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. 26315/03
by Mohammad Yassin DOGMOCH
against Germany

The European Court of Human Rights (Fifth Section), sitting on 18 September 2006 as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 14 August 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Mohammad Yassin Dogmoch, has German and Syrian nationality. He was born in 1941 and lives in Beirut in Lebanon. He was represented before the Court by Mr W. Bub, a lawyer of the law firm Bub, Gauweiler & Partner practising in Munich, Germany.

A. The circumstances of the case

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

1. Background to the case

The applicant is a businessman with professional activities in Germany and throughout the Arab world. Since 1995 the applicant entertained professional contacts with two businessmen from Mannheim, Germany, named S. and K. In the beginning of 2000 the Mannheim Public Prosecutor suspected the latter of having set up an extensive fraudulent scheme. According to the allegations brought out against them, between 1994 and 1999 S. and K. pretended to own industrial drilling machines, which they sold to a number of leasing companies although these drilling machines did not exist and the damage remained with the leasing companies. These incidents, which became known as the "Flowtex-scandal", stirred a considerable amount of media attention and are regarded as a pre-eminent example of commercial delinquency in German history.

2. Proceedings concerning the attachment of the applicant's assets

On 16 February 2000 the criminal investigation judge (*Ermittlungsrichter*) at the Mannheim District Court (*Amtsgericht*), in the investigation proceedings against S., K. and two alleged co-offenders, and upon the Public Prosecutor's request, ordered the applicant's assets, amounting to 60,800,000.00 Deutschmarks (DEM), to be frozen pursuant to sections 111b subsections 2 and 5, 111d, 111e subsection 1 of the Code of Criminal Procedures in conjunction with section 73 subsection 1, second sentence, subsection 3, and section 73a of the Criminal Code (*attachment in rem*, *dinglicher Arrest*, see relevant domestic law below). That court found that, according to the preliminary investigations, a sum of DEM 60,800,000.00 deriving from the fraudulent sales had been transferred to the applicant's enterprise and from there to his personal property. There was the risk that the applicant would try to transfer the assets abroad in order to prevent the execution of claims brought out later by aggrieved third parties.

On 8 May 2000 the Mannheim District Court, in a decision naming the applicant as a person charged with an offence (*Beschuldigter*), modified and extended the attachment of the applicant's assets to the amount of DEM 102,800,000.00. Relying on statements given by S. and K. during the preliminary investigations, the District Court found the suspicion to be confirmed that the applicant had knowingly received money derived from fraudulent transactions. Accordingly, there was the suspicion that the applicant had committed the offence of money-laundering. The money was

subjected to the claims of aggrieved third parties according to the provisions of civil liability.

On 16 June 2000 the Mannheim Regional Court (*Landgericht*), on the applicant's complaint, upheld the attachment of DEM 60,800,000.00 and lifted the attachment of additional DEM 42,000,000.00. That court confirmed that there was strong evidence given by the statements of S. and K. that the applicant had participated in the fraudulent actions. The measure taken was proportionate, moreover, it could be expected that he would try to deprive the aggrieved leasing companies of the assets.

On 19 September 2000 the Mannheim Regional Court upheld its previous decision.

On 23 November 2000 the Mannheim Regional Court rejected the applicant's request to be heard personally. According to that court, the applicant and his counsel had been well informed about all circumstances which raised suspicions against him. In her written submissions to that court, the applicant's counsel had tried to cast doubts on the credibility of the main offenders S. and K. She had laid out in detail the applicant's point of view regarding all circumstances of the cash flow and had tried to rebut the incriminating evidence. As the applicant's point of view had been clearly and unambiguously submitted in writing, the chamber saw no need to hear him orally.

With regard to the right to a fair hearing as guaranteed by Article 103 subsection 1 of the Basic Law, the Regional Court found as follows:

> "The attachment of assets pursuant to section 111d, 111b subsection 5 in conjunction with sections 73 f. of the Criminal Code in order to safeguard third persons' claims is ordered by court decision. According to section 33 subsection 4 sentence 1 of the Code of Criminal Procedure, the order to seize property in order to safeguard the claims of aggrieved parties is issued without hearing the person charged of the offence, as a prior hearing could enable him to transfer the property and thus to thwart the aim of the safeguarding measure. This practice has been approved of by the Federal Constitutional Court.... During the ensuing complaint proceedings...the right to a fair hearing was fully taken account of. Pursuant to section 309 subsection 1 of the Code of Criminal Procedure, the decision on the complaint is taken without an oral hearing. Accordingly, the decision is taken in written proceedings. ...It follows that the fair hearing has to be granted in written proceedings. For special reasons the court of complaint can decide to hear oral statements.
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> According to the chamber, these regulations do neither in general nor in this specific case run contrary to Article 103. With the aid of his counsel Dr. W., the defendant has made full use of the opportunity to submit his statements, which were fully taken into account, in the written proceedings. There were no obstacles which prevented him from using this form of communication to fully and objectively depict the incidents. Neither the alleged actions to the detriment of the leasing companies nor the alleged participation of the defendant were of such a nature that a personal and oral statement given by the defendant would have been more suited to provide a correct assessment of his actions than a written statement and would thus have been preferable for the chamber. The defendant's acts of participation did not have an ambiguous content; they did not concern exceptional or borderline circumstances which would have

> necessitated the defendant's personal presence and hearing in order to assess them. Contrary to the defendant's counsel's opinion, it was not only necessary to weigh the statements given by the two main suspects K. and S. against the defendant's own statements. On the contrary, it was necessary to weigh a number of other circumstances, which, taken on their own, justified the attachment order.... Accordingly, they were no "special reasons" justifying to hear the defendant personally."

On 31 July 2001 the Mannheim District Court upheld the attachment of an amount of DEM 39,000,000.00 and lifted the attachment of DEM 21,800,000.000. On the basis of the results of the preliminary investigations, the District Court confirmed the existence of a strong suspicion that the applicant had aided the transfer and concealment of assets. It further confirmed that an oral hearing was neither legally prescribed nor necessary in order to safeguard the applicant's right to a fair hearing.

On 30 January 2003 the Federal Constitutional Court, sitting as a panel of three judges, refused to accept the applicant's complaint against the decision of the Mannheim Regional Court of 23 November 2000 and – indirectly – against section 111b of the Code of Criminal Procedure for adjudication for lack of prospect of success.

With respect to the right to a fair hearing, the Federal Constitutional Court found as follows:

> "The constitutionally guaranteed right to a fair hearing includes the right to information, the right to lodge requests and to submit statements, and the right that the courts take into account the submitted statements. According to the consistent case-law of the Federal Constitutional Court, Article 103 section 1 of the Basic Law does not grant the right to be heard in a specific form, in particular, in an oral hearing. Accordingly, it is up to the legislator to decide to which extent he wishes to grant the right to an oral hearing in specific proceedings.
>
> According to section 309 subsection 1 of the Code of Criminal Procedure the decision on the complaint is taken without an oral hearing, that is to say in written proceedings. The complaint court is not prevented from orally hearing witnesses or experts in the course of their investigations pursuant to section 308 subsection 2 or to hear oral statements given by the parties to the proceedings. However, it has the discretion to decide whether it deems such measures necessary. There is no indication that it did not make correct use of this discretion, the more so, as the applicant has failed to establish what he would have stated differently in case of an oral hearing."

This decision was served on the applicant's counsel on 17 February 2003.

3. Further developments

On 17 March 2003 the Mannheim Public Prosecutor issued an indictment against the applicant. The criminal proceedings against the applicant have been suspended on 14 June 2006 in view of the applicant's inability to plead.

The order that the applicant's assets amounting to DEM 39,000,000.00 be frozen remains in force.

B. Relevant domestic law

1. Constitutional Law

Article 103 subsection 1 of the Basic Law provides that in the courts, everyone is entitled to be heard in accordance with the law *(Anspruch auf rechtliches Gehör*).

2. Substantial law governing the seizure and freezing of assets

According to section 111b, subsection 2 of the Code of Criminal Procedure, the attachment of assets may be ordered if there are reasons for assuming that the conditions of forfeiture or for confiscation have been fulfilled. According to subsection 5, this also applies if forfeiture may not be ordered because the assets are subject to claims brought out by the aggrieved party.

Section 73 subsection 1, sentence 1 of the Criminal Code provides that the court shall order the forfeiture of any object which has been acquired by a perpetrator or accessory as a result of an unlawful act. According to sentence 2, this shall not apply to the extent that the assets are subject to claims brought out by the aggrieved party.

If the forfeiture of a particular object is impossible due to the nature of what was acquired or for some other reasons, the court shall order the forfeiture of the sum of money which corresponds to the value of that which was acquired (section 73a of the Criminal Code).

3. Procedural provisions

Section 33 subsections 3 and 4 of the Code of Criminal Procedure provide that the concerned person is not heard prior to the issue of an order of seizure or other measure, if this would endanger the purpose of such order. According to section 309 subsection 1, the decision on the complaint shall be taken without an oral hearing. According to section 308 subsection 2, the court of complaint may order investigations or conduct them itself.

COMPLAINTS

1. The applicant complained under Article 6 § 1 of the Convention about having been denied a public hearing in the proceedings concerning the

freezing of his assets. He further alleged that the denial of a hearing violated the principle of equality of arms and had been arbitrary.

2. Invoking Article 6 § 3 (d) of the Convention, the applicant complained about having been denied the right to examine or have examined witnesses.

THE LAW

The applicant alleged a violation of Article 6 § 1 and § 3 (d) which, in so far as relevant, read as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public ... hearing ... by [a] ... tribunal..." ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
>
> (d) to examine or have examined witnesses against him..."

According to the applicant, Article 6 under its criminal head is applicable in the present case, as the proceedings concerning the attachment of his assets amounted to the determination of a criminal charge against him. In this respect, he pointed out that he had been named as a person charged with having participated in the main offenders' S. and K.'s fraudulent actions. According to the applicant, this amounted to a formal information of a criminal charge against him. The applicant further pointed out that the attachment of a sum of DEM 39 million, which had lasted for more than six years without being lifted, had most severe repercussions on his business activities, which factually amounted to a ban from exercising his profession. He further pointed out that his assets could be later on subjected to forfeiture pursuant to sections 73 and 73a of the Criminal Code. According to the applicant, this measure had a penal character.

The Court reiterates that the concept of "criminal charge" within the meaning of Article 6 is an autonomous one. In its earlier case-law the Court has established that there are three criteria to be taken into account when it is being decided whether a person was "charged with a criminal offence" for the purposes of Article 6. These are the classification of the offence under national law, the nature of the offence and the nature and degree of severity of the penalty that the person concerned risked incurring (see, among other authorities, *A.P., M.P. and T.P. v. Switzerland*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1488, § 39; and *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, p. 18, § 50).

In the case of AGOSI v. the United Kingdom, the Court has held that the forfeiture of goods by a national court were measures consequential upon

the act of smuggling committed by another party and that criminal charges had not been brought against AGOSI in respect of that act. The fact that the property rights of AGOSI were adversely affected could not of itself lead to the conclusion that a "criminal charge" for the purposes of Article 6, could be considered as having been brought against the applicant company (see judgment of 24 October 1986, Series A no. 108, p. 22, §§ 65-66; see also *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A no. 316-A, §§ 53-54).

Turning to the present case, the Court notes that the attachment order was issued by a criminal court in the context of criminal investigations against S. and K. and two alleged co-offenders. However, in the District Court's decision of 8 May 2000 and the Regional Court's decision of 16 June 2000 the applicant was explicitly named as a person charged with a criminal offence.

It remains to be determined whether the impugned decisions concerned the "determination" of any such charge. In this respect, the Court has previously attached weight to the question whether the purpose of the measure was the conviction or acquittal of the applicant and if the impugned measure had any implications for the applicant's criminal record (see, *mutatis mutandis*, *Phillips v. the United Kingdom*, no. 41087/98, § 34, ECHR 2001-VII; *Butler v. the United Kingdom* (dec.), no. 41661/98, 27 June 2002). For the Court, these are relevant considerations which also apply in the present case.

The Court notes that the attachment order was a provisional measure taken in the context of criminal investigations and primarily aimed at safeguarding claims which might later on be brought out by aggrieved third parties. If such claims did not exist, the order could, furthermore, safeguard the later forfeiture of the assets. Such forfeiture would, however, have to be determined in separate proceedings following a criminal conviction. There is no indication that the attachment order as such had any impact on the applicant's criminal record. In these circumstances, the Court considers that the impugned decisions as such cannot be regarded as a "determination of a criminal charge" against the applicant within the meaning of Article 6 §§ 1 and 3 of the Convention.

The applicant further claimed that Article 6 § 1 was also or alternatively applicable under its civil head, as the impugned measure was primarily aimed at safeguarding the civil claims of aggrieved third parties and had thus a direct effect on civil rights and obligations.

With respect to the applicability of Article 6 § 1 under its civil head, the Court reiterates its consistent case-law according to which Article 6 does not apply to proceedings relating to interim orders or other provisional measures adopted prior to the proceedings on the merits, as such measures cannot, as a general rule, be regarded as involving the determination of civil rights and obligations (see, among other authorities, *Jaffredou v. France*

(dec.), no. 39843/98, 15 December 1998; *Kress v. France* (dec.), no. 39594/98, 29 February 2000; *Apis v. Slovakia* (dec.), no. 39754/98, 13 January 2000; *Starikow v. Germany* (dec.), no. 23395/02, 10 April 2003; and *Libert v. Belgium* (dec.), no. 44734/98, 8 July 2004).

Only exceptionally has the Court accepted the applicability of Article 6 § 1 to an interim decision (see *Markass Car Hire Ltd v. Cyprus* (dec.), no. 51591/99, 23 October 2001; *Air Canada,* cited above, §§ 15 and 56; *Zlínsat, spol. s r.o. v. Bulgaria,* no. 57785/00, § 72, 15 June 2006).

In the present case, the Court notes that the attachment order was aimed at safeguarding third parties' claims to the applicant's assets. It did not include any determination of such claims, the existence of which would have to be settled in separate proceedings. Neither did it allow any third party to dispose of the assets in question. It follows that the attachment of the applicant's assets was of a purely provisional nature which did not coincide with or forestall any final decision in the main proceedings.

In these respects, the present case can be clearly distinguished from the exceptional cases cited above.

Accordingly, Article 6 § 1 under its civil head is not applicable to the present complaint.

It follows that the complaint is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia WESTERDIEK
Registrar

PEER LORENZEN
President