European Court of Human Rights Finds Violations of the European Human Rights Convention in German Pre-trial Detention Procedures

Suggested Citation: *European Court of Human Rights Finds Violations of the European Human Rights Convention in German Pre-trial Detention Procedures*, 2 German Law Journal (2001), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=56

[1] The European Court of Human Rights (ECHR), in three separate judgments issued on February 13, 2001, found that German authorities violated Article 5 § 4 of the European Convention on Human Rights when the applicants (at the relevant time, detained criminal suspects) failed to gain access to prosecution files that contained information and evidence relevant to court challenges to their pre-trial detention. Article 5 § 4 of the Convention provides: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[2] Article 104 of the Basic Law provides the corresponding constitutional protection under German law, essentially requiring: (1) that a person's freedom be restricted only pursuant to a formal law; (2) that the legitimacy and prolongation of detention be determined by a judge without delay; (3) that a provisionally detained suspect be brought before a judge, no later than one day following the arrest, in order to be informed of the nature of the accusation and to permit the suspect to object to his or her detention; and (4) that a relative or confidant of the detainee be immediately informed of the detention. The Ninth Chapter of the German Code of Criminal Procedure (§§ 112 - 131) establishes the specific terms of the broad protections outlined in Article 104 of the Basic Law.

[3] German law, both the constitutional provisions and the statutorily created rules of procedure, clearly meets the fundamental demands of Article 5 § 4 of the Convention: detention may not be arbitrary and must be reviewed by a judge. The present cases, however, raised the more subtle principle that it is not merely the right to judicial review of pre-trial detention that is guaranteed by the Convention, but a *full, fair and effective judicial review* of pre-trial detention, especially as such requires the *informed participation of defense counsel* - what is known in the jurisprudence of the ECHR as "equality of arms." The German Code of Criminal Procedure, is not totally unresponsive to such concerns. Section 114 of the *Strafprozessordnung* (Code of Criminal Procedure) requires that a detained suspect must be informed (at three separate points - immediately upon arrest, by a judge at a hearing and in writing) of the facts establishing a "strong suspicion of the act" and the existence of one of the statutory "reasons for confinement," the two elements that must be met in order to justify detention. Section 115 of the Code of Criminal Procedure requires that a detained suspect must appear before a judge without delay for a hearing during which he or she can challenge the basis of the detention. The suspect must be informed of the right to appeal a decision on his or her confinement. Pursuant to §§ 117, 118 and 118a, a suspect may challenge his or her on-going (judicially ordered) pre-trial detention at any time at a full judicial hearing. In the case of such a challenge defense counsel must be appointed if the detention has lasted longer than three months. (§ 117(4) Code of Criminal Procedure). In any event, defense counsel may be appointed earlier if the court concludes that the complexity of the proceedings and/or seriousness of the accusation necessitate it or if the prosecution so moves. (§§ 140(2) and 141 Code of Criminal Procedure).

[4] Even more specific to the facts of the applicants' claims, § 115(3) of the Code of Criminal Procedure requires that a suspect be given the opportunity at his or her detention hearing to "present those facts which are in his favor." This right, of course, can only be enjoyed if the suspect and/or defense counsel have been given the chance to become aware of such favorable evidence that happens to be in the prosecution file. In acknowledgment of this reality, § 147 of the Code of Criminal Procedure grants defense counsel the right to inspect the prosecution file upon request.

[5] The applicants were either not given access to prosecution files, or not given full access to prosecution files, to aid and inform their challenges to pre-trial detention. Two of the applicants were denied access pursuant to § 147(2) of the Code of Criminal Procedure, which permits the prosecution to deny access if a suspect's review of the files "can endanger the purpose of investigation." (Applicants Garcia Alva and Lietzow). The third applicant was not given access to the prosecution files because of the ambiguity and inconsistency of his request for access. (Applicant Schöps).

[6] The ECHR applied near identical language and reasoning to each of the cases, concluding in the *Garcia Alva Case and Lietzow Case* that the German authorities had improperly elevated the prosecution's interest in the integrity of the investigation above the very important freedom interests secured by Article 5 § 4 of the Convention. In its decision in the *Garcia Alva Case,* the ECHR clarified the priority to be given to the Article 5 § 4 rights, as against other interests:

The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence

and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defense. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer. (*Garcia Alva v. Germany,* No. 23541//94, 13 February 2001, para. 42 <http://hudoc.echr.coe.int>).

[7] In the *Schöps Case* the ECHR rejected the German government's formalistic approach to the requirement that the suspect or his/her counsel request access to the file. The ECHR concluded that the prosecution could not passively fail to provide the file simply because the request had been unclear or equivocal. The ECHR explained that the prosecution could only assume Schöps' waiver of the Article 5 § 4 rights "- if at all -" if the waiver is "established in an unequivocal manner, . . ." (*Schops v. Germany Case,* No. 25116/94, 13 February 2001, para. 48 <http://hudoc.echr.coe.int>). Similarly, the ECHR dismissed the prosecution's failure to provide files assembled and developed after Schöps' initial request. Germany sought to argue, under these circumstances, that a request for inspection of prosecution files applied only to the files in existence at the time the request was made.

[8] In all three cases the ECHR returned to the principle of "equality of arms" central to the Convention's conception of a just and fair criminal process, and applied that principle to hearings on the legitimacy/necessity of on-going pre-trial detention:

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among other authorities, the *Lamy v. Belgium* judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29 and the *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, CEDH 1999-II).

These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 - and particularly from the autonomous meaning to be given to the notion of "criminal charge" - that this provision has some application to pre-trial proceedings (see the *Imbrioscia v. Switzerland* judgment of 24 November 1993, Series A no. 275, p. 13, § 36). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see, *mutatis mutandis,* the Brandstetter v. Austria judgment of 28 August 1991, Series A no. 211, p. 27, § 67). (*Garcia Alva v. Germany,* No. 23541//94, 13 February 2001, para. 39 <http://hudoc.echr.coe.int>; *Schops v. Germany Case,* No. 25116/94, 13 February 2001, para. 44 <http://hudoc.echr.coe.int>); *Lietzow v. Germany Case,* No. 24479/94, 13 February 2001, para. 44 <http://hudoc.echr.coe.int>).

[9] In all three cases the ECHR found no basis for awarding non-pecuniary damages, indicating its confidence in the adequacy of the German Code of Criminal Procedure, assuming, of course, that its application conforms to the principles outlined in the ECHR's judgments.

For more information:
Human Rights Convention and Court Decisions on the web: http://hudoc.echr.coe.int

Translation of German Code of Civil Procedure (superceded): Gerold Harfst and Otto A. Schmidt, *German Criminal Law: The Code of Criminal Procedure / The Youth Court Law,* Harfst Verlag, 1989.