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

FOURTH SECTION

DECISION

Application no. 23092/20
Madonna RAUSCH
against Germany

The European Court of Human Rights (Fourth Section), sitting on 21 November 2023 as a Committee composed of:

Faris Vehabović*, President*,
Anja Seibert-Fohr,
Sebastian Răduleţu*, judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 23092/20) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 5 June 2020 by a German national, Ms Madonna Rausch ("the applicant"), who was born in 1994 and was represented by Mr U. Sommer, a lawyer practising in Köln;

the decision to give notice of the application to the German Government ("the Government"), represented by their Agent, Mr H.-J. Behrens, of the Federal Ministry of Justice;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the German Federal Bar Association (*Bundesrechtsanwaltskammer*), which was granted leave to intervene by the President of the Section;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns the applicant's arrest and her subsequent police questioning without counsel being present.

2. The applicant and four other persons were investigated in connection with a robbery resulting in death. On the morning of 28 January 2015 the

police searched their apartments and all five were arrested. The police informed the applicant of her right to remain silent and to contact a lawyer. During the subsequent questioning, she admitted her involvement in the crime. On 29 January 2015 the applicant was presented to a judge and an arrest warrant was issued.

3. During her trial before the Regional Court, the applicant objected to the admission of her pre-trial statement as evidence on the grounds, *inter alia*, that she had been questioned without the presence of counsel. On 28 July 2017 the applicant was sentenced to seven years and nine months' imprisonment. The conviction was largely based on the statements she and the other accused had made to the police.

4. On 9 November 2017 the applicant lodged an appeal on points of law before the Federal Court of Justice.

5. Under Article 115 § 1 of the Code of Criminal Procedure, when a person is arrested based on an existing arrest warrant, they must be brought before a judge immediately. In contrast, when the arrest is made without a warrant on the basis of Article 127 § 2 of the Code of Criminal Procedure, as was the case here, the police may first question the person to establish the facts of the case. The law allows for an arrest without a warrant only if the delay necessary for obtaining a warrant would jeopardise the arrest. In both cases, a strong suspicion of guilt is required.

6. With regard to her arrest and the subsequent questioning, the applicant argued in her appeal on points of law that the police had deliberately circumvented the requirement for a judge to issue an arrest warrant before her arrest. She referred to a note from the police in the case file to the effect that the aim of the intervention on 28 January 2015 had been to arrest the accused and search their apartments for evidence. She concluded that the police had possessed sufficient elements to obtain arrest warrants but had intentionally carried out the arrests without a warrant to question the accused before bringing them before a judge. No details regarding the arrest itself were submitted by the applicant. In the text of her appeal on points of law the applicant did not complain about her questioning by the police in the absence of counsel. Only the objection she had made before the Regional Court regarding the admission of her pre-trial statement as evidence (see paragraph 3 above) was submitted to the Federal Court of Justice as an annex to the appeal on points of law in this regard.

7. On 28 June 2018 the Federal Court of Justice rejected the applicant's appeal on points of law. Regarding the failure of the police to obtain a warrant before arresting the applicant, the principal complaint the applicant subsequently brought before the Court (see paragraph 9 below), the Federal Court of Justice ruled that the appeal was inadmissible since the applicant had failed to provide the necessary information to substantiate the assertion that the preconditions for an arrest warrant had been met before the beginning of the searches and the subsequent police questioning as required by

Article 344 § 2, second sentence, of the Code of Criminal Procedure. The applicant had failed to specify what evidence the police had at their disposal before the searches which could have established the required strong suspicion against her and thus have put them in a position to request an arrest warrant. While an arrest without a warrant similarly required a strong suspicion (see paragraph 5 above), the applicant's appeal had also failed to specify whether she had been arrested at the beginning of the searches or at a later time and potentially based on new findings. The Federal Court of Justice thus considered that it was not in a position to examine the lawfulness of the arrest (see paragraph 5 above). Pointing to the fact that, with regard to her arrest and the subsequent questioning, the applicant had only challenged the circumvention of the requirement of obtaining an arrest warrant (see paragraph 6 above), the Federal Court of Justice found that it was not called upon to examine the question of the absence of counsel during police questioning.

8. In her constitutional complaint the applicant again argued that her arrest without first obtaining an arrest warrant had been illegal for that reason and that the subsequent questioning had thus violated her right to remain silent. On 24 March 2020 the Federal Constitutional Court declined to consider the constitutional complaint, without providing reasons.

9. The applicant complained to the Court under Article 5 of the Convention that her arrest had been unlawful. Furthermore, she complained under Article 6 §§ 1 and 3 (c) of the Convention of the absence of counsel during the police questioning and that this fact and the unlawful arrest had violated her right to remain silent and not to incriminate herself.

THE COURT'S ASSESSMENT

10. The Government considered that the applicant had failed to exhaust domestic remedies in that she had not complained of the absence of counsel during police questioning in her appeals before the domestic courts. Furthermore, the complaint regarding the alleged unlawfulness of her arrest had not been properly raised before the Federal Court of Justice.

11. The applicant argued that since the police had planned from the outset to arrest the accused at their homes without waiting for the results of the searches, as referenced in her appeal on points of law (see paragraph 6 above), she had provided the Federal Court of Justice with the necessary information for her appeal. Regarding the absence of counsel during police questioning, the applicant stated that before the Regional Court she had objected to the admission into evidence of her pre-trial statement and that this objection had been submitted to the Federal Court of Justice (see paragraph 6 above). She had thus provided the court with the necessary information to examine her complaints.

12. Turning to the complaint under Article 5 of the Convention, the Court reiterates that, when making use of domestic remedies, applicants should comply with the formal requirements under domestic law (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014, with further references). It is not the Court's task to substitute itself for the domestic courts, in particular with regard to the interpretation of procedural rules such as time-limits for filing documents or lodging appeals (see, *mutatis mutandis*, *Běleš and Others v. the Czech Republic*, no. 47273/99, § 60, ECHR 2002-IX).

13. The applicant's complaint touched upon questions of domestic law. Specifically, she maintained that the police had the opportunity to obtain an arrest warrant before arresting her and that, accordingly, the conditions for an arrest without a warrant were not satisfied (see paragraphs 5 and 11 above). However, the Federal Court of Justice declared the applicant's appeal on points of law inadmissible in this regard since it did not meet the minimum requirements for such an appeal. It considered that the applicant had failed to submit information necessary to examine on what grounds the strong suspicion against her had already existed prior to the searches. Furthermore, it was unclear whether the strong suspicion could have been founded on elements discovered during the searches, since no details regarding the arrest itself had been provided by the applicant in her appeal on points of law. As a result, the court deemed itself unable to examine the complaint (see paragraph 7 above). In view of the above jurisprudence, the Court does not discern any sign of arbitrariness or manifest unreasonableness in this approach (compare *Olivier v. Belgium* (dec.), no. 34708/08, § 25, 19 May 2015). It follows that the applicant did not provide the domestic courts with the opportunity of addressing, and thereby putting right, the particular Convention violation.

14. With respect to the complaint under Article 6 § 3 (c) of the Convention, it should be noted that the applicant had been informed by the police of her rights during questioning (see paragraph 2 above). In any case, the Court notes that while the applicant did object to the absence of counsel during police questioning before the Regional Court (see paragraph 3 above), in her appeal on points of law to the Federal Court of Justice she limited her complaint to the fact that the police had deliberately circumvented the requirement to have a judge issue an arrest warrant before her arrest (see paragraph 6 above). Therefore, the applicant failed to raise the complaint about a violation of her right under Article 6 § 3 (c) of the Convention before the Federal Court of Justice (compare *Association Les Témoins de Jéhovah v. France* (dec.), no. 8916/05, 21 September 2010, and *Nicklinson and Lamb v. the United Kingdom* (dec.), nos. 2478/15 and 1787/15, §§ 89-94, 23 June 2015).

15. In view of these findings, the Court concludes that domestic remedies have not been exhausted as required by Article 35 § 1 of the Convention since

the applicant failed to raise before the competent domestic authorities, in accordance with the applicable procedural requirements, the complaints that were made to the Court.

16. Lastly, to the extent that the applicant complained under Article 6 § 1 of the Convention of a breach of her right not to incriminate herself, the Court notes that she has not raised a separate complaint in this respect in the domestic proceedings. She argued that this breach was a result of the alleged unlawfulness of her arrest and of her having been questioned without counsel present. In the light of the above findings (see paragraphs 13 and 14), this complaint must also be declared inadmissible for non-exhaustion of domestic remedies.

17. It follows that the application must be rejected in accordance with Article 35 § 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 14 December 2023.

Ilse Freiwirth Deputy Registrar	Faris Vehabović President