6 for this outcome, the latter needs to be imputable to German authorities

(see, *mutatis mutandis*, *Hennings*, cited above, p. 11, § 26; *Czekalla v. Portugal*, no. 38830/97, § 60, ECHR 2002-VIII).

The Court notes that several factors must be considered to have contributed to the applicant's case not having been decided anew. It is uncontested that, contrary to Section 145a of the Code of Criminal Procedure, the District Court did not send a copy of the penal order to the applicant's counsel when serving the order on the applicant. As a result, the applicant's first counsel – who had also not been informed by the applicant – had not been in a position to lodge an objection against the order within the prescribed time-limit.

However, the applicant, on whom the penal order had been validly served by way of a notice in her letter-box, did not react to this letter. She also did not take any steps when being sent the payment order and the order for her imprisonment for default of payment, the latter having equally been served on her by way of a notice in her letter-box. The applicant claimed that she had not received any of these letters and notifications. The authorities cannot, however, be held responsible for barring an applicant's access to court because he or she failed to take the necessary steps to ensure receipt of his or her mail and was thereby unable to comply with the requisite time-limits laid down in domestic law (see, in particular, *Hennings*, cited above, p. 11, § 26; and *argumentum e contrario Fretté v. France*, no. 36515/97, § 49, ECHR 2002-I). The Court notes that, after having been questioned by the police, the applicant knew that criminal proceedings were pending against her. Even assuming that the applicant in fact had not received any of the letters sent to her by the German authorities, she could therefore reasonably be expected to take the necessary steps to secure receipt of her mail, especially as she had stated that several other letters had also not reached her or her neighbours.

Furthermore, after having been informed of the warrant and of the underlying penal order on 29 October 1999, the applicant did not lodge – either in person or *via* counsel – an objection to the penal order and an application for reinstatement of the proceedings within the prescribed time-limit. It can be left open whether the applicant failed to provide her new lawyer with the necessary information, notably the exact content of the warrant, which referred, *inter alia*, to the date and file number of the penal order. In any event, the independence of the legal profession implies that the conduct of the defence is essentially a matter between the defendant and his or her counsel. Therefore, a State cannot, in principle, be held responsible for shortcomings in the effectiveness of the defence afforded by a privately financed counsel (see, *inter alia*, *Czekalla*, cited above, § 60).

The Court notes that the German courts, in dismissing the applicant's motion for reinstatement of the proceedings, found that the one-week time-limit for that motion started running on 29 October 1999 when the applicant was informed of the warrant and the underlying penal order, and

not on 5 November 1999, when the applicant's new lawyer actually had access to the case file. It reiterates that it is primarily for the national courts to interpret procedural rules such as time-limits, which are designed to ensure legal certainty (see, among others, *Wynen and Centre hospitalier interrégional Edith-Cavell v. Belgium*, no. 32576/96, § 32, ECHR 2002-VIII; *Běleš and Others v. the Czech Republic*, no. 47273/99, §§ 49-50, 60, ECHR 2002-IX). By deciding, on the basis of a particularly strict construction of a procedural rule, not to examine the merits of a case, domestic courts can undermine the very essence of the applicant's right to a court (see *Běleš*, cited above, § 51). Having regard to all the circumstances of the case, the Court cannot, however, find that the national courts' interpretation of the applicable procedural rules had been unreasonably strict. In reaching this conclusion, it notably has regard to the fact that the possibility to apply for the reinstatement of the proceedings provided a further, additional opportunity for the applicant, other than the objection to the penal order, to have her case decided on the merits.

Making an overall assessment of the conduct of the criminal proceedings against the applicant, the Court observes that the applicant's right to defend herself effectively through legal assistance had been interfered with before the penal order was issued. However, with the possibility to object to the penal order, resulting in trial proceedings in which an applicant's case is decided anew at first instance, German law provided for a mechanism capable of remedying these shortcomings at a later stage of the proceedings. In addition to that, the possibility to apply for reinstatement of the proceedings after having missed the two-week time-limit for lodging an objection extended the applicant's opportunity to receive a fresh decision of her case. Having regard to all the elements contributing to the applicant's case not having been decided anew, the Court finds that these mechanisms provided by national law and the interpretation of these rules by the national courts made it possible to achieve the results required by Article 6. It is essentially imputable to the applicant herself that there had not been a fresh decision of her case on the merits after the penal order had been issued.

Consequently, the Court finds that the proceedings, taken as a whole, were fair. It follows that the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President