



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF POPOVIC v. GERMANY

(Application no. 34236/06)

JUDGMENT

STRASBOURG

13 January 2011

FINAL

13/04/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Popovic v. Germany,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 7 December 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 34236/06) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Montenegrin national, Mr Milovan Popović (“the applicant”), on 11 August 2006.

2. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. On 21 April 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

4. The Federal Republic of Germany having accepted the provisional application of the provisions of Protocol no. 14 governing the power of three judge Committees to rule on cases in which there is a well-established case-law, it was decided to assign the application to a Committee after consultation of both parties, who did not object. On 2 March 2010 the Committee, having deliberated, decided to refer the application to a Chamber.

5. The Government of Montenegro, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), have not indicated that they wished to exercise that right.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1954 and lives in Hamburg.

A. The proceedings before the Hamburg Regional Court

7. On 13 November 1996 K., a dentist, brought an action in the Hamburg Regional Court against the applicant. He claimed the payment of medical fees amounting to DEM 20,708 (some EUR 10,587) for the applicant's dental treatment.

8. On 6 March 1997 the Regional Court held a hearing with the parties, represented by counsel. On 3 July 1997 it heard the submissions of the parties and a witness, the applicant's fiancée.

9. On 31 July 1997 the Regional Court decided to consult a medical expert, M., on the question of whether K. had carried out the applicant's dental treatment correctly.

10. On 14 May 1998 M., having examined the applicant on 19 December 1997, submitted his report to the Regional Court, which had asked him on three occasions to finalize the report and had finally fixed a deadline for its submission. He found that there had not been any malpractice in the applicant's dental treatment.

11. On 24 September 1998 the Regional Court dismissed the objection the applicant had made to expert M. on 15 June 1998. The applicant's appeal against this decision to the Hamburg Court of Appeal was to no avail.

12. On 12 February 1999 the Hamburg Regional Court asked expert M. to supplement his report and granted the applicant legal aid.

13. On 24 September 1999 the applicant requested the court to fix a deadline for submission of the additional expert report on pain of a fine in the event of non-compliance.

14. On 29 February 2000 expert M., having been asked by the Regional Court on 24 June 1999, 30 August 1999, 17 September 1999 and 14 January 2000 to submit his additional report without undue delay, informed the court that he had examined the applicant on 22 October 1999 but that, in the light of the present state of the art, it was impossible to answer the court's questions.

15. On 20 July 2000, having consulted the parties, the Hamburg Regional Court decided to obtain another expert opinion on the question of whether K. had carried out the applicant's dental treatment correctly. By a decision of 14 December 2000, it appointed S. as expert.

16. On 11 June 2001 expert S. submitted his report to the court. Having examined the applicant on 27 February 2001, he found that there had been malpractice in some aspects of the applicant's dental treatment by K.

17. On 15 January 2002 the Regional Court informed the applicant, on his request, that despite its heavy workload, it intended to continue the proceedings soon.

18. On 6 June 2002 the Regional Court held a hearing in which it discussed the results of the expert reports submitted by M. and S. with the parties. The applicant rejected the court's proposal to conclude a friendly settlement.

19. On 27 June 2002 the Regional Court, having regard to the diverging conclusions of the two experts it had consulted, decided to obtain a decisive expert opinion (*Obergutachten*) on the question of whether the applicant's dental treatment had been carried out correctly.

20. On 25 October 2002 the Hamburg Regional Court decided to appoint W. as expert. The latter fixed the date for the applicant's examination for 9 December 2003.

21. On 1 December 2003, in compliance with an expulsion order made by the Hamburg Aliens Office, the applicant left Germany. His attempt to obtain a postponement of his expulsion for ten days in order to allow him to be examined by expert W. had been to no avail.

22. On 9 September 2004 the Regional Court fixed the deadline for the applicant to present himself for an examination by the expert at 30 November 2004.

23. On 1 December 2004 the Regional Court decided that expert W. should give her opinion on the basis of the case file. It noted that it was unclear when the applicant, who still resided abroad, would obtain a residence permit and could thus be examined in person by the expert.

24. On 27 July 2005 expert W., having been asked by the Regional Court to finalize her report without delay, submitted her report to the Regional Court. She found that on the basis of the case file, the applicant's medical treatment by K. had been carried out correctly. She considered the information in the file to be exhaustive and stated that an examination of the applicant in person would not have yielded additional information.

25. On 1 August 2005 the applicant obtained permission to re-enter Germany. He took up residence in Hamburg on 3 August 2005.

26. On 27 October 2005 the Hamburg Regional Court, having held a hearing on 29 September 2005, allowed K.'s action and ordered the applicant to pay him medical fees amounting to EUR 10,587.93 plus interest at a rate of four per cent starting from 22 November 1996. The applicant was further ordered to bear the costs of the proceedings. The Regional Court found (in a judgment running to seven pages) that in view of the expert report submitted, in particular, by W., it had not been shown that the applicant's medical treatment had not been carried out correctly.

B. The proceedings before the Hamburg Court of Appeal

27. On 10 May 2006, in a reasoned decision, the Hamburg Court of Appeal dismissed the applicant's request for legal aid as his appeal had no prospects of success.

28. By decision of 19 June 2006 the Hamburg Court of Appeal dismissed the applicant's appeal as it had no prospects of success.

29. The applicant subsequently paid the court costs due in their entirety. He did not, however, pay the plaintiff the medical fees plus interest as ordered by the Regional Court's judgment and did not reimburse the plaintiff any of the latter's costs of the proceedings (EUR 2,846.95) for lack of any income or revenues.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained that the length of the civil proceedings instituted against him had been incompatible with the “reasonable time” requirement, laid down in Article 6 of the Convention, which, in so far as relevant, reads as follows:

“(1) In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

31. The Government contested that argument.

32. The period to be taken into consideration began on 13 November 1996 and ended on 19 June 2006. The proceedings thus lasted more than nine years and seven months for two levels of jurisdiction.

A. Admissibility

33. The Court considers that the applicant, who was the defendant in the proceedings at issue and lost the case before the domestic courts, may nevertheless claim to be the victim of a violation of Article 6 § 1 (compare, for instance, *Di Mauro v. Italy* [GC], no. 34256/96, §§ 10, 21-24, ECHR 1999-V). It further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

34. In the applicant's view, the duration of the proceedings brought against him had been plainly excessive. He took the view that he could not be blamed for not having been available for examination in 2004 as the Hamburg Aliens Office had refused to postpone the deadline for his departure in compliance with an expulsion order in order to allow him to present himself for examination by expert W. He stressed that he had suffered from the protracted length of the proceedings brought against him.

35. The Government conceded that the length of the proceedings had probably failed to comply with the "reasonable time" requirement under Article 6. There had indeed been delays of a couple of months in the complex proceedings before the Regional Court due to the heavy workload of its specialised chamber, the work of which could be assigned to different chambers only to a limited extent. However, that court had had limited means to compel the experts, whose reports had been in the applicant's interest, to speed up their examination. A large part of the duration of the proceedings before the Regional Court was attributable to the applicant. In particular, he had delayed the proceedings for some twelve months because, being in Montenegro, he had not been available for a medical examination by expert W. As the applicant had lost the action brought against him, it could no longer be said that what had been at stake in the proceedings had been of importance to him.

36. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

37. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above).

38. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. It notes, in particular, that the proceedings, which for a chamber specialized in cases concerning liability for medical malpractice do not appear to have been very complex, were pending before the Hamburg Regional Court for almost nine years. Delays which are attributable to the authorities were caused by the Regional Court's failure to further the proceedings because of its heavy workload (in particular between 11 June 2001 and 6 June 2002) and notably by its failure to employ the necessary means in order to obtain medical expert advice more speedily. While it is true that the applicant, due to his compliance with an expulsion order, could not be examined in

December 2003, the Court observes that he had failed in his attempt to obtain a postponement of his expulsion with the German authorities in order to be able to present himself for examination. In these circumstances, the delay caused by his unavailability for examination in 2003, when the proceedings were already pending for more than seven years, cannot be attributed to him. In view of the fact that the applicant – who, since 1999, was considered by the Regional Court to lack sufficient means to conduct the proceedings brought against him and was therefore granted legal aid – was faced with a claim of a considerable amount of money (more than EUR 10,000), the Court also considers that what was at stake in the proceedings was of importance for the applicant.

39. Having regard to its case-law on the subject, the Court therefore considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement. There has accordingly been a breach of Article 6 § 1.

II. THE REMAINDER OF THE APPLICANT'S COMPLAINTS

40. The applicant further complained under Article 6 §§ 1 and 3 (d) of the Convention that the civil proceedings instituted against him had been unfair because the domestic courts had not considered the testimony of his fiancée to be credible and had allowed the plaintiff's action. He further submitted that the medical fee claimed by the plaintiff was in breach of Article 7 of the Convention. Moreover, the applicant claimed that he had not had an effective remedy within the meaning of Article 13 of the Convention before the domestic courts because they had wrongly found against him.

41. The Court has examined the remainder of the applicant's complaints, which fall to be examined under Article 6, as submitted by him. However, having regard to all material in its possession, the Court finds that the applicant did not exhaust domestic remedies because, in any event, he failed to obtain a decision by the Federal Constitutional Court.

42. It follows that the remainder of the application must be rejected for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

44. The applicant considered that in view of the delays caused by the Regional Court, the payment of pecuniary and non-pecuniary compensation to him was appropriate. He claimed, in particular, 12,782.30 euros (EUR) for the costs incurred for his dental treatment.

45. The Government contested the applicant's claim for pecuniary damages and argued that he had failed to demonstrate that this damage had been caused by the length of the proceedings. They argued that the applicant had in fact profited from the delays in the proceedings because he had only been ordered to pay interest at a (low) rate of four per cent on the medical fees he has been owing to the plaintiff since 1996 – a rate at which he would not have been able to take up a loan himself at the relevant time.

46. The Government further submitted that in view of the considerable delays caused by the applicant in the complex proceedings at issue and in view of the fact that the applicant, as shown above, had benefitted from the delays in economic terms, the finding of a violation was in itself sufficient redress for non-pecuniary damage.

47. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

48. As to the non-pecuniary damage the applicant alleged to have suffered, the Court notes that owing to the delays in the proceedings, the plaintiff's claim against the applicant, which the civil courts considered well-founded, remained unenforceable for a considerable time and could no longer be enforced when the proceedings were terminated by a final judgment as the applicant was without means. It considers that the applicant nevertheless suffered distress from the protracted length of the proceedings in view of the ongoing uncertainty about his obligation to pay a considerable amount of money. Having regard to all the elements before it and ruling on an equitable basis, the Court therefore awards him EUR 5,000 under that head, plus any tax that may be chargeable.

B. Costs and expenses

49. Submitting documentary evidence, the applicant claimed EUR 3,300.27 for fees paid to his lawyers (EUR 2,300.81 to his lawyer representing him before the Regional Court and EUR 999.46 to his counsel before the Court of Appeal).

50. The Government contested these claims for lack of a causal connection between these costs and the duration of the proceedings.

51. With regard to the sums claimed in respect of the costs of the proceedings before the domestic courts, the Court, having regard to the documents in its possession, considers that it is not in a position to calculate the exact amount of additional costs accrued only as a result of the length of

these proceedings. It further observes that from February 1999 onwards, the applicant was granted legal aid in the proceedings before the Regional Court. In these circumstances, the Court rejects the claim for costs and expenses under this head. As the applicant did not submit a claim for costs and expenses incurred in the proceedings before this Court, the Court does not make an award in this respect either.

C. Default interest

52. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President