



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

THIRD SECTION

CASE OF WIMMER v. GERMANY

(Application no. 60534/00)

JUDGMENT

STRASBOURG

24 February 2005

FINAL

24/05/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Wimmer v. Germany,

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

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs R. JAEGER,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 16 September 2004 and 1 February 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 60534/00) 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 Josef Wimmer (“the applicant”), on 20 July 2000.

2. The applicant was represented before the Court by Mr G. Rixe, a lawyer practising in Bielefeld. The German Government (“the Government”) were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, and, subsequently, Mrs A. Wittling-Vogel, *Ministerialrätin*, of the Federal Ministry of Justice.

3. The applicant, invoking Article 6 § 1 of the Convention, alleged that the length of the proceedings before the Federal Constitutional Court concerning the custody of his children had exceeded a reasonable time.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 16 September 2004, the Court declared the remainder of the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other’s observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1952 and lives in Töging am Inn, Germany.

9. On 25 November 1992 the applicant and his wife (hereafter Ms W.) divorced before the Groß Gerau District Court. In this context, the District Court granted them joint custody of their two daughters, aged four and eight at that time.

10. On 6 July 1993, following Ms W.'s appeal (*Beschwerde*) and after hearing both her and the applicant as well as two representatives of the local Youth Office, the Frankfurt/Main Court of Appeal granted Ms W. sole custody of the children, while allowing the applicant to retain a right of access. It found that, given the fact that the parents did not seem entirely willing to co-operate in practical matters, it would be in the children's best interest if decisions concerning their everyday life were taken by their mother alone. It added that the mother had agreed to discuss important decisions with the applicant and that she was expected to ensure that contacts between the applicant and his daughters would continue on a regular basis. In its decision, the Court of Appeal did not admit an appeal on points of law (*weitere Beschwerde*).

11. On 9 August 1993 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He claimed in particular that the decision of the Frankfurt/Main Court of Appeal had misinterpreted the existing provisions on custody of children, notably Section 1671 of the Civil Code (see Relevant domestic law, below), and infringed his parental rights guaranteed by Article 6 § 2 of the Basic Law.

12. On 23 March 1994 the President of the Federal Constitutional Court informed the applicant that he had communicated the case to 25 third parties, who had the right to submit their observations until 30 September 1994. The list of third parties included the Federal Parliament (*Bundestag*), the Federal Council (*Bundesrat*), the Federal Government, the *Länder* Governments, the President of the Federal Court of Justice, the parties of the proceedings before the Frankfurt/Main Court of Appeal, as well as various national organisations dealing with family law issues and involved in the protection of children.

13. On 13 November 1995, following the applicant's request dated 2 October 1995, the Federal Constitutional Court forwarded the pertinent written observations dated 1 and 25 July, 20 and 27 September, 20 October and 9 December 1994 and 19 February 1995. These included the observations of the Federal Ministry of Justice of 9 December 1994 stating that the Government planned an amendment of the law on family matters, *inter alia* by introducing explicit provisions on joint custody after divorce.

14. Towards the end of 1997, the applicant received a telephone call from the Federal Constitutional Court informing him that the questions raised by his complaint would become obsolete with the expected entry into force of the amended Law on Family Matters of 16 December 1997 (*Kindschaftsrechtsreformgesetz*) on 1 July 1998. The applicant was asked whether he wanted to declare that his constitutional complaint had been disposed of (*Erledigterklärung*) under these circumstances.

15. On 24 June 1998 the applicant requested the Constitutional Court to deliver a decision despite the change of law brought about by the Law on Family Matters.

16. On 22 December 1999 (decision served on 20 January 2000), the Federal Constitutional Court, sitting as a panel of three judges, refused to admit the applicant's constitutional complaint. It found that due to the amended Law on Family Matters, the constitutional complaint no longer raised issues of general interest. The applicant's complaints could be adequately dealt with in proceedings for the amendment of a court order (*Abänderungsverfahren*) pursuant to Section 1696 § 1 of the Civil Code (see Relevant domestic law, below) before the competent civil courts. In these proceedings, the new legal provisions on family matters could be taken into account.

II. RELEVANT DOMESTIC LAW

17. Section 1671 of the Civil Code, in its version in force until 30 June 1998, provided that the court sitting in family matters had to grant the custody of a child to one of his or her parents divorcing. The provision has been amended by the Law on Family Matters of 16 December 1997, which entered into force on 1 July 1998. Pursuant to the amended Section 1671 of the Civil Code, parents who split up keep, as a rule, joint custody of their children. The courts sitting in family matters award sole custody to one parent only if a motion is filed to this end and certain further conditions are satisfied, especially if sole custody is best for the child's well-being.

18. The statutory provision on the amendment of a court order concerning the custody of a child, Section 1696 § 1 of the Civil Code, in its version in force until 30 June 1998, was worded as follows:

“The court sitting in guardianship matters and the court sitting in family matters may modify their decisions at any time during the continuation of parental custody, if they consider this to be necessary in the interest of the child.”

19. Section 1696 § 1 of the Civil Code, as amended by the Law on Family Matters in force since 1 July 1998, provides:

“The court sitting in guardianship matters and the court sitting in family matters must modify their decisions, if this is necessary for cogent reasons which have a lasting effect on the child’s well-being.”

THE LAW

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

20. The applicant claimed that the length of the proceedings before the Federal Constitutional Court had exceeded a reasonable time, and that there had accordingly been a breach of Article 6 § 1 of the Convention, which, in so far as relevant, provides:

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

21. The Government contested this view.

A. Period to be taken into consideration

22. The period to be taken into consideration in determining whether the proceedings satisfied the “reasonable time” requirement laid down in Article 6 § 1 – which, according to the Court’s constant case-law (see, amongst many others, *Voggenreiter v. Germany*, no. 47169/99, §§ 30-32, ECHR 2004-I), is applicable to the proceedings at issue – started on 9 August 1993, when the applicant lodged a constitutional complaint with the Federal Constitutional Court. It ended when the decision of the Constitutional Court was served on the applicant (see *Gast and Popp v. Germany*, no. 29357/95, § 69, ECHR 2000-II), that is, on 20 January 2000. The proceedings thus lasted for approximately 6 years and 5 months on one level of jurisdiction.

B. The reasonableness of the length of the proceedings

23. The reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court’s case-law, in particular the complexity

of the case, the applicant's conduct and that of the competent authorities. On the latter point, the importance of what was at stake for the applicant in the litigation has to be taken into account (see, *inter alia*, *Gast and Popp*, cited above, § 70; *Nuutinen v. Finland*, no. 32842/96, § 110, ECHR 2000-VIII).

1. Complexity of the case

24. Contrary to the applicant, the Government maintained that the question at issue in the applicant's constitutional complaint had been complex, as it had been highly disputed between the German courts whether parents might be granted joint custody under Section 1671 of the Civil Code (in its version in force until 30 June 1998) when they did not agree on it.

25. The Court concedes that the questions of equal treatment of parents and of the best interest of children after their parents' separation, which were raised by the applicant's constitutional complaint, necessitated a considerate assessment of the relevant factual and legal issues. However, given that only the constitutionality of one Section of the Civil Code had been in dispute and that the facts underlying the case had not been complicated, the Court finds that the applicant's case cannot be considered as particularly complex.

2. Conduct of the applicant

26. The applicant submitted that he had not contributed to the length of the proceedings. This was contested by the Government, who pointed out that the delays caused in the proceedings after the promulgation of the amended Law on Family Matters in December 1997 were mainly attributable to him. They argued that the applicant had not answered the Constitutional Court's question of December 1997 whether he wanted to declare that his constitutional complaint had been disposed of until 24 June 1998.

27. The Court finds that the applicant could be considered to have delayed the proceedings by not promptly responding to, and thereby leaving open for some six months, the question whether he still wanted the Federal Constitutional Court to render a decision on his complaint. However, the prolongation of the proceedings caused thereby, having regard to the total duration of the proceedings, must be regarded as small.

3. Conduct of the competent authorities

28. In the applicant's view the Federal Constitutional Court had unduly delayed the proceedings by not treating his case after it had received the third parties' observations due in September 1994 until its telephone call in December 1997. The Federal Constitutional Court had not been entitled to postpone his case until the entry into force of the amended Law on Family Matters. Assuming that the questions raised by his complaint had become

obsolete with the entry into force of that new legislation, there had been no reason to give a decision on his case only on 22 December 1999. As the case had concerned the custody of his children, it had been of great significance to him and had to be dealt with speedily.

29. The Government pointed out that it had been reasonable for the Constitutional Court not to anticipate by their decision legislation on the provisions on joint custody after divorce, which it had known to be forthcoming due to the observations of the Federal Ministry of Justice of 9 December 1994. After the entry into force of the amended Law on Family Matters, the applicant's case did not have to be treated in a particularly speedy manner, as he could have obtained a decision on custody by instituting fresh proceedings pursuant to the amended Section 1696 § 1 of the Civil Code. The applicant had obviously not been very eager to be granted custody of his children, as he had not instituted such proceedings.

30. The Court recalls that Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. Although this obligation applies also to a Constitutional Court, when so applied it cannot be construed in the same way as for an ordinary court. Its role as guardian of the Constitution makes it particularly necessary for a Constitutional Court, sometimes, to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms. Furthermore, while Article 6 requires that judicial proceedings be expeditious, it also lays emphasis on the more general principle of the proper administration of justice (see, *inter alia*, *Süßmann v. Germany*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1174, §§ 55-57; *Niederböster v. Germany*, no. 39547/98, § 43, ECHR 2003-IV; *Trippel v. Germany*, no. 68103/01, §§ 27 et seq., 4 December 2003).

31. In the present case, the Court recognises, as it has already done in the case of *Niederböster* (cited above, § 44), that the Federal Constitutional Court's ability to force the legislature's hand is somewhat limited if the legislature embarks on a reform of the statutory provisions forming the subject matter of the applicant's constitutional complaint. It reiterates, however, that in order to make the reasonable time requirement laid down in Article 6 § 1 practical and effective, it is of the essence that justice be rendered without delays which might jeopardise its effectiveness and credibility (see, amongst many others, *Niederböster*, cited above, § 44). In this respect, the Court, referring to its constant case-law, recalls that it is essential, in particular, for custody cases to be dealt with speedily (see, *inter alia*, *Nuutinen*, cited above, § 110; *Niederböster*, cited above, § 39).

32. The Court notes that the Federal Constitutional Court, after the time-limit for third-party observations had elapsed on 30 September 1994,

apparently had not proceeded with the applicant's constitutional complaint until its phone-call to the applicant by the end of 1997, and had been awaiting the new legislation on family matters. Given the fact that the applicant's constitutional complaint of 9 August 1993 concerning the custody of his children had already been pending for some 4 years and 3 months before the Constitutional Court in December 1997, it doubts that the above-mentioned period, during which no action was taken in the applicant's case, could still be regarded as reasonable.

33. The Court, however, observes in particular that, after the applicant had informed the Constitutional Court on 24 June 1998 that he still wanted a decision, it took another approximately eighteen months until the Constitutional Court notified him that it refused to admit his constitutional complaint. Given the duration of the proceedings at the time of the applicant's said submissions, this further delay appears to be excessive.

34. Moreover, what was at stake for the applicant in the litigation is a material consideration in assessing the competent authorities' conduct of the proceedings. In this respect, the Court observes that the fact that the applicant refused to institute fresh proceedings in the civil courts for the amendment of the initial decision on custody after the change of the underlying legislation in his favour, could be considered to have contributed to a delay in resolving the question of custody. Nonetheless, the Court stresses that the applicant's case concerned the right to retain custody of his children, which has to be considered as essential for a parent and which, in order to be exercised effectively, necessitates a speedy decision. Therefore, his case had to be treated with special diligence.

35. In the light of the foregoing, the Court concludes that the length of the proceedings before the Federal Constitutional Court exceeded a reasonable time. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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."

37. The applicant claimed compensation for non-pecuniary damage and the reimbursement of his costs and expenses.

A. Damage

38. The applicant claimed a minimum of 15,000 euros (EUR) for non-pecuniary damage. He argued that cases concerning the custody of children were to be treated speedily, and pointed to the distress he had suffered as a result of the length of the proceedings, because of which he had to spend some six weeks in a health resort.

39. The Government took the view that the applicant's case did not warrant the award of non-pecuniary damages. The applicant failed to prove that there was a causal link between the length of the proceedings and his stay in a health resort. As the case had merely concerned the custody of the applicant's children, whereas he had retained a right of access throughout the proceedings, these did not have to be conducted particularly speedily.

40. The Court, having regard to all the factors before it, considers that the finding of a violation of Article 6 § 1 constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

41. The applicant, relying on documentary evidence, claimed a total of 1,580.49 EUR for the costs and expenses – comprising lawyer's fees, post and copy costs and value-added tax – incurred in the proceedings before this Court for the services of his counsel.

42. The Government considered this sum to be adequate.

43. According to the Court's consistent case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, *inter alia*, *Venema v. the Netherlands*, no. 35731/97, § 117, ECHR 2002-X). The Court, having regard to its case-law (see, amongst others, *H.A.L. v. Finland*, no. 38267/97, §§ 58-59, ECHR 2004-...), agrees with the parties that the applicant's claim, despite the fact that only his complaint about the length of the proceedings was successful, is justified. The Court therefore awards him 1,580.49 EUR, plus any value-added tax that may be chargeable.

C. Default interest

44. 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. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 1,580.49 (one thousand five hundred and eighty euros forty-nine cents) in respect of costs and expenses, plus any tax that may be chargeable;
 - (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 24 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President