FIFTH SECTION

DECISION

Application no. 53126/07
Reinhold TARON
against Germany

The European Court of Human Rights (Fifth Section), sitting on 29 May 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Ann Power-Forde,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 25 November 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr Reinhold Taron, is a German national who was born in 1955 and lives in Drentwede. He was represented before the Court by Ms P. Nieweg, a lawyer practising in Steinhagen. The respondent Government were represented by their agent Mr H.-J. Behrens, *Ministerialrat,* of the Federal Ministry of Justice.

## A. The circumstances of the case

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

### *1. The proceedings regarding the construction permit and the respective reopening proceedings (first shed)*

3. The applicant lives outside residential building zones in a rural area that is primarily designated for agriculture. In July 2000, the Diepholz Administrative District (*Landkreis*) granted his neighbour a construction permit for an industrial poultry shed (*Legehennenstall*) some 265 metres from the applicant's home. All appeals of the applicant and related applications to suspend execution of the permit were dismissed. The permit became final on 29 September 2003 when the Lower Saxony Administrative Court of Appeal refused the applicant's request to be granted leave to appeal.

4. On 20 July 2005 the applicant lodged an action for reopening of the proceedings regarding the first shed with the Hannover Administrative Court.

5. The Hannover Administrative Court has not decided on this claim.

### *2. The proceedings regarding the licence of compliance with environmental standards (second shed)*

6. On 21 June 2004 the Diepholz Administrative District granted the applicant's neighbour a permit according to the Federal Act on Protection against Emissions (*Bundesimmissionsschutzgesetz*) concerning the erection of a second industrial poultry shed some 580 metres from the applicant's home.

7. The applicant objected on 25 June 2004.

8. On 26 July 2004 the Diepholz Administrative District allowed the applicant's neighbour to make use of the permit despite the pending proceedings of the applicant. All four subsequent requests of the applicant to reinstate the suspensive effect of his objection with the Hannover Administrative Court were dismissed.

9. On 29 September 2005 the Hannover Administrative Court held that the numerous submissions of the applicant showed that he had become unable to properly represent himself and decided that he had no longer *locus standi* in the proceedings. The applicant's related application for legal aid was rejected for lack of reasonable prospects.

10. On 15 February 2007 the applicant, represented by counsel, lodged an action for failure to act (*Untätigkeitsklage*) with the Hannover Administrative Court.

11. After the Diepholz Administrative District dismissed on 12 March 2007 the applicant's objection of 25 June 2004 the applicant pursued his legal action and challenged the merits of this decision.

12. On 17 November 2008 the Administrative Court held an oral hearing and later on the same day dismissed the applicant's claim as ill-founded. The court heard expert evidence on the environmental impact of the poultry farm, and also the applicant and the applicant's neighbour.

13. On 8 and 28 January 2009 the applicant requested leave to appeal the judgment with the Lower Saxony Administrative Court of Appeal.

14. On 14 February 2011 the Lower Saxony Administrative Court of Appeal refused the applicant's request to be granted leave to appeal.

*3. The creation of a new domestic remedy*

15. On 7 December 2011 the Government informed the Court that in response to the pilot judgment *Rumpf v. Germany* (no. 46344/06, 2 September 2010) a federal Act against Protracted Court Proceedings and Criminal Investigations had entered into force on 3 December 2011.

16. In December 2011 the Court informed the applicant in the present case and other applicants in the same position of the enactment of a new domestic remedy. The Court referred to the case *Brusco v. Italy* ((dec.), no. 69789/01, ECHR 2001-IX) and invited him to inform the Court whether he intended to make use of the new remedy within the time limit set by the transitional provision of that Act.

17. By letter of 17 February 2012 the applicant informed the Court in response that he considered it unacceptable to pursue yet another national remedy. He pointed out that his case had been already pending for four years with this Court in distinction from the factual situation in *Brusco v. Italy*, cited above. It would lead to further delay to initiate a new set of proceedings to which no national case-law exists. Finally, he requested that his application before the Court be maintained.

## B. Relevant domestic law

18. The Act on Protracted Court Proceedings and Criminal Investigations (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*, henceforth: the Remedy Act) was published in the Federal Law Gazette – Part I, 2011, page 2302 et seq. – on 2 December 2011 and entered into force the next day.

*1. Relevant features of the remedy*

19. The Remedy Act introduces general provisions for civil and criminal cases in sections 198 to 201 of the Courts Constitution Act

(*Gerichtsverfassungsgesetz*, henceforth: CCA). For specialised – such as at hand the administrative – jurisdictions only one provision was introduced in the respective codes of procedure, here Article 173 Sentence 2 of the Code of Administrative Procedure (*Verwaltungsgerichtsordnung*) referring to the general rules with marginal adaptions regarding the competent court.

20. The new remedy combines an instrument to expedite the proceedings, an objection to delay (*Verzögerungsrüge*), which has to be raised before the court whose proceedings are allegedly unduly delayed (henceforth: trial court), with a subsequent compensation claim to be lodged at the Court of Appeal (henceforth: compensation court), see section 198 paragraph 1 and 3 CCA.

21. According to section 198 paragraph 1 CCA a party to proceedings (*Verfahrensbeteiligter*) who suffers a disadvantage from protracted proceedings is entitled to adequate compensation. The amount depends on the length of the individual case taking into account its difficulty and importance as well as the conduct of the parties and relevant third persons. A compensation award is not dependent on the determination of fault.

22. The compensation is awarded in monetary form, if other forms of compensation for lengthy proceedings are not available. Another form of compensation may consist in the court pronouncing that there has been an unreasonable delay in proceedings, section 198 paragraph 4 CCA.

23. The compensation for one year of protraction amounts to 1,200 euros. If this amount is not equitable due to the circumstances of the case, the court may allow for a higher or lower sum.

24. A prior objection to delay before the trial court is a prerequisite for a subsequent compensation claim. The action for compensation may not be lodged with a compensation court until six months after the objection had been raised, see section 198 paragraph 5 CCA. The compensation claim must at the latest be lodged within six months of the final judicial decision of the trial court.

25. Proceedings for compensation are subject to court fees. However, the plaintiff will be reimbursed according to the quota of his success in court.

26. The judgment of the compensation court is subject to appeal on points of law (*Revision*) only.

### *2. Transitional provision*

27. According to its Article 23 the Remedy Act applies to pending as well as to terminated proceedings whose duration may still become or have already become the subject of a complaint with this Court.

28. In pending proceedings the objection to delay (*Verzögerungsrüge*) should be raised without delay when the Remedy Act entered into force. In these cases the objection preserves a subsequent compensation claim even for the past.

29. For terminated proceedings whose duration may still become or have already become the subject of a complaint with this Court it is not necessary to raise the objection prior to filing a compensation claim. The claim based on Article 23 of the Act has to be lodged with the competent court on 3 June 2012 at the latest.

## COMPLAINTS

30. The applicant complained under Article 6 § 1 of the Convention about the excessive length of the proceedings in connection with his appeals against the construction permit of an industrial poultry shed and the permit of environmental compliance regarding the second industrial poultry shed in his neighbourhood. He further complained under Article 13 about the lack of an effective remedy against the excessive length of proceedings under German law.

31. Invoking again Article 6 § 1 he further complained about the Administrative Court's refusal to grant him legal aid even though it had priorly denied him *locus standi* in the proceedings and ordered that he be represented by a lawyer, if he wished to pursue them.

32. Referring to Article 2 of the Convention the applicant finally complained about the decisions of Diepholz Administrative District to permit the construction of the first poultry shed and 4 years later to allow the erection of a second one. He maintained that the emissions resulting from these sheds impaired his and his family's health. He further alleged that the legal requirements for the granting of the relevant permits do not provide for sufficient safeguards to prevent risks for the applicant's health and life.

## THE LAW

### A. Alleged violation of Article 6 § 1 of the Convention on account of the length of proceedings concerning the second poultry shed

33. The Court will first determine whether the applicant complied with the rule of exhaustion of domestic remedies set out in Article 35 of the Convention, which provides, in so far as relevant:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

*1. General principles*

34. The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body until they have had the opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights, (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV; and *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 *et al*., § 69, ECHR 2010-...).

35. Nevertheless, the only remedies which Article 35 of the Convention requires to be used are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory, but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, cited above, § 66, and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). In addition, according to the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see *Van Oosterwijck v. Belgium*, 6 November 1980, § 36, Series A no. 40, A, and *Akdivar and Others*, cited above, § 67). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Van Oosterwijck*, cited above, § 37; *Akdivar and Others*, cited above, § 71; and *Brusco v. Italy*, cited above).

36. An assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Brusco*, cited above and *Fakhretdinov and others v. Russia* (dec.), nos. 26716/09, 67576/09 and 7698/10, 23 September 2010).

*2. Application to the present case*

37. The Court notes at the outset that the applicant declared that he has no inclination to bring proceedings according to section 198 CCA.

38. While disputing the effectiveness and appropriateness of the new remedy before the Court, the applicant did not doubt that it was available to him. Nor does the Court see any reason to doubt that the applicant became entitled to bring his claim to the competent domestic courts pursuant to Article 23 of the Remedy Act. That the Remedy Act envisages court fees for proceedings does not unreasonably restrict its accessibility, as the general provisions for legal aid under German law are applicable, which the Court has repeatedly held to be compatible with the requirements of the Convention (see *Eckardt v. Germany* (dec.), no. 23947/03, 10 April 2007).

39. As regards the effectiveness of the new remedy it is evident from the Remedy Act, see above, that when deciding compensation claims domestic courts are required to apply the Convention criteria as established in the Court's case-law. In particular, compensation should be determined with regard to the individual circumstances of the case, the length of the protraction, and the significance of its consequences for the applicant. Finally, compensation is to be awarded irrespective of an establishment of fault.

40. In view of these elements, the Court accepts that the Remedy Act was enacted to address the issue of excessive length of domestic proceedings in an effective and meaningful manner, taking account of the Convention requirements. It is true that domestic courts have not been able to establish any practice in the few months since its entry into force. However, the Court does not see at this stage any reason to believe that the new remedy would not afford the applicant the opportunity to obtain adequate and sufficient compensation for his grievances or that it would not offer reasonable prospects of success. The mere doubts about the capacity of the new remedy to provide adequate compensation cannot alter the Court's conclusion.

41. The Court further reiterates that the States enjoy some margin of appreciation as to the manner of providing a domestic remedy in respect of the "reasonable time" requirement (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 188- 189, ECHR 2006-V, *Fakhretdinov and others v. Russia,* cited above and *Žunič v. Slovenia* (dec.), no. 24342/04, 18 October 2007). Therefore, the Court does not find it appropriate to examine at the present stage every single provision of the Remedy Act *in abstracto* when it has no reason to assume that the Remedy Act will not attain the purposes for which it had been enacted.

42. Finally, the Court does not lose sight of the fact that the new remedy only became available after the introduction of the present application and that only exceptional circumstances may compel the applicant to avail himself of such a remedy (see § 36 above). It observes that there have been several cases concerning the length of proceedings in various countries in which such exceptional circumstances were found to exist (see *Brusco v. Italy*, cited above; *Nogolica v. Croatia*, cited above; *Andrášik and Others*

*v. Slovakia* (dec.), nos. 57984/00 *et al.*, ECHR 2002-IX; *Michalak v. Poland* (dec.), no. 24549/03, §§ 41-43, 1 March 2005; and *Korenjak v. Slovenia*, no. 463/03, §§ 63-71, 15 May 2007, *Fakhretdinov and others v. Russia*, cited above. The Court stresses that the nature of the remedy and the context in which it was introduced weighs heavily in its assessment of such exceptions (see *Scordino (no. 1)*, cited above, § 144).

43. As in the cases mentioned above, the Court considers it appropriate and justified in the circumstances of the present cases to require the applicant to use the new domestic remedy introduced by the Remedy Act. Firstly, as it observed in *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI, the right to a hearing within a reasonable time would be less effective if there was no opportunity to submit Convention claims to a national authority first. Once a domestic compensatory remedy has been introduced, it becomes particularly important for such complaints to be considered in the first place and without delay by the national authorities, which are better placed and equipped to establish the relevant facts and to calculate monetary compensation (see, *mutatis mutandis*, *Demopoulos and Others* (dec.) [GC], cited above, § 69). Secondly, the Court attaches particular importance to the fact that the applicant is entitled to bring his claims to the domestic courts under the transitional provision of the Remedy Act which reflects the intention of the German legislator to grant redress at the domestic level to those people who had already applied to the Court before the entry into force of the Remedy Act (compare *Brusco*, cited above). It reiterates that its task, as defined by Article 19 of the Convention, would neither be best achieved by taking such cases to judgment in the place of domestic courts, nor by considering them in parallel with the domestic proceedings (see, *mutatis mutandis*, *E.G. v. Poland* (dec.), no. 50425/99, § 27, 23 September 2008). In addition, the Court finds it not excessive to refer the applicant to the domestic courts, as the Remedy Act provides only for proceedings in two instances.

44. For reasons of fairness and effectiveness the Court sees no necessity for treating pending cases with this Court differently and to require only applicants of cases lodged after the pilot judgment (*Rumpf*, cited above) to make use of the new remedy. After the judgment in *Sürmeli v. Germany* ([GC], no. 75529/01, ECHR 2006-VII on 8 June 2006) it had become clear that the existing legal provisions in Germany were insufficient to expedite proceedings and to compensate for protracted proceedings. Since then the German legislator has worked on various ways to comply with the requirements of the Convention which finally resulted in the above mentioned Remedy Act.

45. However, the Court's position may be subject to review in the future depending, in particular, on the domestic courts' capacity to establish consistent case-law under the Remedy Act in line with the Convention requirements (see *Korenjak*, cited above, § 73). Furthermore, the burden of

proof as to the effectiveness of the new remedy will lie in practice with the respondent Government.

46. In view of the foregoing considerations, the Court finds that the applicant is required by Article 35 § 1 of the Convention to avail himself of the new domestic remedy by pursuing domestic proceedings.

47. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

### B. Lack of effective remedy in respect of excessive length of the proceedings

48. Given that the applicant's complaint under Article 6 regarding the second poultry shed is rejected for non-exhaustion of domestic remedies, the related complaint under Article 13 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3(a) and 4 of the Convention.

### C. The remainder of the applicant's complaints

49. The applicant further complained that he was denied sufficient access to the Hannover Administrative Court within the meaning of Article 6 § 1 of the Convention as the court denied legal aid; in particular after it had decided that he had no longer *locus standi* in the proceedings. Invoking Article 2 of the Convention he further complained about the allegedly wrongful operating permissions for both poultry sheds that disregarded threats to his and his family's health.

50. The Court has examined the remainder of the applicant's complaints as submitted by him. However, having regard to all the material in its possession, the Court finds that, even assuming exhaustion of domestic remedies in all respects, these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

51. It follows that the remainder of the application must likewise be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3(a) and 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President