

European Court of Human Rights Rules in the On-going Dispute Between Liechtenstein and Germany

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[1] On July 12, 2001, the European Court of Human Rights (ECHR) handed down its judgement in the case of Prince Hans-Adam II of Liechtenstein v. Germany (application number 42527/98). The Court of Human Rights unanimously rejected the applicant's allegation that Germany violated Article 6 § 1 (access to court and fairness of the proceedings), Article 1 of Protocol No. 1 (protection of property) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights.

[2] The case is part of a legal dispute between the two countries that is being played-out before several legal forums in respect of seized property. *German Law Journal* recently reported on Liechtenstein's initiation of proceedings against Germany in the International Court of Justice and that case, in the earliest stages, is still pending before the ICJ. (1) However, the ECHR with its decision from July 12, 2001, has already decided a number of issues that arise in both cases at the European level. The Strasbourg decision may serve as precedent for the decision from the ICJ at the international level.

[3] The conflict underlying the ECHR case is also rooted in the confiscation of the painting "Szene an einem römischen Kalkofen" owned by the applicant's father. The painting was confiscated in 1946 by the former Czechoslovakian authorities under the so called Beneš-Decree No. 12 as "measures against German external assets" because the applicant's father had been regarded as German national. In 1991, the Municipality of Cologne obtained the painting as a temporary loan for an exhibition from then Czechoslovakia. The Cologne *Landgericht* (Regional Court), prompted by a petition filed by Prince Hans-Adam II of Liechtenstein, at that time issued a temporary injunction ordering the painting into the custody of a bailiff. In the proceedings that followed, the Prince claimed that the bailiff should surrender the painting to him but the Regional Court ultimately declared the applicant's action inadmissible. The Regional Court relied on Chapter 6, Article 3 of the *Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen* (Convention on the Settlement of Matters Arising out of the War and the Occupation -- the "Settlement Convention") of 23 October 1954, which had been undertaken by the governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the French Republic and the Federal Republic of Germany. The Regional Court concluded that Chapter 6, Article 3 precluded German jurisdiction regarding the applicant's case. The Regional Court explicitly rejected the applicant's argument that his father had never been a German citizen and that therefore the Settlement Convention did not apply. Referring to the case law of the *Bundesgerichtshof* (Federal Court of Justice) the Regional Court concluded that the confiscating state's position regarding the nationality of ownership of seized property is decisive. The applicant's appeal was dismissed by the Cologne *Oberlandesgericht* (Higher Regional Court) in 1996. The appellate court affirmed the lower court's ruling regarding the inadmissibility of the applicant's action in German jurisdiction, relying again on Chapter 6, Article 3 § 1, in conjunction with § 3, of the Settlement Convention. These provisions are the procedural consequence of the principle that the legal relations resulting from the liquidation of German property abroad by foreign powers for the purpose of reparation were "*Endgültig und Unanfechtbar*" ("final and unchallengeable") for the Federal Republic of Germany and the private persons concerned. The Federal Court of Justice, in 1997, refused to entertain the applicant's appeal on points of law, as the case was found to be of no fundamental importance and, in any event, had no prospect of success. The applicant filed a *Verfassungsbeschwerde* (constitutional complaint) that was rejected by the third three-judge chamber of the *Bundesverfassungsgericht* (Federal Constitutional Court) in 1998. The Federal Constitutional Court considered that, to the extent that the civil courts had regarded the expropriation as a measure within the meaning of Chapter 6, Article 3 § 1 of the Settlement Convention, they had expressly refrained from qualifying the applicant's father's nationality. The Federal Constitutional Court concluded that the interpretation of the lower courts of the terms "measures against German external assets" to include any measures which, in the intention of the expropriating State, were directed against German assets, was not constitutionally objectionable. The Federal Constitutional Court further recalled that the Settlement Convention addresses acts of confiscation that could not be characterized as violations of constitutional property rights because the Settlement Convention as a whole served to settle matters dating back to a time before the entry into force of the German *Grundgesetz* (Basic Law) on May 23, 1949. Moreover, the Federal Constitutional Court held that there was no indication of arbitrariness or of a violation of other constitutional rights. As a result of the Federal Constitutional Court's ruling the Cologne Regional Court suspended its temporary injunction and the painting was returned to the Czech Republic.

[4] As far as the access to court is concerned, the preclusion of German jurisdiction under Chapter 6, Article 3 of the Settlement Convention was a consequence of Germany's particular status under public international law after WW II. Under these unique circumstances the limitation on access to a German court, as a consequence of the Settlement

Convention, had a legitimate objective pursued by the German government while negotiating with the Allied Powers to regain full sovereignty. After WW II the Federal Republic of Germany was not in a position to argue against the aims of the United States, France and the United Kingdom, which sought to exclude a review of confiscation measures against German external assets for reparation purposes by German courts or to impose other limitations on German jurisdiction under the Settlement Convention. This situation prevailed until 1990, when the Treaty on the Final Settlement with respect to Germany, the so called Two-Plus-Four Treaty, was negotiated and signed. The Treaty terminated the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole while providing for the full sovereignty of the united Germany. An additional agreement between the Three Powers and the Federal Republic of Germany dealt with the suspension of the Relations Convention and Settlement Convention and provided that, *inter alia*, Chapter 6, Article 3 of the Settlement Convention remained in force. The Federal Republic of Germany had to accept this specific limitation on its jurisdiction as its position of power in relation to the Allies had not, at the time of the signing of the Two-Plus-Four Treaty, changed dramatically in comparison to the time shortly after the end of WW II.

[5] Assessing the German courts' rulings the ECHR came to the conclusion that it cannot be said that the German courts' interpretation of Chapter 6, Article 3 of the Settlement Convention was inconsistent with previous German case law or that its application was manifestly erroneous or was such as to reach arbitrary conclusions. The Court considered further that the applicant's interest in bringing litigation in the Federal Republic of Germany was not sufficient to outweigh the vital public interests in regaining sovereignty and unifying Germany. Accordingly, the German court decisions declaring the applicant's ownership action inadmissible cannot be regarded as disproportionate to the legitimate aim pursued and they did not, therefore, impair the very essence of the applicant's "right of access to a court."

[6] Referring to the applicant's allegation of unfair proceedings before the Federal Constitutional Court, the ECHR also rejected a violation of Article 6 § 1 of the Human Rights Convention, stating that the applicant had the benefit of adversarial proceedings before the Federal Constitutional Court and that he was able to submit the arguments he considered relevant to his case. (2)

[7] As regards the alleged violation of Article 1 of Protocol No. 1, the ECHR observed that the expropriation had been carried out by authorities of former Czechoslovakia in 1946, *i.e.* long before the entry into force of the Human Rights Convention on September 3, 1953, and before May 18, 1954, the date that Protocol No. 1 to the Convention entered into force. Accordingly, the ECHR held that it lacked the competence *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date. The ECHR added that, under these circumstances, no question of a continuing violation of the Convention by the decisions of the German Courts and the subsequent return of the painting to the Czech Republic arose.

[8] The violation of Article 14 of the Convention that had been alleged by the applicant was rejected on the grounds that Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols and, therefore, has no independent force; its effect is solely in relation to "the enjoyment of the rights and freedoms" safeguarded by other convention provisions. However, the application of Article 14 does not require a breach of the Convention but only a connection between the fact at issue and another of the provisions. (3)

[9] Finally, the two concurring opinions by three Judges annexed to the judgement have to be mentioned because they apply a different line of reasoning than the Court's majority opinion. The German Judge Georg Ress, joined by the Slovenian Judge Boštjan Zupancic, rejected the majority opinion that a violation of Article 6 § 1 of the Convention did not apply due to a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. The question of proportionality does not arise in a case where the right of access to the courts is denied *per se*. According to Judges Ress and Zupancic, the Court should have stated that limitations to Article 6 § 1 may also follow from the specific legal status of a contracting party implicitly accepted by all other Parties at the time of ratification of the Convention. In the specific case the Federal Republic of Germany, which was still an occupied country and under the supreme authority of the Four Allied Powers, when it ratified the Convention on December 5, 1952. Germany was far from being a sovereign state and the exclusion of German jurisdiction under the Settlement Convention was a consequence of the particular status of Germany under public international law after the Second World War. A State under such an occupational regime, which was considered to be *sui generis*, was far from being able to fulfil all the requirements, in particular of Article 6 of the Convention. The particular status of Germany was so obvious that no declaration to that effect was made in relation with the deposit of the instrument of ratification. The particular status of Germany related to its situation under public international law in which it did not have the full authority of a sovereign state over its internal and external affairs. If Contracting States admitted to the Convention a State with such restrictions on its statehood, and if the depository of the Convention (the Secretary General of the Council of Europe) had no objections to its admission, it can be presumed that they do not have any objections to later treaties by which this restricted legal status in the field of jurisdiction over certain matters is merely confirmed. The French Judge Jean-Paul Costa found the reasoning of the judgement unorthodox and illogical. "The question of

proportionality arises only as a subsidiary issue, in the event that the very essence of the right to a court has not been affected." In opposition, the Court should have reference to an exceptional immunity from jurisdiction created by the "Settlement Convention." (4) This instrument would have fully opposed the applicant's right to a hearing of the merits of his case, given the nature and object of the legal action he had brought and the confiscation measure from which the loss of his title to the painting originated.

[10] These concurring opinions contain a convincing critique on the flawed reasoning of judgement in respect of Article 6 § 1. Moreover, the judgement contains another motive for the rejection of the applicant's claim. The ECHR found the possibility of bringing litigation in the Federal Republic of Germany to challenge the validity and lawfulness of the expropriation measures by former Czechoslovakia at a time prior to the existence of the Federal Republic of Germany under its 1949 Constitution a "remote and unlikely prospect." However, some might also criticise this judgement arguing that the Settlement Convention was not applicable at all because it excludes German jurisdiction over cases in which only German external assets had been expropriated. The European Court of Human Rights has delivered its judgement, the legal community awaits the assessment of this dispute by the International Court of Justice.

(1) Malcolm MacLaren, *Liechtenstein Files Lawsuit in the ICJ Against Germany In Respect Of Seized Property*, 2 GERMAN L.J. 10 (June 15, 2001), www.germanlawjournal.com.

(2) See, *Apeh Üldözötteinek Szövetsége, Iványi Róth and Szerdahelyi v. Hungary*, No. 32367/96, § 39, HUDOC-Reference: REF00001825.

(3) See, *Jewish liturgical association Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, § 86, ECHR 2000-VII.

(4) See, Decisions by the European Commission of Human Rights, *X v. Austria* of 6 February 1969, No. 3374/67, Yearbook 12, p. 247 and *N., C., F. and A.G. v. Italy* of 4 December 1995, No. 4236/94, D.R. 84-B, p. 84.