CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 63214/00
by Hanno OHLEN
against Denmark

The European Court of Human Rights (First Section), sitting on 6 March 2003 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr V. ZAGREBELSKY, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 15 October 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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, Mr Hanno Ohlen, is a German national, born in 1939, who lives in Steinburg, Germany. The respondent Government are represented by their Agent, Mrs Nina Holst-Christensen, the Ministry of Justice.

A. Circumstances of the case

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

The applicant ran a business in Germany. On 30 August 1995 he was arrested in Denmark, charged with aggravated tax fraud for an unknown amount, however exceeding 500,000 Danish kroner (DKK) and relating to the period 1990-1995. Having consented to the seizure of his car and having agreed that his real estate in Denmark be provided as security, the applicant was released the following day after a court hearing held before the City Court in Vordingborg (*Retten i Vordingborg*).

The tax authorities (*Told og Skat, Næstved*) alleged that since 1990 the applicant had lived in Denmark to such an extent that he was liable to pay taxes, and thus carried out an investigation of the applicant's tax assessment. The applicant disputed the assessments, notably on the grounds that he had paid tax in Germany.

On 14 November 1995 the police requested that the City Court in Vordingborg issue an order for discovery to procure documents from the applicant's accountants, lawyer and bankers in Germany. However by request of the applicant's counsel, it was agreed that counsel together with the applicant procured the relevant documents.

The documents were handed in on 7 October 1996 by the applicant, who in the meantime had changed counsel.

The tax authorities changed their assessment on several occasions; once after it had been established on 10 March 1997 that the statements of accounts procured by the applicant (and his counsel) from a German bank were erroneous, and many times due to the applicant's objections.

On 16 June 1998 a final assessment was made, which the applicant appealed against on 11 September 1998 to the National Taxation Board (*Landsskatteretten*), where the case is still pending.

On 19 April 1999 the prosecution submitted an indictment to the City Court in Vordingborg claiming that the applicant had evaded tax in the amount of DKK 57,252 as to the period 1990-1991, during which he had stayed illegally in Denmark. Hearings were scheduled to take place on 4 and 5 November 1999. The applicant was convicted in accordance with the indictment by judgment of 12 November 1999. He was sentenced to a fine of DKK 57,000.

As to legal costs the court stated:

> "[The applicant] shall pay legal costs. In view of the fact that [the applicant] was arrested on 30 August 1995 and appeared before this court on 31 August 1995 charged with tax evasion of an unknown amount of not less than DKK 500,000, but now following a very lengthy investigation, is being charged with and convicted of tax evasion to an extent which is quite limited compared to the original charge, the court finds that the Treasury should pay the fees to the assigned counsel for the defence."

Accordingly, the applicant was exempted from paying fees to counsel in the amount of DKK 117,500 including VAT.

On 24 November 1999 the applicant appealed against the judgment to the High Court (*Østre Landsret*). The Regional Public Prosecutor claimed that the judgment be upheld, including the part exempting the applicant from defraying fees to counsel. The applicant's appeal was not received by the High Court until 1 February 2000 as pursuant to the Administration of Justice Act *(Retsplejeloven)* the notice of appeal and the indictment had to be served on the applicant through the German authorities, since the applicant had his residence in Germany at the relevant time.

In the meantime, on 8 January 2000, the applicant requested that the prosecution initiate additional investigation concerning some of his accounting material. He found that he was entitled to further deduction in the tax assessment than those on which the City Court judgment was based. For this purpose, having complied with his request, the prosecution sent the case-files back to the police.

On 24 February 2000 a meeting was held between the applicant's counsel, the police and the Customs and Tax office. Counsel produced copies of the applicant's ledger from 1990 and 1991 and was granted permission to reconcile the accounts with the exhibits produced.

On 17 May 2000, since the police had not received any reconciled accounts from counsel, the case-files were returned to the prosecution.

On 24 August and 25 October 2000 the prosecution informed the High Court of the expected duration of the trial, which was estimated to last one or two days.

On 14 February 2001 the High Court scheduled the case for trial to commence on 30 May 2001.

On 23 May 2001, having received an information from counsel that the National Taxation Board would reach its decision within a short time the Regional State Prosecutor requested that the High Court adjourn the trial. It appears that shortly thereafter the High Court adjourned the case awaiting the outcome of the case before the National Taxation Board as it was presumed that its decision could be of importance to the determination of the criminal proceedings.

On 28 August 2001 oral proceedings were conducted before the National Taxation Board, during which it was agreed that counsel should submit a new comprehensive pleading with exhibits, thereby replacing all previous pleadings with exhibits.

On 22 October 2001 the prosecution informed the High Court about the development of the case before the National Taxation Board.

On 13 November, by counsel's request, the time-limit to submit his pleading with exhibits was extended until 1 December 2001 by the National Taxation Board.

On 4 January 2002, not having received the said pleading with exhibits, the National Taxation Board stated that unless submitted by 1 February 2002 the case would be decided on the evidence available.

It appears that no decision has been taken by the National Taxation Board.

On 8 April 2002 the High Court requested a statement from the prosecution as to the development of the case. It appears that the case is still pending before the High Court.

B. Relevant domestic law

The Administration of Justice Act provides in as far as relevant:

Section 840, subsection 1

> The High Court notifies the Regional Public Prosecutor of the scheduling of the trial, and informs [him or her] and the accused about assignment of counsel [if any]. The information to the accused thereon may be given through the Regional Public Prosecutor in connection with the serving of the summons.

Section 968, subsection 2

> Appeal against court orders and other decisions taken during the trial or during preliminary court sessions ... may be lodged [with the superior court], when and in so far the decision concerns [e.g.] the adjournment of the case, ...

COMPLAINTS

1. The applicant complains under Article 6 § 1 of the Convention that the criminal charge against him has not been determined within a reasonable time.

2. Also, invoking Articles 6 § 1, 6 § 2 and Article 7 of the Convention, he complains of the fairness of the criminal proceedings before the City Court and of the tax assessment proceedings.

THE LAW

1. Complaining of the length of the criminal proceedings against him the applicant invokes Article 6 § 1, which in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

The Government contend that the investigation period and the proceedings before the City Court leading to the judgment of 12 November 1999 should be distinguished from the appeal proceedings before the High Court.

As to the first part of the proceedings the Government submit that the applicant cannot claim to be a victim within the meaning of Article 34 of the Convention since due to the length of these proceedings, notably the investigation period, the City Court of Vordingborg exempted the applicant from paying fees to counsel. Accordingly, in the Government's view, the City Court, at least in substance, acknowledged the alleged violation of the Convention and provided redress therefore. Since the Regional Public Prosecutor before the High Court claimed the first instance court's judgment upheld, the former will not set aside the decision on exemptions of costs to the detriment of the applicant.

As to the pending appeal proceedings, the Government claim that the applicant has failed to exhaust an efficient domestic remedy, which is available to him. In this respect they maintain that the applicant could have requested that the High Court schedule the case for trial on the evidence available pursuant to section 840 of the Administration of Justice Act. Thus, the applicant could have objected to the adjournment of the criminal proceedings awaiting the outcome of the tax assessment proceedings pending before the National Taxation Board and he could have requested that the High Court schedule the trial. A decision by the High Court to refuse such a request could have been appealed against to the Supreme Court pursuant to section 968, subsection 2 of the Administration of Justice Act.

The applicant disagrees.

The Court recalls, as to the question whether the applicant may continue to claim to be a victim of a violation of Article 6 § 1 of the Convention on the grounds of the length of criminal proceedings brought against him, that in order to deprive the individual concerned of his status as a victim within the meaning of Article 34 of the Convention, the national authorities must have acknowledged in a sufficiently clear way the failure to observe the reasonable time requirement and provided redress in relation thereto e.g. by reducing the sentence in an express and measurable manner (see the *Eckle v. Germany* judgment of 15 July 1982, Series A no. 51, § 66, *Beck v. Norway*,

no. 26390/95, 26 June 2001, § 27, *Graaskov Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X and *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001, unpublished).

Applying these principles in the present case, the Court recalls that the applicant, being convicted on 12 November 1999, was under an obligation to pay legal costs. However, the City Court exempted him therefrom in view of the fact that he in 1995 originally was charged with tax evasion of an unknown amount of not less than DKK 500,000, but that following a very lengthy investigation, he was finally charged with, and in 1999 convicted of, tax evasion relating to an amount of DKK 57,252.

Accordingly, the applicant was exempted from paying fees to counsel in the amount of DKK 117,500 including VAT.

Although appeal proceedings currently are pending before the High Court, the Court notes the Government's observations that the Regional Public Prosecutor has claimed that the City Court's judgment be upheld, including the part concerning exemption of costs, and that accordingly the High Court will not set aside the first instance court's decision as to exemption of costs before it to the detriment of the applicant.

The Court finds it unnecessary to examine this issue further but will in the circumstances of the case proceed on the assumption that the decision to exempt the applicant from defraying fees in the amount of DKK 117,500 including VAT is final.

It is not in dispute that the City Court did not expressly acknowledge that the authorities have failed to observe the reasonable time requirement. In its reasons for exempting the applicant from paying costs the City Court refers on the one hand to the very lengthy investigation, and on the other hand to the fact that the final tax evasion charge (and conviction) was quite limited compared to the original charge from 1995.

It is unclear how much of the exemption from paying costs can be attributable alone to the referred length of the investigation period, which had lasted three years, seven months and twenty days.

In these circumstances, the Court is not convinced that the national authorities in substance acknowledged a failure to comply with the "reasonable time" requirement within the meaning of Article 6 § 1 of the Convention and exempted the applicant from paying such an amount of costs that it constitutes a redress in relation to the alleged violation of the Convention, thereby precluding the examination of the part of the application that relates to the investigation period and the proceedings before the City Court.

Accordingly, the Court finds that the applicant may claim to be a victim of a violation of his right to trial within a reasonable time as guaranteed by Article 6 § 1 of the Convention. It follows that the first part of the Government's objections must be rejected.

As to the question whether the applicant has exhausted domestic remedies, the Court recalls that the purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see e.g. *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (ibid.).

The Court recalls that the burden of proving the existence of an effective and sufficient remedy, lies upon the State invoking the rule (see among others *Vernillo v. France,* judgment of 20 February 1991, Series A no. 198, § 27, *Dalia v. France*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, § 38 and *Susini and others v. France* (dec.), no. 43716/98, 8 October 2002).

Moreover, the Court reiterates that the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VIII).

Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Kudla v. Poland* [GC], no. 30210/96, § 157 ECHR-XI).

Finally, remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are "effective", within the meaning of Article 13 of the Convention if they "[prevent] the alleged violation or its continuation, or [provide] adequate redress for any violation that [has] already occurred". Article 13 therefore offers an alternative: a remedy is "effective" if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see the *Kudla* judgment cited above, §§ 158 and 159, and *Mifsud v. France* [GC], (dec.), no. 57220/00, 11 September 2002, § 17).

It remains for the Court to determine whether the means available to the applicant in Danish law for raising a complaint about the length of the criminal proceedings in his case would have been "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred.

The Court notes at the outset that the Government do not claim that Danish law contains remedies which have been specifically designed or developed to provide a remedy in respect of complaints of length of criminal court proceedings, whether preventative or compensatory in nature.

However, referring to section 840, subsection 1 and section 968, subsection 2 of the Administration of Justice Act the Government submit that the applicant could have requested that the High Court schedule the case for trial on the evidence available, and in case the High Court refused to grant such a request, he could have lodged an appeal with the Supreme Court. In the view of the Government the aggregate of these remedies satisfies the requirement required by Article 13 of the Convention in that such an action can prevent the alleged violation or its continuation.

The Government have not provided any domestic case-law to demonstrate that anyone has ever made such an application, let alone made any such application successfully. Thus, no domestic case-law is cited by the Government to show the possibility of such an action being either preventative of further delay, or giving adequate redress (see *Kudla v. Poland,* cited above, § 159 and *Matthies-Lenzen v. Luxembourg*, no. 45165/99, (dec.), 14 June 2001).

Therefore, the Court cannot but limit itself to a literal understanding of the invoked sections of the Administration of Justice Act. According to section 840, subsection 1 the High Court notifies the Regional Public Prosecutor of the scheduling of the trial, and pursuant to section 968, subsection 2 an appeal may be lodged with the Supreme Court against a decision taken by the High Court, if such a decision concerns [e.g.] the adjournment of the case.

In the opinion of the Court, although admittedly section 968, subsection 2 of the Administration of Justice Act implies that the Supreme Court may decide either to uphold or to revoke the High Court's decision to schedule a case, the wording of the invoked sections of the Act does not provide lucidity as to speculation on the effectiveness of such an action in a case like the present one.

In these circumstances, the Court does not consider that the Government have discharged the onus on them to show that an effective domestic remedy exists, which has acquired the requisite degree of legal certainty to enable and oblige an applicant to use it for the purposes of Article 35 § 1 of the Convention.

Consequently, the Court considers that second part of the Government's objections must be rejected.

As regards the alleged breach of Article 6 § 1 of the Convention and the period to be considered it is undisputed that the proceedings commenced on 30 August 1995 when the applicant was arrested and charged with aggravated tax fraud amounting to a minimum of DKK 500,000 and that the case is still pending before the High Court. Thus, at this moment the case has been pending for more than seven years and five months.

The Government maintain that the proceedings were to some extent complex, notably since information had to be collected from the applicant's lawyer, accountant and bank in Germany. Moreover, they contend that the

applicant to a considerable extent has been a contributory cause of the length of the proceedings, especially as to the investigation period and in connection with the appeal proceedings. With regard to the investigation period they recall that it took almost a year before the applicant and counsel procured the relevant documents. In addition, the investigation became very protracted due to the applicant's many objections to the assessment made by the tax authorities. As to the appeal proceedings, the Government reiterate that the applicant requested further investigation as to the tax assessment, and that counsel failed to reconcile the accounts for 1990-1991 despite the fact that his request in this respect was complied with on 24 February 2000. Finally, the Government find that there are no periods of inactivity that can form the basis of criticism of the authorities involved.

The applicant disagrees.

The Court considers, in the light of the criteria established by the case-law of the Court on the question of "reasonable time" and having regard to all the information in its possession, that an examination of the merits of the complaint is required.

2. The applicant also complains of the fairness of the criminal proceedings before the City Court and of the tax assessment proceedings. He invokes Articles 6 § 1, 6 § 2 and Article 7 of the Convention.

Given the fact that the criminal proceedings in the present case are still pending before the High Court, and that any assessment of complaints of fairness of these proceedings under Article 6 of the Convention must be made in the light of the proceedings as a whole, the Court concludes that the applicant's complaint concerning the lack of a fair trial is premature and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

In respect of the complaint concerning the applicants tax assessment proceedings which are currently pending before the National Taxation Board, the Court considers that these proceedings do not involve a determination of the applicant's civil rights and obligations and that, thus, Article 6 of the Convention is not applicable to such proceedings (see *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 29-31, ECHR-VII).

It follows that this part of the application must be rejected as being incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention.

Finally, as to Article 7 of the Convention the Court has examined this part of the application as submitted by the applicant. In the light of all the material in its possession, the Court finds that this does not disclose any appearance of the rights and freedoms set out in the invoked Article.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint relating to the length of the criminal proceedings instituted against him.

Declares the remainder of the application inadmissible.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President