CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 14374/03
by Hartmut WEISERT
against Germany

The European Court of Human Rights (Fifth Section), sitting on 3 April 2007 as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 23 April 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Hartmut Weisert, is a German national who was born in 1943 and lives in Frankfurt.

A. The circumstances of the case

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

On 20 October 1993 the Frankfurt Public Prosecutor's Office commenced criminal investigations against the applicant on suspicion of fraud related to the raising of credit secured on real property. It informed the applicant about the criminal investigations against him the day after.

On 7 December 1999, after having held a hearing during which the applicant was represented by a court appointed lawyer, the Frankfurt District Court convicted the applicant of aggravated fraud and sentenced him to two years' imprisonment. The court considered as a mitigating factor that the offence had been committed already a considerable time ago, namely in March and April 1992. The court, having regard to the lapse of time, suspended the execution of the sentence on probation.

On 5 November 2002 the Frankfurt Regional Court, upon the applicant's appeal, scheduled eight hearings for the period between 10 December 2002 and 22 January 2003. On 29 November 2002 the applicant withdrew his appeal. He submitted that he had suffered mentally and physically from the length of the proceedings against him. Therefore he would not have been able to attend the hearings.

On 30 December 2002 the applicant lodged a constitutional complaint with the Federal Constitutional Court complaining about the alleged failure of the District Court to appoint a lawyer of his own choosing, about the densely scheduled hearings during the appellate proceedings and that the sitting judge at the Regional Court had been substituted by another judge.

On 18 March 2003 the Federal Constitutional Court refused to admit the applicant's constitutional complaint without giving any reasons.

B. Relevant domestic law and practice

1. The right to expeditious proceedings

Article 2 § 1 of the German Basic Law (*Grundgesetz*) in conjunction with the principle of the rule of law guarantees the right to expeditious proceedings. According to the settled case-law of the Federal Court of Justice (see, decision of 21 July 1994, no. 1 StR 396/94, decision of 26 June 1996, no. 3 StR 199/95) and of the Federal Constitutional Court (see, among others, decision of 24 December 1983, no. 2 BvR 121/83; decision of 19 April 1993, no. 2 BvR 1487/90), the consequence of the excessive length of criminal proceedings must be either a reduction of the sentence or even the discontinuation of the proceedings. Pursuant to recent decisions of the Federal Constitutional Court, that principle applies to the criminal courts as well as to the Public Prosecutor's Office (see, decision of 25 July 2003, no. 153/03, *Reports of Chamber Decisions* (BVerfGK) no. 1, pp. 269 et seq. and decision of 21 January 2004, no. 2 BvR 1471/03,

Reports of Chamber Decisions (BVerfGK) no. 2, pp. 239 et seq. and decision of 21 June 2006, nos. 2 BvR 750/06, 752/06 and 761/06).

2. Sections 153 and 154 of the Code of Criminal Procedure

Section 153 of the Code of Criminal Procedure provides that the public prosecution or the courts may discontinue the proceedings at any stage if the perpetrator's culpability is considered to insignificant and if there is no public interest in the prosecution.

Section 154 provides that if a judgment cannot be expected in reasonable time and if another sentence or the measure of reform and prevention already imposed seems sufficient to protect the legal order, the public prosecution may decide not to prosecute and the courts may close the proceedings preliminarily at any stage upon a motion by the public prosecutor's office.

COMPLAINTS

1. The applicant complained under Article 6 § 1 of the Convention about the length of the preliminary investigations and the subsequent criminal proceedings before the District Court and the Regional Court.

2. The applicant further complained under Article 6 §§ 1, 3 (a)-(c) of the Convention that he had been denied a fair trial. In particular, he complained that his court appointed representative had concluded a deal with the judge against his will and that the District Court had refused to appoint A as his representative. In respect of the appellate proceedings, he complained about the densely scheduled hearings and the substitution of the sitting judge. Finally, he alleged that the District Court had erroneously interpreted the elements of fraud.

THE LAW

1. The applicant complained about the length of the criminal proceedings as well as about their alleged unfairness. He relied on Article 6 § 1 of the Convention, the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ...

The period to be taken into consideration began on 21 October 1993 when the applicant was officially notified that criminal proceedings had been instituted against him and ended on 29 November 2002 when he withdrew his appeal before the Regional Court.

The question arises whether the applicant has exhausted the remedies available to him in German law, in accordance with Article 35 § 1 of the Convention. The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity to prevent or put right the alleged violations of the Convention. It is based on the assumption, reflected in Article 13 of the Convention, that there is an effective remedy available in respect of the alleged breach in the domestic system. This is an important aspect of the subsidiary character of the Convention machinery. Thus, the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

As regards the effectiveness of a complaint for contesting the length of proceedings, the Court recalls that such a remedy should either be capable of expediting pending proceedings or provide the litigant with adequate redress for delays that have already occurred (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 77, ECHR 2006-...; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII).

In respect of criminal proceedings possible means of providing redress may be the reduction of the sentence or the discontinuation of the proceedings (see *Sprotte v. Germany* (dec.), no. 72438/01, 17 November 2005 with further references; *Conrad v. Germany*, no. 13020/87, Commission decision of 13 April 1988).

The Court therefore has to examine whether the applicant had at his disposal a remedy which met those requirements.

According to the well-established case-law of the Federal Court of Justice and the Federal Constitutional Court, both the criminal courts and the Public Prosecutor's Office may discontinue criminal proceedings or preliminary investigations in view of their length at any stage of the proceedings pursuant to sections 153 and 154 of the Criminal Procedure Code (see "Relevant domestic law and practice" above). Moreover, the German courts are obliged to examine at any stage of the trial proceedings whether the unreasonable delay of the proceedings may justify a reduction of the sentence. Thus, an appeal, an appeal on points of law and even a constitutional complaint (see "Relevant domestic law and practice", in particular, the Federal Constitutional Court's decision of 21 June 2006, nos. 2 BvR 750/06, 752/06 and 761/06) may result in a decision to reduce or to mitigate the accused's sentence or event to discontinue the proceedings on account of their length. The Court therefore considers that the applicant had

effective remedies to obtain redress for the alleged delays in the proceedings.

In the instant case, the Court notes that the applicant failed to show that before the German courts he had at all contested the length of the proceedings. Moreover, by withdrawing his appeal before the Regional Court the applicant decided to forego the possibility to obtain adequate redress for the alleged delay in his criminal proceedings as the Regional Court or any higher instance were prevented from examining whether the length of the proceedings had exceeded a reasonable time requiring a reduction of his sentence.

Furthermore, the applicant has not invoked any special circumstances which could absolve him from the obligation to exhaust these remedies. In this respect, the Court does not accept the applicant's allegation that he was unable to attend the hearings before the Regional Court for having suffered mentally and physically from the length of his proceedings.

Therefore the Court considers that the applicant did not comply with his obligation to exhaust the domestic remedies within the meaning of Article 35 § 1 of the Convention.

It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

2. As regards the applicant's remaining complaints, in the light of all the material in its possession the Court considers that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that these complaints must be rejected under Article 35 §§ 3 and 4 of the Convention as being manifestly ill-founded.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President