



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

FIFTH SECTION

CASE OF KÜBLER v. GERMANY

(Application no. 32715/06)

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 Kübler v. Germany,

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

Peer Lorenzen, *President*,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges*,
Bertram Schmitt, *ad hoc judge*,

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. 32715/06) 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 German national, Mr Tobias Kübler (“the applicant”), on 9 August 2006.

2. The applicant was represented by Mr C. Lenz, a lawyer practising in Stuttgart. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. The applicant complained, in particular, about a violation of his right to effective access to a court.

4. On 23 June 2009 the Court declared the application partly inadmissible and decided to communicate the complaint concerning access to a court to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mrs R. Jaeger, the judge elected in respect of Germany, having withdrawn from sitting in the case, the Government appointed Mr Bertram Schmitt to sit as an *ad hoc* judge.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in Stuttgart.

7. The applicant has been practising as a lawyer since 1989. In November 2001 the applicant applied for one of the six posts of advocate notary (*Anwaltsnotar*) officially advertised by the Baden-Württemberg Ministry of Justice (hereafter: “the Ministry of Justice”) enabling qualified lawyers to practise simultaneously as a solicitor and as a notary in the Stuttgart court circuit.

1. Proceedings prior to the remittal by the Federal Constitutional Court

8. On 18 March 2002 the Ministry of Justice informed the applicant that it intended to appoint six other lawyers as advocate notaries. The applicant's subsequent request to compel the Ministry of Justice to review its decision was dismissed by the Stuttgart Court of Appeal.

9. On 31 March 2003 the Federal Court of Justice rejected the applicant's appeal.

10. On 3 April 2003 the applicant informed the Ministry of Justice that he intended to lodge a constitutional complaint with and apply for interim legal protection to the Federal Constitutional Court. He requested the Ministry of Justice to await the outcome of the proceedings before the Federal Constitutional Court before appointing the advocate notaries.

11. On 7 April 2003 the Ministry of Justice informed the applicant it would no longer wait to make the appointments.

12. On 9 April 2003 the applicant lodged a constitutional complaint and requested the Federal Constitutional Court to grant him interim legal protection, arguing that there was a danger that the Ministry of Justice would appoint the advocate notaries and thus create irreparable damage to him.

13. On 10 April 2003 the Federal Constitutional Court granted the applicant interim legal protection and ordered the Ministry of Justice to keep one post of advocate notary free until the statutory time-limit for the submission of the grounds for the applicant's constitutional complaint had elapsed. On the same day the Federal Constitutional Court sent its decision by fax to the Ministry of Justice.

14. Nonetheless, on 10 April 2003 the Ministry of Justice appointed five notaries. On the following day it appointed the sixth notary.

15. On 29 April 2003 the Ministry of Justice informed the Federal Constitutional Court that it had received the court's interim injunction on 10 April 2003, but that this had been submitted to the competent head of

division in the Ministry only on 14 April 2003. However, it also announced that it would advertise a further post as advocate notary as of 30 June 2003.

16. On 14 May 2003 the applicant submitted the reasons for his constitutional complaint to the Federal Constitutional Court, which extended its interim injunction on 3 June 2003, 19 November 2003 and 4 May 2004, until such time as it had issued its final decision on the applicant's constitutional complaint.

17. On 8 October 2004 the Federal Constitutional Court found for the applicant. First, it held that the applicant's constitutional complaint had not become inadmissible following the appointment of the six notaries by the Ministry of Justice. In particular, the applicant had an interest in a declaration that the application procedure had been unconstitutional and in a fresh examination of his application or, if that was impossible, in being granted compensation. The right to an effective remedy under Article 19 § 4 of the German Basic Law permitted the continuation of the proceedings before the Federal Constitutional Court, since the Ministry of Justice had failed to abide by its interim injunction.

18. On the merits, the Federal Constitutional Court found that the recruitment procedure as practised by the Ministry of Justice had violated the applicant's freedom of profession as guaranteed by Article 12 of the Basic Law and the principle of equal access to public office as provided for by Article 33 § 2 of the Basic Law (see “Relevant domestic law” below), mainly because it had not taken sufficient account of the relevant professional experience of the candidates. The Federal Constitutional Court remitted the case to the Court of Appeal for fresh consideration, as “it was not excluded that [the applicant], who had obtained better results in the second state exam and had more relevant professional experience than the candidate who, on account of his seniority, was appointed as sixth advocate notary in the recruitment procedure, could succeed in the initial proceedings if his application was reassessed.”

2. Proceedings after the remittal by the Federal Constitutional Court

19. On 7 April 2005 the Stuttgart Court of Appeal quashed the decision of the Ministry of Justice of 18 March 2002 and compelled it to reassess the application, taking into account the findings of the Federal Constitutional Court.

20. On 28 November 2005 the Federal Court of Justice quashed the Court of Appeal's decision. It found that the applicant had lacked an interest in a decision compelling the Ministry of Justice to appoint him as an advocate notary or to reassess his application, as the Ministry had already allocated the six notary posts to other applicants. Thus the principle of stability of office (*Grundsatz der Ämterstabilität* – see “Relevant domestic law” below) prohibited the annulment of one of the six appointments. Furthermore, it was impossible to allocate the applicant the next available

notary post or to create a new post for him as this would infringe the rights of other potential candidates and be in violation of section 4 of the Federal Notaries Act (*Bundesnotarordnung* - see “Relevant domestic law” below). The court held that its findings complied with the Federal Constitutional Court's decision of 8 October 2004, which had not specified the manner in which the applicant should obtain redress. It was thus possible that the applicant could be granted redress in official liability proceedings rather than having his application re-examined.

21. On 29 March 2006 the Federal Constitutional Court refused to admit the applicant's constitutional complaint. It found that the applicant could not attain more with the second constitutional complaint than he had already obtained in its decision of 8 October 2004. In that decision the Federal Constitutional Court had not specified the manner in which the lower courts were to grant the applicant legal protection. It had referred to two options, namely the reassessment of the applicant's application by the Ministry of Justice or compensation for damage. It was thus still open to the applicant to request damages in official liability proceedings.

3. Proceedings challenging the appointment of the sixth notary

22. On 27 November 2003 the Stuttgart Court of Appeal dismissed the applicant's request to annul the appointment of the sixth advocate notary. It found that even if this appointment had been unlawful, it could not be annulled. In particular, the applicant had not submitted any reason allowing for the revocation of an appointment of a notary under the relevant provisions of the Federal Notaries Act.

23. On 10 August 2004 the Federal Court of Justice rejected the applicant's appeal as the principle of stability of office did not allow for revoking the appointment of notaries. Equally, it was not possible to create a special post as an advocate notary for the applicant.

24. On 26 October 2004 the Federal Constitutional Court declared the applicant's constitutional complaint inadmissible, as its decision of 8 October 2004 had already given him the possibility to have the lawfulness of the recruitment procedure reviewed by the lower courts. He therefore lacked standing for this constitutional complaint.

4. Official liability proceedings

25. In 2006 the applicant instituted official liability proceedings against the *Land* Baden-Württemberg before the Stuttgart Regional Court, on the ground that the Ministry of Justice had appointed the sixth advocate notary in spite of the Federal Constitutional Court's interim injunction in his favour.

26. On 22 February 2008 the Stuttgart Regional Court dismissed the applicant's action. It found that, irrespective of the possibility that the

Ministry of Justice could have breached its official duty when disregarding the Federal Constitutional Court's interim injunction, there had been no causal connection between the applicant's damage and the alleged breach of duty. Had the Ministry of Justice complied with the interim injunction, it would have halted the recruitment procedure, refrained from appointing the advocate notaries and started a fresh recruitment procedure for the six posts. During such a procedure it would have assessed the new applications in accordance with the Federal Constitutional Court's decision of 8 October 2004. However, it remained totally unclear whether the applicant could have succeeded in such a fresh procedure with a new field of candidates.

27. On 25 April 2008 the applicant appealed that decision before the Stuttgart Court of Appeal.

28. On 21 January 2009 the Stuttgart Court of Appeal requested the *Land* of Baden-Württemberg to submit a written statement on whether a fresh recruitment procedure would have led to the applicant being selected for one of the six notary posts. On 22 July 2009 the *Land* submitted its written opinion, alleging that the applicant under no conceivable circumstances would have ranked among the six top candidates. In July 2010, the proceedings were still pending before the Stuttgart Court of Appeal.

29. By e-mail dated 23 July 2010 the presiding judge of the Stuttgart Court of Appeal informed the applicant's counsel that he was obliged to postpone the hearing originally scheduled for 17 November 2010 to the second half of February 2011. This was due to the fact that the senate had to hear other, more urgent cases, which had to be prepared by the same rapporteur judge. Even taking into account the length of the instant proceedings, the presiding judge considered the applicant's case to be less urgent for the following reasons: If the applicant should obtain compensation, he would be awarded interests at a rate which exceeded the interest rates which could be obtained elsewhere. If he should lose his action, some additional months would not matter.

B. Relevant domestic law and practice

1. Provisions of the Basic Law

30. Article 12 § 1 of the Basic Law provides that all Germans have the right to freely choose their profession, their place of work, and their place of training.

31. Under Article 33 § 2 of the Basic Law every German is equally eligible for any public office according to his or her aptitude, qualifications and professional achievements.

32. Article 33 § 5 of the Basic Law provides that the law governing public service is to be regulated with due regard to the traditional principles of the professional civil service. One of the latter is the principle of stability of office, according to which appointments to public office are not to be revoked or annulled following legal remedies instituted by unsuccessful candidates.

2. Notarial law

33. Some *Länder*, like Baden-Württemberg, provide for the possibility for qualified lawyers to be appointed as so-called “advocate notaries” (*Anwaltsnotare*) enabling them to exercise the profession as notary alongside their activity as solicitors. Advocate notaries (like single profession notaries) are “independent holders of a public office” who are appointed by the competent judicial authority. Once officially appointed, notaries do not receive a salary from the state, but charge fees (fixed by law) to the parties. As a rule, notaries do not enjoy the status of civil servants.

34. The Federal Notaries Act lays down the access requirements, the rights and obligations of notaries and their organisation and functions. It is complemented by respective orders of the *Länder*.

35. Section 4 of the Federal Notaries Act provides that the number of appointments of notaries is to be restricted to what is necessary to ensure the sound administration of justice. In particular, the number of notaries must correspond to the need of individuals to be provided with notarial services, and a balanced age structure must be ensured in the profession of notary. In Baden-Württemberg the Ministry of Justice has responsibility for and discretion in deciding on this need (*Organisationsermessen*) and therefore in fixing the number of advocate notaries. In so doing it takes account of the average number of notarisations taking place within the areas of the various district courts. Once the Ministry of Justice has decided to create a new notary post, it publishes – in compliance with section 6 (b) of the Federal Notaries Act – a vacancy notice for the Court of Appeal district (*Oberlandesgerichtsbezirk*) in which such a need has been identified.

36. According to section 111 of the Federal Notaries Act, disputes surrounding the appointment and selection of notaries are adjudicated by the civil Court of Appeal (*Oberlandesgericht*) and in the second instance by the Federal Court of Justice. Since 1 September 2009, the proceedings are governed by the Administrative Courts Act (*Verwaltungsgerichtsordnung*, see section 111b of the Federal Notaries Act).

3. Provisions governing official liability

37. Pursuant to Article 34 of the Basic Law, taken in conjunction with Article 839 of the Civil Code, the State or a public body is liable to pay compensation to an individual for any damage arising from an intentional or

negligent breach of official duties committed by its officials. No such obligation to afford redress arises where the injured party has wilfully or negligently omitted to avoid the damage by means of another legal remedy.

THE LAW

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

38. The applicant complained that the Baden-Württemberg Ministry of Justice's failure to comply with the Federal Constitutional Court's interim injunction of 10 April 2003 and the non-enforcement of the Federal Constitutional Court's decision of 8 October 2004 violated his right to effective access to a court as provided in Article 6 § 1 of the Convention, which, insofar as relevant, reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

39. The Government contested these arguments.

A. Admissibility

1. Applicability of Article 6 § 1

(a) The Government's submissions

40. The Government considered that Article 6 of the Convention was not applicable in the instant case, as neither the interim proceedings nor the main proceedings concerned a civil right within the meaning of Article 6 § 1. Relying on the Court's judgment in the *Pellegrin* case (*Pellegrin v. France* [GC], no. 28541/95, § 59; § 64 *et s.*, ECHR 1999-VIII), they submitted that disputes on recruitment to civil service fell outside the scope of Article 6 § 1, as neither the Convention nor the protocols thereto guaranteed such right. This principle remained unchanged by the Court's judgment in the *Vilho Eskelinen* case (*Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-IV, 8 August 2006). The office of a notary had to be regarded as part of the civil service, as he performed functions which were manifestations of public authority. It followed that the right to equal access to the notary profession derived from Article 12 in conjunction with Article 33 § 2 of the Basic Law did not qualify as a “civil” right within the meaning of Article 6 § 1.

41. Relying on the Court's judgment in the case of *Micallef v. Malta* ([GC], no. 17056/06, § 83 *et s.*, ECHR 2009-...) the Government further

submitted that Article 6 § 1 was not applicable to the interim proceedings, because they did not effectively determine a civil right.

(b) The applicant's submissions

42. According to the applicant, the right of access to the office of advocate notary qualified as a “civil right” within the meaning of Article 6 § 1 of the Convention and the relevant case-law of the Court. The competent authority did not have any discretion when selecting those candidates which were best suited to hold the office. Advocate notaries were free entrepreneurs who did not receive any remuneration from the Government and did not exercise any functions which belonged to the core-area of public law. They did not even exercise any official authority within the meaning of Article 51 § 1 of the Treaty on European Union.

43. The applicant further submitted that Article 6 § 1 was applicable also to the interim proceedings because the failure to comply with the interim injunction annihilated the applicant's claim to be appointed as notary advocate.

(c) The Court's assessment

44. The Court reiterates that Article 6 § 1 secures the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Osman v. the United Kingdom*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, p. 3166, § 136, and *Cordova v. Italy* (no. 1), no. 40877/98, § 48, ECHR 2003-I). This right extends only to disputes (“contestations”) over “civil rights and obligations” which can be said, at least on arguable grounds, to be recognised under domestic law (see, among other authorities, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 46-47, § 81, and *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, p. 16, § 36).

45. As regards the “civil” nature of such right, the Court held that the approach developed in the case of *Vilho Eskelinen* (cited above) also applies to the right of access to a public office (see *Josephides v. Cyprus*, no. 33761/02, § 54, 6 December 2007; *Lombardi Vallauri v. Italy*, no. 39128/05, § 62, ECHR 2009-... (extracts) and *Penttinen v. Finland* (dec.), no. 9125/07, 5 January 2010). It is thus for the Contracting States, in particular the competent national legislature, and not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way. If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6. If it does not, then there is no issue and Article 6 § 1 will apply irrespective of whether the applicant seeks

reinstatement or some other form of pecuniary redress (see *Vilho Eskelinen*, §§ 61-62 and *Penttinen*, both cited above).

46. Turning to the circumstances of the instant case, the Court notes, at the outset, that the applicant had a constitutional right to equal access to the office of advocate notary. With regard to the second condition, the Court observes that under section 111 of the Federal Notaries Act, disputes surrounding the appointment and selection of notaries are adjudicated by the civil courts. It follows that the applicant's right of access to a court to challenge the lawfulness of the decision not to appoint him advocate notary had not been excluded by the domestic law. The Court therefore concludes that Article 6 of the Convention is applicable to the present case.

47. The Court further reiterates that the applicability of Article 6 on interim proceedings will depend on the following conditions: First, the right at stake in both the main and the injunction proceedings should be "civil". Second, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable (see *Micallef*, cited above, §§ 84-85).

48. The Court, having already established above that the right claimed by the applicant has to be regarded as "civil" within the meaning of Article 6 § 1, observes that the interim measure issued by the Federal Constitutional Court was aimed at preventing the Ministry of Justice from filling all notary posts before the termination of the main proceedings. Having regard to the fact that only a certain number of notary posts was available and that it was impossible to revoke the appointment of an advocate notary even if another candidate's claim was successful, the Court finds that the interim measure had a direct effect on the civil right at stake. It follows that Article 6 is applicable to the interim proceedings and that the instant complaint is not inadmissible *ratione materiae* with the provisions of the Convention.

2. Exhaustion of domestic remedies/Status as a victim

(a) The Government's submissions

49. According to the Government, the applicant failed to exhaust domestic remedies. They point out that in the official liability proceedings, which remained pending before the domestic courts, important factual questions had to be answered which were decisive for assessing whether the impugned conduct violated the applicant's Convention rights. This applied, in particular, to the question of whether the applicant's application for the post of a notary would have been successful if it had been freshly assessed on the basis of the selection criteria prescribed by the Federal Constitutional Court. According to the Government, the Court's case-law on non-compliance with final judicial decisions could not simply be applied to

the present case because this matter did not involve the implementation of a final decision. Interim injunctions did not constitute an end in themselves, but served as a means with regard to the determination on the merits. It followed that a failure to comply with the interim injunction could only lead to a violation of Article 6 if it caused a disadvantage with respect to the merits of the case.

50. Furthermore, the applicant could not claim to be a victim of a violation of his Convention rights within the meaning of Article 34 of the Convention, as he did not suffer any disadvantage because of the failure to comply with the Federal Constitutional Court's interim injunction. Referring to the submissions filed by the *Land* of Baden-Württemberg in the official liability proceedings, the Government alleged that the applicant would not have been appointed as notary even if the interim order had been respected, because other candidates had been better qualified.

51. Even assuming that the Stuttgart Court of Appeal should award the applicant damages for the non-compliance with the interim order, the award of compensation would constitute adequate reparation and the applicant would thus cease to be a victim of a violation of his Conventions rights.

(b) The applicant's submissions

52. The applicant submitted that the question as to whether he would have been appointed notary advocate if the domestic authorities had respected the interim injunction was irrelevant with regard to his status as a victim of a violation of Article 6 § 1 of the Convention. The causality of the procedural violation was irrelevant to the establishment of a violation of the Convention. The failure to comply with the interim order had deprived him of any legal protection against the appointment of the other candidates. This violation of his procedural rights had not ceased to exist.

53. Relying on the *Hornsby* case (*Hornsby v. Greece*, 19 March 1997, § 37, *Reports of Judgments and Decisions* 1997-II) the applicant further considered that he was not obliged to await the outcome of the official liability proceedings in order to exhaust domestic remedies. Because of the failure to comply with the interim order, he had been deprived of legal protection in the main proceedings. The granting of compensation would not be equivalent to the appointment to the position of notary. It followed that the action for damages could not eliminate his status as a victim. The applicant further submitted that the *Land* of Baden-Württemberg purposefully delayed the compensation proceedings, as was demonstrated by the Stuttgart Court of Appeal's postponement of the court hearing.

(c) The Court's assessment

54. The Court considers that the Government's objections raise questions which are closely linked to the merits of the complaint and should be considered together. The Court therefore decides to join the Government's

objections concerning the exhaustion of domestic remedies and the applicant's status as a victim to the merits of the complaint.

3. The substance of the complaint

55. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It is therefore to be declared admissible.

B. Merits

1. The applicant's submissions

56. The applicant submitted that the Government had failed to respect his right of access to a court in two respects: firstly, they had failed to comply with the interim injunction issued by the Federal Constitutional Court, thus effectively annihilating his claim to be appointed as advocate notary. Secondly, the domestic courts had failed to execute the Federal Constitutional Court's final decision of 8 October 2004. According to the applicant, the Federal Court of Justice had been obliged freshly to assess the applicant's request to be appointed notary. Instead, it declared all the applicant's motions inadmissible. There were no relevant reasons to deny him the award of an advocate's post. In particular, there was no valid reason which would prohibit revoking the appointment of the successful candidate. Furthermore, there were no sufficient reasons not to award him an additional post.

57. The execution and enforcement of court decisions was an integral part of a fair trial within the meaning of Article 6 § 1 of the Convention. In this respect, the Court did not distinguish between the main proceedings and interim legal protection. Referring to the binding nature of the Court's interim injunctions (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I), the applicant argued that the same standards had to be applied in the domestic proceedings. The applicant further submitted that the right to interim legal protection was guaranteed under the German constitution and that the compliance with the interim injunction had been crucial for the outcome of the proceedings.

2. The Government's submissions

58. The Government contested these arguments. According to the Government, the decision of the Federal Constitutional Court dated

8 October 2004 had been enforced, respectively, was in the process of being enforced. The Government pointed out that the operative part of the decision merely set aside the impugned decisions and referred the case back to the Court of Appeal. There was no doubt that these direct legal effects had been respected.

59. According to the Government, the Federal Constitutional Court did not issue a decision as to how the applicant's rights were to be satisfied following the referral of the case. It rather stated that either a new decision on his application or – in case this was not possible – an entitlement to compensation for damages would be an option. This had been confirmed by the decision of the Federal Constitutional Court of 29 March 2006. It was up to the domestic courts to assess whether the applicant could further pursue his claim to be appointed as notary under domestic law. The decision reached by the Federal Court of Justice had been well-reasoned and could not be regarded as arbitrary. The question whether the applicant was entitled to damages remained to be determined in the liability proceedings.

3. The Court's assessment

60. The Court reiterates that Article 6 § 1 secures to everyone the “right to a court”, which encompasses the right to have a final judgment given by any court executed (see, among many other authorities, *Hornsby*, cited above, § 40, and *Gulmammadova v. Azerbaijan*, no. 38798/07, § 35, 22 April 2010).

(a) Non-compliance with the Federal Constitutional Court's interim decision of 10 April 2003

61. The Court observes that the object of an interim measure is to maintain the *status quo* pending a court's determination of the justification for the measure. In addition, the interim measure is aimed at assuring that, for the duration of the main proceedings, the court remains able to examine the applicant's claim under its normal procedure (see, *mutatis mutandis*, *Mamatkulov and Askarov*, cited above, § 108). Being intended to ensure the continued existence of the matter that is the subject of the motion at issue, the interim measure goes to the substance of the proceedings. The Court therefore considers that a State organ's failure to comply with an interim measure issued by a domestic court in the course of proceedings on the determination of civil rights can, under certain circumstances, amount to a violation of the applicant's right of access to a court under Article 6 § 1 of the Convention.

62. First, and in line with the Court's case-law on the execution of final judgments and decisions (see paragraph 59, above), the interim measure has to be binding on the State organ concerned. Second, the failure to respect the interim measure has to have had a direct impact on the course of the

main proceedings in that it effectively curtailed the applicant's procedural rights to have his case examined by a court.

63. The Court further observes that the object of an interim measure is to preserve and protect the rights and interests of a party before a court, pending a final decision. It follows from the very nature of interim measures that a decision on whether they should be indicated in a given case will often have to be issued within a very short lapse of time. Consequently, the full facts of the case will often remain undetermined until the final judgment on the merits is given. It is precisely for the purpose of preserving a court's ability to render such a judgment after an effective examination of the facts and the underlying law that an interim order is granted (see, *mutatis mutandis*, *Paladi v. Moldova* [GC], no. 39806/05, § 89, ECHR 2009-....). Consequently, the fact that the damage which an interim measure was designed to prevent subsequently turns out not to have occurred despite a failure to comply with the interim measure has to be regarded as being irrelevant for the assessment whether there has been a violation of the applicant's rights under Article 6 § 1. The Court therefore considers that it does not have to be established in the present context as to whether the applicant would have been appointed advocate notary if the Ministry of Justice had complied with the interim injunction and reserved a post for him.

64. Turning to the circumstances of the instant case, the Court notes that on 10 April 2003 the Federal Constitutional Court, by interim injunction, ordered the Baden-Württemberg Ministry of Justice to keep one post of advocate notary free pending further examination of the applicant's constitutional complaint. The Federal Constitutional Court extended its interim injunction until such time that it had issued its final decision. Notwithstanding, on 10 and 11 April 2003 the Ministry of Justice filled all vacant notary posts by appointing other candidates. The Court further observes that it has not been disputed by the Government that the interim order given by the highest German court had been binding on the Ministry of Justice.

65. With regard to the further course of the proceedings before the domestic courts, the Court notes that the Federal Constitutional Court considered that the recruitment procedure had violated the applicant's constitutional rights and remitted the case to the lower courts for fresh consideration. Following the remittal, the Federal Court of Justice declared the applicant's motion inadmissible on the grounds that the applicant had lacked an interest in a decision compelling the Ministry of Justice to appoint him as an advocate notary or to reassess his application because the Ministry of Justice had already allocated all available posts to other candidates. It follows that the Ministry of Justice's failure to comply with the interim injunction deprived the applicant of having the merits of his

complaint examined in the main proceedings. Consequently, the applicant's procedural rights have been effectively curtailed.

66. The foregoing considerations are sufficient to enable the Court to conclude that the Ministry of Justice's failure to comply with the interim order violated the applicant's right to access to a court. There has accordingly been a violation of Article 6 § 1 of the Convention.

(b) Non-enforcement of the Federal Constitutional Court's decision of 8 October 2004

67. With regard to the alleged non-enforcement of the Federal Constitutional Court's decision in the main proceedings, the Court notes, at the outset, that the operational part of that decision merely proscribed that the case be remitted to the lower courts for fresh consideration. This part of the Federal Constitutional Court's decision has been complied with by the lower courts.

68. The Court further observes that the Federal Constitutional Court found on the merits that the recruitment procedure as practiced by the Ministry of Justice had violated the applicant's right to freedom of profession because it had not taken sufficient account of the candidate's professional experience. While considering that it was not excluded that the applicant could succeed in the initial proceedings if his application was reassessed, the Federal Constitutional Court also considered that the applicant could be awarded compensation if it was impossible to award him a notary post. It follows that the Federal Constitutional Court did not issue any binding decision as to how its decision was to be implemented. Under these circumstances, the Court considers that it has not been established that the lower courts had failed to execute the Federal Constitutional Court's decision. There has accordingly been no violation of Article 6 § 1 in this respect.

4. The Government's objections

69. Examining the Government's objection as to the exhaustion of domestic remedies (see paragraphs 48-49 above) in the light of the above considerations, the Court reiterates that under Article 35 of the Convention, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. 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, *inter alia*, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII).

70. Turning to the circumstances of the present case, the Court notes that the applicant instigated official liability proceedings in 2006. Following the rejection of his claim by the Stuttgart Regional Court on 22 February 2008, the proceedings are currently pending before the Stuttgart Court of Appeal.

The Court observes that through the official liability proceedings, the applicant seeks compensation for not having been awarded the post of an advocate notary. This claim presupposes that the applicant would have been awarded the post if the Ministry of Justice had complied with the interim injunction issued by the Federal Constitutional Court. As regards the prospect of success of the compensation claim, the Court notes that the applicant's claim has been rejected by the first instance court for lack of causation. The Court takes further note of the Government's submissions according to which the applicant's compensation claim lacked prospect of success because he would not have been appointed notary even if the Ministry of Justice had complied with the interim order.

71. As the Court has found (see paragraph 62, above), the establishment of a violation of the applicant's right of access to a court under Article 6 § 1 of the Convention does not depend on whether he sustained any material damage as a result thereof. In this respect, the criteria applied by the Court differ from those applied by the domestic courts in the official liability proceedings. Having regard to these circumstances and to the uncertainties which remain regarding the outcome of the liability proceedings, the Court considers that the applicant could not be reasonably expected to await the outcome of the liability proceedings before lodging his complaint with the Court. It follows that the applicant has to be considered as having exhausted domestic remedies as required by Article 35 § 1 of the Convention.

72. With regard to the applicant's status as a victim, the Court observes that the applicant has, so far, not been awarded any redress for the violation of his rights under Article 6 § 1 of the Convention. It follows that the applicant has not lost the status of a victim within the meaning of Article 34 § 1 of the Convention. It follows that the Government's objections are to be rejected.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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

74. The applicant claimed 1,078,254.70 euros (EUR) in respect of loss of income for the period of time from 16 October 2004 to 31 December 2010. He further claimed EUR 150,000.00 per year for the period of time from 2011 until reaching retirement age in 2030.

The applicant also claimed compensation for non-pecuniary damage for having been deprived of the possibility to become notary, which he assessed at EUR 10,000 per year for the years 2004 to 2010.

75. According to the applicant, he would have been appointed advocate notary on 16 October 2004 if the Baden-Württemberg Ministry of Justice had complied with the interim injunction issued by the Federal Constitutional Court. The sum claimed was compensation for the “real loss of opportunity” suffered by him as a result of the violation of the rights under Article 6 § 1 of the Convention. Relying on the Court's judgment in the *Oğur* case (*Oğur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III), the applicant considered that the decision on his just-satisfaction claims could not be postponed as this would further delay his receipt of compensation.

76. The Government considered that the question of pecuniary damage was not ready for decision by the Court, as the issue whether the applicant would have been appointed advocate notary if the interim injunction had been complied with was the subject of the pending official liability proceedings. The Government invited the Court to postpone its decision on the applicant's just satisfaction claim until a final decision was reached in the official liability proceedings, which could be expected in the foreseeable future.

77. Alternatively, the Government submitted that there was no causal connection between the violation of his Convention right and the alleged damage, as the applicant would not have been appointed notary advocate even if the interim injunction had been complied with. They further considered that the calculation of the alleged loss of income was based on incorrect data.

78. Having regard to the official liability proceedings pending before the Stuttgart Court of Appeal, the Court considers that the question of the application of Article 41 is not ready for decision in so far as pecuniary and non-pecuniary damage is concerned. Accordingly, it shall be reserved until the termination of these proceedings.

B. Costs and expenses

79. The applicant also claimed EUR 29,278.19 for the costs and expenses incurred before the domestic courts and EUR 30,042.55 for those incurred before the Court.

80. The Government submitted that the sums claimed for the proceedings before the domestic courts had not been incurred in an attempt to avert the violation of the applicant's Convention right. Furthermore, the sums claimed were not reasonable as to quantum.

81. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were

actually and necessarily incurred and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, for example, *Gäfgen v. Germany* [GC], no. 22978/05, § 196, ECHR 2010-...).

82. As to the costs and expenses claimed for the proceedings before the domestic courts, the Court considers that the costs claimed by the applicant were only partially incurred in an attempt to rectify the violation of the applicant's Convention rights and were as a whole excessive. It therefore considers it reasonable to award the applicant EUR 3,500 under this head.

83. As to the costs and expenses incurred in the proceedings before it, the Court, taking into account that the applicant's claims before the Court were only partly successful, considers it reasonable to award the applicant EUR 5,500 under this head, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

84. 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. *Joins to the merits* the Government's objections regarding the non-exhaustion of domestic remedies and the applicant's status as a victim and rejects them;
2. *Declares* the remainder of the application admissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention with regard to the failure to enforce the Federal Constitutional Court's interim injunction dated 10 April 2003;
4. *Holds* that there has been no violation of Article 6 § 1 of the Convention with regard to the execution of the Federal Constitutional Court's decision dated 8 October 2004;
5. *Holds* that the question of the application of Article 41 is not ready for decision in so far as pecuniary and non-pecuniary damage is concerned; and accordingly,
 - (a) *reserves* the said question;

(b) *invites* the Government and the applicant to inform the Court about the outcome of the official liability proceedings pending before the Stuttgart Court of Appeal and, in particular, of any agreement they may reach;

(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be;

6. *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 9,000 (nine thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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;

7. *Dismisses* the remainder of the applicant's claim for costs and expenses.

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
Section Registrar

Peer Lorenzen
President