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. 40899/05
by Y
against Germany

The European Court of Human Rights (Fifth Section), sitting on 3 February 2009 as a Chamber composed of:

Peer Lorenzen, *President,*
Rait Maruste,
Karel Jungwiert,
Renate Jaeger,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 15 September 2005,

Having deliberated, decides as follows:

THE FACTS

The applicant is a German national who was born in 1967 and lives in Munich.

A. The circumstances of the case

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

On 11 November 2003 the applicant was issued with a penal order (*Strafbefehl)* by the Munich District Court for libel and was sentenced to a fine of 60 euros per day for 30 days.

On an objection by the applicant, main proceedings were instituted before the District Court. By a judgment dated 8 January 2004 the applicant was sentenced to a fine of 35 euros per day for 40 days.

Following an appeal lodged by both the applicant and the Munich Public Prosecutor's Office, the Munich Regional Court, on the occasion of a hearing on 30 July 2004, decided to ask for a psychiatric opinion as to the applicant's criminal responsibility (*Schuldfähigkeit*) at the time he committed the alleged offence, and suspended the proceedings.

On 16 September 2004 the applicant lodged an application alleging bias on the part of the judge conducting the proceedings before the Regional Court. He alleged in particular that the judge had tried to intimidate the witness presented by the applicant during a hearing in the matter. The appeal was dismissed on 29 October 2004 on the ground that it had been lodged outside the statutory time-limit.

On 25 May 2005 the Munich Regional Court provisionally stayed the libel proceedings at the request of the Public Prosecutor's Office pursuant to Section 154(2) of the Code of Criminal Procedure (see Relevant domestic law below) with reference to separate preliminary proceedings instituted against the applicant on account of different criminal charges.

On 30 May 2005 the applicant lodged an appeal with the Munich Court of Appeal and on 12 June 2005 a constitutional complaint with the Federal Constitutional Court against the decision to provisionally stay the proceedings.

On 1 July 2005 the Federal Constitutional Court (File No. 2 BvR 954/05) declined to consider the applicant's constitutional complaint on the ground that the provisional stay of the proceedings did not constitute a legal detriment for the applicant and that there was no indication that the decision had been arbitrary. It further held that the applicant was still subject to the presumption of innocence and that in general there was no right to demand continuance of criminal proceedings with a view to being acquitted.

On 5 July 2005 the Munich Court of Appeal dismissed the applicant's appeal as inadmissible on the ground that the latter had not been adversely affected by the Regional Court's decision to stay the proceedings. The applicant's remonstrance was rejected by the Court of Appeal on 4 August 2005.

On 12 July 2006 the Munich Court of Appeal, following a complaint by the applicant of failure to act by the relevant authorities, dismissed an appeal by the applicant against the Munich Regional Court's order of 30 July 2004 for a psychiatric opinion as to the applicant's criminal responsibility on the ground that it merely concerned an interim procedural measure. It further dismissed an appeal against the dismissal of his

application alleging bias on the part of the judge conducting the proceedings before the Regional Court. The Court of Appeal specified that bias on the part of the acting judge could only be challenged within the scope of an appeal against a judgment rendered in the instant libel proceedings but that no such judgment existed due to the discontinuation of the proceedings.

B. Relevant domestic law

Section 154(2) of the Code of Criminal Procedure provides for the provisional stay of criminal proceedings in the following terms:

> "...
>
> (2) Once proceedings have been instituted, the court may provisionally stay them at any stage at the request of the Public Prosecutor's Office.
>
> ...
>
> (4) If the proceedings have been provisionally terminated on account of a penalty or measure of reform and prevention which is to be expected for another offence, the proceedings may be resumed, unless barred by limitation in the meantime, within three months after the judgment imposed for the other offence has entered into force.
>
> (5) If the court has provisionally terminated the proceedings, a court order is required for their resumption."

COMPLAINTS

1. The applicant complained under Article 6 of the Convention about the Munich Regional Court's decision to provisionally stay the libel proceedings against him and that he should have been acquitted.

2. He further complained under Article 6 of the Convention that the Munich District Court had not correctly assessed the evidence provided in the first-instance proceedings. He submitted that the witness presented by him had been intimidated by the judge conducting the subsequent proceedings before the Munich Regional Court and that the judge was biased. He also argued that the Regional Court's order to ask for a psychiatric opinion as to his criminal responsibility constituted a breach of his right to a fair trial.

3. The applicant finally alleged that the conduct of the proceedings and the decisions taken by the Munich District Court, Regional Court and Court of Appeal had also been in violation of Articles 3, 10 and 13 of the Convention.

THE LAW

1. *The complaint regarding the provisional discontinuance of the proceedings*

The applicant complained that the decision to provisionally stay the proceedings violated his right to a fair trial pursuant to Article 6 of the Convention, the relevant parts of which read as follows:

> "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 established by law...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> ..."

a) Determination of a criminal charge within a reasonable time

The Court reiterates in this context that there is no right under Article 6 of the Convention to a formal conviction or acquittal following the laying of criminal charges (see *Deweer v. Belgium judgment of 27 February 1980, Series A no. 35,* § 49, referring to the Commission's report of 5 October 1978, Series B no. 33, § 58).

The question remains, however, whether criminal proceedings that have been provisionally halted can be considered to be still pending against the applicant and, consequently, may constitute an infringement of the applicant's right to a determination of criminal charges within a "reasonable time" pursuant to Article 6 § 1 of the Convention.

The Court reiterates that one of the purposes of the right to trial within a reasonable period of time is to protect individuals from "remaining too long in a state of uncertainty about their fate" (see *Withey v. the United Kingdom* (dec.), no. 59493/00, ECHR 2003-X; S*tögmüller v. Austria*, judgment of 10 November 1969, Series A no. 9, § 5).

Accordingly, criminal proceedings are said to have begun with "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test of whether "the situation of the [suspect] has been substantially affected" (see *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, § 73).

This implies that such proceedings would end with an official notification to the accused that he or she was no longer to be pursued on those charges, such as would allow a conclusion that the situation of that person could no longer be considered to be substantially affected. This end

is generally brought about by an acquittal or a conviction (see *X v. the United Kingdom,* no. 8233/78, Commission decision of 3 October 1979, §§ 64 and 65, unreported).

However, the Court recognised in the *Deweer* judgment, cited above, that proceedings could end through a unilateral decision taken in favour of the accused including when the trial judge terminated the proceedings without a ruling. The Court has further found that criminal proceedings ended when the prosecution informed the accused that it had discontinued the proceedings against him (see *Slezevicius v. Lithuania*, no. 55479/00, § 27, 13 November 2001, unreported) and when a domestic court found that an accused was unfit to stand trial by reason of his psychiatric condition (see *Antoine v. the United Kingdom*, (dec.) no. 62960/00, ECHR 2003-...), even though in both cases there remained a theoretical possibility that the accused could one day be proceeded against on the relevant charges.

As to whether the proceedings in the instant case can be considered to have ended by the Munich Regional Court's decision to provisionally stay the proceedings with reference to separate preliminary proceedings instituted against the applicant on account of different criminal charges pursuant to section 154(2) of the Code of Criminal Procedure, the Court notes, on the one hand, that there remained an opportunity for the court to resume proceedings against the applicant in the future. Pursuant to section 154(4) of the Code of Criminal Procedure, in the event proceedings are provisionally terminated on account of a penalty or measure of reform and prevention which is to be expected for another offence, the proceedings may be resumed, unless barred by limitation in the meantime, within three months after the judgment imposed for the other offence has entered into force. According to section 154(5) of the Code of Criminal Procedure, a court order is required for the resumption of the proceedings.

On the other hand it has to be noted that from the time of the decision that criminal proceedings are to be stayed the proceedings are no longer pending before the court, the allegation that an individual has committed a criminal offence is no longer maintained, and the individual is thus no longer "charged with a criminal offence" within the meaning of Article 6. His rights and freedoms are not subject to any limitations on the account of the charges that were the subject of the stayed proceedings and the situation of the suspect is thus no longer substantially affected.

The Court further finds that the mere possibility of a resumption of proceedings does not justify a differentiation between a provisional or other discontinuation of proceedings in this respect. The prosecution of criminal charges brought against an individual may in general be instituted and halted by the authorities at any time during preliminary proceedings without the suspect having a right to challenge the decisions involved. The possibility of a resumption of proceedings is furthermore not limited to the provisional discontinuation of criminal proceedings pursuant to section

154(2) of the Code of Criminal Procedure, but is also an option in other cases of discontinuation which are not categorised as being provisional, such as under section 170(2) of the Code of Criminal Procedure pursuant to which the public prosecution office shall stay the proceedings if the investigations do not offer sufficient reason for preferring public charges.

The Court furthermore observes that according to section 154 (4) and (5) of the Code of Criminal Procedure, a resumption of proceedings is accompanied by procedural safeguards. The resumption may only be effected by court order and only if a prosecution for the underlying offence has not meanwhile been time-barred, as where a case has been discontinued, the statutory time-limits begin to run again. In addition, a resumption of proceedings is also no longer possible in the event that a three-month period has elapsed following entry into force of the judgment in the separate case on the account of which the proceedings were stayed. In the event the prosecution for the underlying offence has been time-barred or the aforementioned three-month period has elapsed, the provisional stay of the proceedings becomes final.

The Court therefore considers that the Munich Regional Court's decision to provisionally stay the proceedings can be considered to have ended the criminal proceedings against the applicant for the purposes of Article 6, even if there remained a possibility that a court could resume them.

Accordingly, the Court finds that the provisional discontinuation of criminal proceedings as such does not constitute an infringement of the applicant's right to a determination of criminal charges within a "reasonable time" pursuant to Article 6 § 1. The Court therefore holds that the complaint is manifestly ill-founded in this respect and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

b) The principle of presumption of innocence

As regards a possible violation of the principle of presumption of innocence as established under Article 6 § 2 of the Convention by the Regional Court's decision to provisionally stay the proceedings, the Court reiterates in the first place that this principle is not undermined by the fact that the criminal proceedings against the applicant ended without formal acquittal *(*see *Whitey*, cited above).

The Court further observes that under German law an individual benefits from the presumption of innocence until his or her conviction, irrespective of whether proceedings were halted definitely or provisionally. In its decision of 1 July 2005 declining to consider the applicant's constitutional complaint, the Federal Constitutional Court confirmed that the applicant was still benefiting from the presumption of innocence following the provisional stay of proceedings.

In the case at hand, there is nothing to establish that the decision to provisionally stay the proceedings itself contains any reasoning suggesting that the applicant was regarded as guilty.

It follows that the Munich Regional Court's decision to provisionally stay the proceedings pursuant to section 154(2) of the Code of Criminal Procedure does not violate the presumption of innocence established under Article 6 § 2 of the Convention. This part of the application is thus manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The remainder of the applicant's complaints

The applicant further complained of an infringement of his right to a fair trial under Article 6 § 1 of the Convention on the ground that the Munich District Court's judgment sentencing him to a fine was based on an incorrect assessment of the evidence provided by him during the proceedings and that he should have been acquitted.

He further alleged that the judge conducting the procedure before the Munich Regional Court was biased, in particular that he had tried to intimidate the witness presented by the applicant, and that he should therefore have been excluded from the proceedings.

The applicant also argued that the Regional Court's order to ask for a psychiatric opinion as to his criminal responsibility pursuant to section 81(a) of the Code of Criminal Procedure also constituted a breach of his right to a fair trial pursuant to Article 6 § 1 of the Convention.

The applicant finally complained that the criminal proceedings before the courts infringed his rights under Articles 3, 10 and 13 of the Convention without specifying which particular act or procedural decision of the courts amounted to a violation of the said provisions.

However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, 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 complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President