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. 45176/99
by Günter SCHMELZER
against Germany

The European Court of Human Rights (Fourth Section), sitting on 12 December 2000 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,
Mr M. PELLONPÄÄ, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 27 April 1998 and registered on 5 January 1999,

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 is a German national, born in 1925 and living in Heidesheim (Germany). The respondent Government are represented by their Agent Mr K. Stoltenberg, *Ministerialdirigent*, of the Federal Ministry of Justice.

A. The circumstances of the case

On 31 January 1994 the Bingen District Court (*Amtsgericht*) convicted the applicant, a recidivist offender, of having driven a motor vehicle without a driving licence and, having regard to his preceding conviction of such offences, it fixed a global sentence of one year's imprisonment. The execution of the sentence was suspended until 3 May 1998. The court further ordered that the applicant should not be issued a driving licence before 3 November 1995. The applicant's appeal was dismissed by the Mainz Regional Court (*Landgericht*) on 14 November 1994. On 20 November 1994 the applicant left Heidesheim and moved to the Netherlands, where he officially took residence in Brummen. On 14 June 1995 he was issued a Dutch driving licence. On 1 July 1995 he moved back to Germany and took residence at his previous address in Heidesheim.

On 16 March 1997 the applicant was stopped by the police when driving a car. Having only the Dutch driving licence, criminal proceedings were commenced against the applicant on the suspicion of having driven a motor vehicle without a valid driving licence. In these proceedings, he was assisted by defence counsel.

By indictment of 30 June 1997, the Mainz Public Prosecutor's Office (*Staatsanwaltschaft*) charged the applicant of having driven a motor vehicle without a valid driving licence. It further requested the competent Bingen District Court to seize the car in question as there were strong reasons to assume that it was liable to forfeiture and to consider the question of a resale (*Notveräusserung*).

On 16 July 1997 the Bingen District Court issued a warrant to search the applicant's premises and his cars and to seize the applicant's car with the registration number MZ-E6605. The court found that there was a strong suspicion that on 16 March 1997 the applicant had driven this car without a valid driving licence. In this respect the court considered that, following his conviction of driving without licence in 1994, he should not have been issued a new one before November 1997. When stopped, he had shown a Dutch driving licence, passed in the Netherlands in June 1995. This licence was, according to the court, not valid in Germany as, at the relevant time, though not having been registered in Heidesheim between 20 November 1974 and 1 July 1975, he had in fact been living there. The car was to be seized as object used when committing the offence, liable to forfeiture on account of his recidivism. The measures were carried out on 17 July 1997.

On 25 September 1997 the Public Prosecutor's Office informed the applicant that, taking into account the costs of storage and the value of the car, its resale was envisaged. The applicant's representative objected on 17 October 1997.

On 2 December 1997 the Bingen District Court committed the applicant for trial. Subsequently, it ordered an opinion as to the value of the car.

On 23 December 1997 the District Court ordered the sale of the seized car under section 111 lit. l (1) of the Code of Criminal Procedure (*Strafprozessordnung*), as the costs of storage by far exceeded its value. In this respect, the court had regard to the opinion of a technical expert according to which the remaining value was zero, whereas at the relevant time the costs amounted to more than 800 DEM and were increasing at a daily rate of DM 5.

On 5 January 1998, upon the applicant's objection, the District Court suspended the resale.

On 13 January 1998 the Mainz Regional Court (*Landgericht*) dismissed the applicant's appeal, confirming the District's Court reasoning. It added that in assessing the value of the car, objective criteria were relevant and not the applicant's subjective impression.

On 6 February 1998 the trial opened before the Bingen District Court. Having heard the applicant, an expert and several witnesses, the competent judge proposed to adjourn the proceedings in order to conduct further investigations. The same day, a decision to stay the proceedings provisionally, pursuant to section 154 of the Code of Criminal Procedure, was issued.

On 9 February 1998 the District Court ordered the seizure of the applicant's bank statements to investigate whether he had stayed for a longer period in the Netherlands and issued checks there.

The same day, the court ordered that the resale of the car be continued, as the suspicion against the applicant had not been dissipated at the hearing of 6 February 1998. The applicant's assertion that he had repeatedly returned to Heidesheim in order to fetch his mail was not convincing. On 11 February 1998 the bailiff was instructed to proceed to the resale. Upon the applicant's objection, the resale procedure was suspended pending the outcome of these proceedings.

On 2 March 1998 the Mainz Regional Court dismissed the applicant's appeal against the decision of 9 February 1998. The Regional Court confirmed the reasons advanced by the District Court. It also found that the resale could be continued irrespective of the provisional discontinuation of the trial. It considered that the reference to section 154 had been erroneous. Section 154 provided that, upon the prosecutor's request, proceedings could be provisionally stayed where the penalty to be expected in the case of a conviction was almost negligible in comparison with a penalty for another offence. However, the Prosecutor's Office had not made such a request. Rather, the correct interpretation of the decision at issue was that the District Court had adjourned the proceedings *sine die* for the purpose of further investigations, which it had ordered the same day.

The car was sold on 20 March 1998 for 100 DEM, paid to the *Justizkasse*.

On 27 March 1998 the Federal Constitutional Court (*Bundesverfassungsgericht*) refused to entertain the applicant's constitutional complaint (*Verfassungsbeschwerde*).

On 18 May 1998, in the context of another set of criminal proceedings pending before the Mainz Regional Court, the applicant was sentenced to two years and six months' imprisonment. He was found guilty of, *inter alia*, several offences in connection with having illegally run a dump for dangerous waste, offences under the Firearms Act and twelve counts of driving without licence, committed between November 1994 and April 1996.

On 9 July 1998 the Mainz Public Prosecutor's Office, referring to the applicant's conviction of 18 May 1998, requested that the proceedings before the Bingen District Court be provisionally stayed pursuant to section 154 § 2 of the Code of Criminal Procedure.

On 15 July 1998 the proceedings were provisionally stayed.

In the meantime, on 21 April 1998, the Mainz-Bingen District Administrative Authority (*Kreisverwaltung*), having regard to the Dutch driving licence obtained in June 1995, issued the applicant a German driving licence.

B. Relevant domestic law

According to section 21(1) lit. 1 of the Road Traffic Act (*Strassen-verkehrsgesetz*), driving a motor vehicle without the requisite licence is a criminal offence punishable with imprisonment not exceeding one year or with a fine. In such cases, the motor vehicle to which the offence relates may be confiscated if the perpetrator drove the vehicle although, *inter alia*, his driving licence had been withdrawn (section 21(3)(1)).

Driving a motor vehicle with a foreign driving licence is governed by section 4 of the Regulations on International Road Traffic (*Verordnung über den internationalen Kraftfahrverkehr*). According to its paragraph 1 lit. b, a person with a driving licence issued in a Member State of the European Communities is entitled to drive a motor vehicle in Germany if not permanently resident there. According to paragraph 2 lit. a are excepted from this general rule persons who had their permanent residence in Germany at the time when the foreign licence was issued. Persons have their permanent residence where they effectively live for a period of at least 185 days.

Section 74 of the Code of Criminal Procedure, as in force at the material time, provided for the confiscation of objects generated by or used or intended for use in the commission of preparation of a criminal offence. Such confiscation was only permissible if, *inter alia*, the perpetrator owned the object in question (section 74(1) lit. 1).

According to section 74b of the Code of Criminal Procedure, as in force at the material time, confiscation of an object under, *inter alia*, section 74(1) lit.1 should not be ordered if disproportionate to the importance of the offence in question.

Confiscation may also be ordered in cases where, for factual reasons, no specific person can be prosecuted or convicted or where the court discontinues the proceedings under provisions granting the prosecutor's office or the court discretion for doing so (section 76 a of the Code of Criminal Procedure).

According to section 111 b, as in force at the material time, objects may be seized pursuant to section 111c, if there are compelling reasons to assume that the conditions for their forfeiture or confiscation are met. Section 111 c provides that the confiscation of movable assets is effected in taking them into public custody or indicating the seizure by seal or in some other way (section 111 c(1)); that objects so seized may be resold before a final judgment inter alia if the cost of storage is excessively expensive or difficult, the proceeds being substituted for the object in question (section 111 l (1)).

Section 154 of the Code of Criminal Procedure provides that the public prosecutor may decide not to prosecute where the penalty to be expected if a conviction is secured is almost negligible in comparison with a penalty imposed on the defendant - or which he must expect to be imposed - for another offence (section 154(1)). Once the proceedings have been instituted, the court may provisionally stay them at any stage on an application by the public prosecutor (section 154(2)).

COMPLAINTS

The applicant complains that the sale of his car violated the principle of the presumption of innocence under Article 6 § 2 of the Convention. Moreover, he invokes Articles 1, 3, 6, 7 and 14 of the Convention, and the right to property.

THE LAW

1. The applicant complains about the resale of his car, seized in the context of criminal proceedings against him.

The Government submit that the applicant failed to exhaust the domestic remedies, as required under Article 35 § 1 of the Convention. They submit that, subsequent to the provisional stay of the criminal proceedings against him, he should have claimed payment of

the proceeds of the resale or instituted official liability proceedings to obtain compensation for losses as a consequence of the resale.

The applicant objects to the Government's view, indicating that in any subsequent proceedings, the court would have regard to the impugned court decisions confirming the lawfulness of the resale.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2275-76, §§ 51-52). In the present case, the question arises whether the applicant, after having exhausted the ordinary remedies against the order to confiscate his car and against the resale and having obtained a decision of the Federal Constitutional Court upon his complaints in these respects, could be expected, for the purposes of Article 35 § 1, to institute a further set of court proceedings to obtain payment of the proceeds of the resale, i.e. DM 100. In this respect, the Court also recalls the storage costs and, as indicated by the Government, outstanding claims of the *Justizkasse* amounting to a total of DM 26,000.

In any event, this matter does not need to be resolved, as the application is inadmissible for the following reasons.

2. The applicant considers that the resale amounts to a breach of his right to respect for his property, which is protected under Article 1 of Protocol No. 1. This provision reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Court recalls that Article 1 guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many other authorities, the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, § 48).

The Government maintain that the resale of the applicant's car constituted an interference with his right to property which was justified under paragraph 2 of Article 1. They submit that the resale was based on sections 111 l in conjunction with 111 c of the Code of Criminal Procedure. At the relevant time, there had been compelling reasons to assume that the applicant had committed the offence of driving without a valid licence, as, under the relevant provisions of the Regulations on International Road Traffic, he was only allowed to drive with a Dutch driving licence in Germany, if he did not have his permanent residence there. However, according to the police investigations he had only a fictitious address in the

Netherlands in order to obtain a driving licence. In another set of proceedings, he had in fact been convicted of having driven without a valid driving licence.

According to the Government, the resale served the legitimate aim of avoiding excessive storage costs and this measure, having regard to the value of the car, was proportionate.

The applicant submits that the resale, effected before any final conviction, caused him substantial damages. In his view, he was entitled to drive in Germany with his Dutch driving licence.

The resale of the car in question amounted to an interference with the applicant's right to peaceful enjoyment of his possessions as protected by the first sentence of Article 1. This point has not been in dispute.

Although it involves a deprivation of possessions, confiscation of property does not necessarily come within the scope of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (see the AGOSI judgment cited above, p. 17, § 51). However, in the present case, the car in question was sold on account of the storage costs and the applicant was accordingly deprived of his property within the meaning of the second sentence of the first sub-paragraph of Article 1.

The Court therefore has to satisfy itself that the requirements of the provision in question were complied with.

As regards the purpose of the interference, it is recalled that the notion of "public interest" is necessarily extensive (see the Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, p. 19, § 39). The seizure and confiscation of objects to which a criminal offence relates serve the purpose of the prevention of crime and, in this context, measures to avoid excessive storage costs for objects seized in the context of criminal proceedings pursue a legitimate objective which is in the public interest.

The seizure of the applicant's car and its subsequent resale were based on the relevant provisions of the Code of Criminal Procedure. At the relevant time, the German prosecution authorities and the competent courts suspected the applicant of having driven the car without a valid driving licence, constituting a criminal offence under the Road Traffic Act. The applicant was in particular suspected to have circumvented the provisions of the Regulations on International Road Traffic as far as they concern the lawful use of driving licences issued abroad. The German courts, on the basis of the material before them, reached the conclusion that there was a strong suspicion that the applicant's Dutch driving licence had not entitled him to drive in Germany. In fact, he was convicted of driving without a valid licence in a parallel set of criminal proceedings. The applicant's submissions, which do not express more than his disagreement with the domestic decision, have not shown any clear non-observance of German law. Consequently, the interference was in accordance with German law.

In order to assess the proportionality of the interference, the Court has first looked at the degree of protection from arbitrariness that was afforded by the proceedings in this case.

In this instance, the District Court, under the general rules governing criminal proceedings, ordered the resale of the applicant's car. This car had been seized as object liable to confiscation in the context of criminal proceedings conducted against the applicant. The District Court had taken its decision upon the request of the Public Prosecutor's Office on the ground that, having regard to expert advice, that the costs of storage by far exceeded the remaining value of the car in question. The court indicated the reasons of fact and of law, including the serious grounds for suspecting the applicant of having driven without a valid driving licence, a criminal offence punishable with imprisonment or a fine. The resale was twice suspended upon the applicant's objections; however, his respective appeals remained unsuccessful. The Regional Court confirmed the resale order, specifying that it was the objective value that mattered. The offence was eventually effected after a first trial hearing.

Bearing in mind the above, as well as the State's margin of appreciation in this area, the Court considers that the resale in question did not constitute an excessive burden on the applicant. Moreover, as there were effective judicial safeguards to challenge the measure taken against the applicant, the Court finds that, in the circumstances of the present case, a fair balance was achieved. There is, therefore, no appearance of a breach of Article 1 of Protocol No. 1.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

3. The applicant further raises complaints under Article 6 of the Convention about the court decisions ordering the resale and of the proceedings concerned. He also invokes Articles 1, 3, 7 and 14 of the Convention.

The applicant alleges in particular a violation of the principle of innocence, as guaranteed by Article 6 § 2. This provision provides that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law”.

The decisions ordering the resale of the seized car could give rise to an issue under Article 6 § 2 if the supporting reasoning, which cannot be dissociated from the operative provisions, amounted in substance to a determination of the accused's guilt without his having previously been proved guilty according to law (see, *mutatis mutandis*, the Lutz, Englert and Nölkenbockhoff v. Germany judgments of 25 August 1987, Series A no. 123, p. 25, § 60, pp. 54-55, § 37, and p. 79, § 37).

In the present case, the Mainz Regional Court, in the appeal proceedings, only stated that the suspicion against the applicant had not been dissipated at the trial. At that time, the main criminal proceedings against the applicant were still pending.

In these circumstances, the court decisions ordering the resale and their implementation were not tantamount to a declaration of guilt. Accordingly, there is no appearance of a breach of Article 6 § 2.

Moreover, as regards the remainder of the applicant’s submissions, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this part of the application must also be rejected, in accordance with Article 35 § 4 of the Convention

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Antonio PASTOR RIDRUEJO
President