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EGMR (Nr. 67500/01) - Entscheidung vom 13. Mai 2004 (Atik v. Germany)

Recht auf faires Verfahren: freier Verkehr mit dem Verteidiger (Gesamtbetrachtung; Überwachungsfreiheit und wirksame Verteidigung; Kontaktaufnahme eines V-Mannes, eines verdeckten Ermittlers mit dem Verteidiger; Bedeutung der etwaigen Informationserlangung bzw. der belastenden Informationsverwertung); Erschöpfung des Rechtsweges.

Art. 6 Abs. 1 Abs. 1 EMRK; Art. 6 Abs. 3 lit. c EMRK; Art. 35 EMRK; § 137 StPO; § 110a StPO

Leitsätze des Bearbeiters

1. Die Anforderungen des Art. 6 Abs. 3 EMRK repräsentieren einzelne Bestandteile des Rechts auf ein faires Verfahren nach Art. 6 Abs. 1 Satz 1 EMRK.

2. Das Recht des Angeklagten, mit seinem Verteidiger unüberwacht zu kommunizieren zu können, stellt ein grundlegendes Erfordernis eines fairen Strafverfahrens dar, das aus Art. 6 Abs. 3 lit. c EMRK abzuleiten ist. Wäre der Verteidiger nicht im Stande, unüberwacht mit seinem Mandanten zu kommunizieren und von diesem vertrauliche Instruktionen zu erhalten, würde der Verteidigerbeistand viel von seinem Nutzen verlieren, obgleich die Konvention gerade darauf abzielt, praktisch wirksame Rechte zu gewähren.

3. Der Einsatz eines V-Mannes, der seine rechtlich bestehenden Einsatzgrenzen überschreitet und mit dem Anwalt des späteren Beschuldigten in eigener Initiative persönlich Kontakt aufnimmt, berührt den von Art. 6 Abs. 3 lit. c EMRK gewährten Schutzbereich und kann zu Verletzungen der Konvention führen. Zu einem Einzelfall, in dem eine Verletzung verneint wurde, weil der V-Mann in keiner Weise verfahrensrelevante Informationen erlangt hat, in keiner Weise derartige Informationen zum Nachteil des Beschuldigten verwertet worden sind.

THE FACTS

The applicant, Huseyin Atik, is a Turkish national, who was born in 1957 and lives in Hamburg. He was represented before the Court by Mr Gerhard Strate and Mr Klaus Ulrich Ventzke, lawyers practising in Hamburg. 1

The facts of the case, as submitted by the applicant, may be summarised as follows. 2

On 6 October 1995 the Hamburg Regional Court (*Landgericht*) convicted the applicant of drug trafficking and sentenced him to nine years' imprisonment. 3

Following his conviction he was serving his sentence. As from 1996, he was continuously contacted by one Y., an undercover agent acting with the authorisation of the Hamburg police, who passed himself off as a potential purchaser of a larger amount of cocaine. 4

At the applicant's request, the undercover agent contacted the applicant's counsel with a view to applying for the reopening of the criminal proceedings. The undercover agent met the counsel several times accompanied by other persons, however at one occasion - contrary to the instructions given by the Hamburg police - on his own initiative in the absence of other persons. The last visit took place on 3 November 1998. 5

Thereafter the applicant informed the undercover agent that his former cell-mate T. could arrange for the delivery of a large quantity of cocaine for a price of 55,000 German Marks (DEM) per kilogram. After consulting the applicant, T. met the undercover agent in his flat on 4 November 1998 in order to hand over almost 12 kg of cocaine. While carrying out the transaction, he was arrested by the police. 6

By a judgment of 17 June 1999, the Hamburg Regional Court convicted the applicant of drug trafficking and sentenced 7

him to four years' and six months' imprisonment. The applicant lodged an appeal on points of law against this judgment. He complained in particular that the Regional Court had not discontinued the proceedings having regard to the circumstances in which the undercover agent had contacted his lawyer.

On 12 January 2000, the Federal Court of Justice (*Bundesgerichtshof*) rejected the applicant's appeal on points of law. 8
It expressed serious concern about the involvement of the undercover agent in the relationship between the defence counsel and the applicant, but found that in the present case there was nothing to show that during these meetings evidence had been obtained to the applicant's detriment. Moreover, the Hamburg Regional Court had sufficiently taken into account the intervention of the undercover agent when fixing the sentence.

By a decision of 7 June 2000, notified to the applicant's counsel on 16 June 2000, the Federal Constitutional Court 9
(*Bundesverfassungsgericht*), sitting in a panel of three judges, declined to entertain the applicant's constitutional complaint. It found that it did not raise any fundamental constitutional issues. Furthermore it was not relevant for the protection of the applicant's basic rights since it had no prospects of success. The constitutional complaint was inadmissible as the applicant failed to substantiate the alleged violation of his constitutional rights and, consequently, did not meet the formal requirements under Articles 23 § 1 and 92 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*). Moreover, the Federal Constitutional Court found that there was nothing to suggest that the applicant's basic or similar rights had been breached. The undercover agent had met the applicant's lawyer for the last time on 3 November 1998 in connection with the request for a retrial. On 4 November 1998 the drug deal had been carried out. There was no indication and it had not been alleged that after that date the undercover agent had performed further activities, in particular contacted the applicant's lawyer. Therefore at no time the applicant's right to an effective exercise of his defence rights had been infringed.

COMPLAINT

The applicant complained under paragraph 3 (c) in conjunction with paragraph 1 of Article 6 of the Convention that, as a 10
consequence of the contacts between the undercover agent and his lawyer, he had been deprived of his right to a fair trial. With reference to the Court's case-law (*S. v. Switzerland*, judgment of 28 November 1991, Series A no. 220, p. 16, § 48), he pointed out that an accused's right to communicate with his defence counsel out of hearing of a third person was part of the basic requirements of a fair trial in a democratic society.

THE LAW

The applicant complained that the contacts of the undercover agent with his lawyer deprived him of a fair trial. He relied 11
on Article 6 §§ 1 and 3 (c) of the Convention, which provide:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a 12
fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights: 13

... 14

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay 15
for legal assistance, to be given it free when the interests of justice so require;"

The Court notes that, even though the constitutional complaint was inadmissible for lack of a sufficient substantiation of 16
the alleged violation of the applicant's constitutional rights, the Federal Constitutional Court found that the applicant's right to an effective exercise of his defence rights had not been infringed.

The Court recalls that domestic remedies have not been exhausted when an appeal is not admitted because of a 17
procedural mistake by the appellant. However, non-exhaustion of domestic remedies cannot be held against the applicant if, in spite of the latter's failure to observe the forms prescribed by law, the competent authority has nevertheless examined the substance of the appeal (*Huber v. Switzerland*, no. 12794/87, Commission decision of 9 July 1988, Decisions and Reports (DR) 57, p. 251); no. 33979/96, *Skalka v. Poland* (dec.), no. 43425/98, 3 October 2002). It may thus be questioned whether the applicant has complied with the condition as to the exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention in the present case. However, the Court does not need to resolve that issue, as the application is in any event inadmissible for the following reasons.

Since the requirements of paragraph 3 of Article 6 represent particular aspects of the right to a fair trial guaranteed in 18

paragraph 1, the Court will examine the applicant's complaint under both provisions taken together (see, among other authorities, *Van Geyselghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

The Court reaffirms that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6 § 3 (c). If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (see *S. v. Switzerland*, quoted above, p. 16, § 48, *Brennan v. the United Kingdom*, judgment of 16 October 2001, ECHR 2001-X, p. 233, § 58). The Court notes that the undercover agent overstepped the permissible limits when meeting the applicant's lawyer on his own initiative in the absence of other persons. Such a breach of the confidentiality of the consultations with a lawyer is capable of raising issues under the Convention. However, there is no indication in the present case, and it does not result from the contested judgment nor had it been argued, that the undercover agent had obtained really relevant information in connection with the charges brought against the applicant and that any such information had been used against him. 19

In these circumstances, the Court cannot find that the undercover agent's activity infringed the applicant's right to an effective exercise of his defence rights under Article 6 §§ 1 and 3 (c) of the Convention. 20

It follows that the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention. 21

For these reasons, the Court unanimously 22

Declares the application inadmissible. 23