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Judgment of the Court of Justice in Case C-297/07

Staatsanwaltschaft Regensburg v Klaus Bourquain

PROHIBITION ON BEING TRIED TWICE FOR THE SAME ACTS ALSO APPLIES TO A CONVICTION WHICH COULD NEVER HAVE BEEN DIRECTLY ENFORCED

This interpretation intends to ensure that no one is prosecuted for the same acts in several Member States on account of his having exercised his right to freedom of movement

Mr Klaus Bourquain, a German national serving in the Foreign Legion, was tried for desertion and homicide, found guilty in his absence and sentenced to death in 1961 by judgment of a French military tribunal in Algeria. That tribunal held it proved that Mr Bourquain, while attempting to desert, shot dead another legionnaire, also of German nationality, who tried to stop him from fleeing. Mr Bourquain, who took refuge in the German Democratic Republic, never appeared before the tribunal.

According to the Code of Military Justice applicable in 1961, the penalty would not have been enforced if Mr Bourquain had reappeared, but new proceedings instituted in his presence, and the possible imposition of a penalty would have depended on their outcome.

After the judgment of the military tribunal, no other criminal proceedings were instituted against Mr Bourquain in either France or Algeria. In 2002, the Public Prosecutor in Regensburg took steps to bring Mr Bourquain to trial in Germany for the crime committed in Algeria.

When the new proceedings were opened in Germany, the penalty imposed in 1961 could not be enforced in France for two reasons: it was time-barred and France had passed an amnesty law in respect of the events in Algeria.

The Landgericht Regensburg (Regional Court, Regensburg) before which the case was brought nevertheless had doubts regarding the lawfulness of the new criminal proceedings. It asked the Court to rule on the application, in the Schengen area, of the *ne bis in idem* principle. That principle means that a person whose trial has been finally disposed of in one State in the Schengen area cannot be prosecuted for the same acts in another State, inter alia when *the penalty can no longer be enforced*.

In its judgment delivered today, **the Court rules that the bar on being tried twice for the same acts also applies to a conviction which could never, on account of specific features of procedure, have been directly enforced.**

The Court explains first that, in principle, a conviction *in absentia* can also constitute a procedural bar to the opening of new criminal proceedings in respect of the same acts.

Second, the Court holds that the sentence pronounced in 1961, in Mr Bourquain's absence, is a final judgment, even though the penalty could not be directly enforced given the procedural obligation to open new proceedings if he were to reappear.

Equally, the Court rejects the argument that the *ne bis in idem* principle requires the penalty to be directly enforceable at the time when it is imposed; what is decisive is that the penalty can no longer be enforced when the new criminal proceedings are begun.

According to the Court, that interpretation is reinforced by the objective of the Schengen acquis, which is to ensure that no one is prosecuted for the same acts in several Member States on account of his having exercised his right to freedom of movement. That right to freedom of movement can be effectively guaranteed only if, in a situation such as that at issue in the main proceedings, the person can be sure that, once he has been convicted and when the penalty imposed on him can no longer be enforced under the laws of the sentencing State, he may travel within the Schengen area without fear of prosecution in another Member State.

In the case in the main proceedings, in which it is agreed that the penalty imposed was no longer capable of being enforced in 2002 when the second criminal proceedings were instituted in Germany, it would be contrary to the effective application of Article 54 of the CISA to rule out its application solely on the ground of the specific features of the French criminal proceedings which made enforcement of the penalty conditional on a further conviction pronounced in the presence of the accused.

Consequently, the Court holds that the bar on being tried twice for the same acts is applicable also to criminal proceedings instituted in a contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never, on account of specific features of procedure such as those referred to in the main proceedings, have been directly enforced.

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Languages available: FR CS DE EN ES EL HU IT NL PL RO SK

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-297/04>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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