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Meeting: 1428th meeting (March 2022) (DH)

Item reference: Action Plan (28/02/2022)

Communication from Germany concerning the case of Meng v. Germany (Application No. 1128/17)

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Réunion : 1428^e réunion (mars 2022) (DH)

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Communication de l'Allemagne concernant l'affaire Meng c. Allemagne (requête n° 1128/17) (**anglais uniquement**)



Bundesministerium
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DGI

28 FEV. 2022

SERVICE DE L'EXECUTION
DES ARRÊTS DE LA CEDH

Berlin, 25 February 2022

Application Meng v. Germany (No. 1128/17)

Action Plan on the execution of the judgment of the European Court of Human Rights delivered on 16 February 2021, final 16 May 2021

A. Case description

The applicant is a German national who was born in 1964 and lives in Frankfurt am Main (Germany). The application concerns the impartiality of the competent Regional Court in criminal proceedings against the applicant, as required by Article 6 § 1 of the Convention. The presiding judge in the proceedings against the applicant, who had been charged with, and on 9 April 2014 was convicted of, the murder of her husband out of greed, jointly committed with G.S., had previously been the judge rapporteur in the criminal proceedings against G.S., whom the Regional Court, on 11 July 2011, had convicted of murder of the applicant's husband out of greed (as a single perpetrator). That latter judgment contained numerous references to the applicant, inter alia, with regard to the joint plan drawn up by her and G.S. for the killing of the applicant's husband and her contributions to the crime.

The Court found Germany to have violated the applicant's right to a fair trial under Article 6 of the Convention. The applicant had not been mentioned only in passing in the impugned judgment: it had contained extensive findings of fact also concerning the applicant and had assessed evidence taken at the trial also in respect of the applicant. The Regional Court had presented its findings regarding the applicant as established facts and established legal qualifications thereof, and not as mere suspicions. The Regional Court could thereby be seen to have made a legal assessment of the act also in respect of the applicant, in that it had found in substance that not only G.S., but also the applicant had acted out of greed and that the latter had thus participated in, and was equally guilty of, the murder. The applicant therefore had had a legitimate fear that judge M., in the light of the wording of the judgment

against G.S., had already reached a preconceived view on her guilt. The applicant's doubts as to the impartiality of the Regional Court in the present case had been objectively justified.

The Court did not award the applicant just satisfaction, because the applicant had not applied for it.

B. Individual measures

1. Identification of the consequences of the violation suffered by the applicant

Due to the composition of the tribunal that convicted her, the applicant had an objectively justified fear that it was not impartial (para. 63). Owing to an application of the available procedural remedies that was not complying with the requirements of the Convention, as now clarified by the Court, the defect was not remedied by the Federal Court of Justice (para. 64).

2. Reopening of the proceedings

According to Section 359 no. 6 of the Code of Criminal Procedure the reopening of the proceedings concluded by a final judgment shall be admissible for the benefit of the convicted person' benefit if the European Court of Human Rights has held that there has been a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and the judgment was based on that violation.

The applicant has exercised her right and applied for the reopening of the proceeding to the competent court (Regional Court Kassel) on 30 July 2021. For this purpose, the case files were transferred to the competent court to decide on the application. To date, the decision on the application to reopen the proceedings has not been taken yet.

The Federal Government commits to inform the Committee of Ministers about the reopening of the proceedings as soon as possible.

3. Payment of just satisfaction / reimbursement of costs and expenses

As the Court did not award the applicant just satisfaction, no just satisfaction was paid to the applicant.

4. Conclusion regarding individual measures

In light of the identified consequences that the applicant suffered from the violation (*supra* B.1), and the fact that the Court did not award the applicant just satisfaction, the Federal

Government considers that the possibility to apply for a reopening theof proceedings is the only appropriate redress to the applicant and that no further individual measures are indicated.

C. General measures

1. Isolated nature of the established violation

a) Identification and assessment of the source of the violation

The specific violation of the Convention resulting from the particular circumstances of the applicant's conviction and the failure by the higher courts to remedy a specific procedural defect, are rendering it - as will be shown below - an isolated case. Given that the violation was intrinsically linked to the case's circumstances and that the Court's decision will influence the application of the procedural safeguards by the German courts, similar issues in other cases are not to be expected in the future.

The isolated nature of the established violation derives from the specific factual findings on which the Court based its decision and which showcase that the violation stemmed from an application of the procedural safeguards in the specific case, that was not in compliance with the Convention.

The applicable subjective and objective tests to determine the impartiality of a judge in line with the Convention are by their very nature case-by-case-assessments (para. 44). In the absence of any indications of personal prejudice of judge M., the objective test was decisive in the present case (para. 53). Against this backdrop, the Court based its reasoning on the circumstances of the case at issue. It took into account in its examination the fact that the judgment against G.S. contained a detailed assessment of evidence concerning the applicant's involvement in the murder (paras. 59, 61) and presented its findings regarding the applicant as established facts (para. 60). By consequence the Court found that in its judgment against G.S. the Regional Court could be seen to have made a legal assessment of the act, also vis-à-vis the applicant (para. 61). It should be noted that the Court cited explicitly the wording of the judgement against G.S (paras. 58, 59). Finally, the Court recalled that a higher court might make reparations for defects that took place in the first-instance proceedings, but that the Federal Court of Justice upheld the judgment without remedying the defect in question (para. 64).

b) Convention-compliant interpretation of existing effective procedural safeguards regarding the impartiality of a judge

There are effective procedural safeguards in place in Germany for cases in which the impartiality of a judge is doubted, see Sections 22 et seq of the Criminal Procedural Code. In the case at hand, the Judge M. in question himself (Section 30 of the Criminal Procedural Code, para. 13) and the applicant (Section 24 of the Criminal Procedural Code, para. 15) had made use of these procedural instruments and the impartiality of Judge M. was reviewed by a different panel of three judges (para. 16). However, it is the application of these procedural instruments without due consideration of the conventional requirements in the specific case which led to the continuation of the violation of the applicant's rights.

German courts are bound by the Court's case law in the sense that they have to examine how the fundamental rights concerned in the case at hand can be interpreted in a way that complies with the Federal Republic's obligations under international law. By consequence, the Court's judgment will lead to the development of a Convention-compliant national case-law in terms of the application of the procedural instruments relating to the impartiality of the tribunal. In particular, the Court's judgment will have to be taken into account by the German courts in their interpretation of Section 24 of the Criminal Procedural Code on the challenge of a judge for fear of bias. As a consequence, the occurrence of similar violations will be ruled out in future.

2. Publication and dissemination of the judgment

The courts and authorities that were involved in the proceedings, whose decisions formed the basis of the application, have been notified of the judgment. Furthermore, a German translation of the judgment has been sent to all the ministries of justice of the Länder for notification within their remit.

In addition to this, a German translation of the judgment was published in anonymous form on the website of the German Federal Ministry of Justice in the Ministry's case-law database (www.bmj.de/egmr). Furthermore, the translation was sent to several important publishing houses that bring out legal periodicals.

Moreover, the judgment was included in the report drawn up in the Federal Ministry of Justice, entitled "Bericht über die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte und die Umsetzung seiner Urteile in Verfahren gegen die Bundesrepublik Deutschland im Jahr 2020" ("Report on the Case-Law of the European Court of Human Rights and on the Execution of its Judgments in Cases against the Federal Republic of

Germany in 2020"). This report will be widely disseminated and published on the Federal Ministry of Justice website at www.bmj.de.

In order to fuel the development of this case-law (*supra* C.1), the wide dissemination of the judgment, as undertaken by the Federal Government, is crucial. The Federal Government is satisfied to see the academic debate and media engagement which have followed the wide dissemination of the judgment. By way of example, reference is made to an article in the *Süddeutsche Zeitung* of 19 February 2021¹ and an academic comment on the judgement in the *Journal Neue Juristische Wochenschrift* by Prof. Nora Rządowski.²

3. Conclusion on the necessity of general measures

The assessment of the violation's roots has revealed that the violation was intrinsically linked to the specific circumstances and the specific application of the domestic safeguards in this specific case. Against the backdrop of the isolated nature of the violation and the general measures taken to disseminate widely the Court's judgment, which will lead to case law in conformity with the Convention, the Federal Government considers that the implementation of the judgment does not require any further general, in particular any legislative, measures.

D. Conclusion

The Federal Government considers that the possibility for a reopening of the proceedings (application currently pending) sufficiently redresses the violation suffered by the applicant and that the wide dissemination of the Court's judgment will prevent similar violations in future. Therefore, the Federal Government considers that the implementation of the judgment does not require the adoption of any measures than those already taken and that Germany has thus complied with its obligations under Article 46 paragraph 1 of the Convention. The Federal Government commits to inform the Committee of Ministers of the outcome of the application for reopening of the proceedings, as soon as possible.

¹ <https://www.sueddeutsche.de/politik/justiz-befangener-richter-1.5211795>.

² NJW 40, 2021, p. 2951.