



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

FIFTH SECTION

CASE OF BÄHNK v. GERMANY

(Application no. 10732/05)

JUDGMENT

STRASBOURG

9 October 2008

FINAL

09/01/2009

This judgment may be subject to editorial revision.

In the case of Bähnk v. Germany,

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

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

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 16 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 10732/05) 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, Ms Petra Bähnk (“the applicant”), on 17 March 2005.

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

3. On 22 January 2008 the Fifth Section of the Court declared the application partly inadmissible and decided to communicate the complaints concerning the length of the proceedings and the lack of remedies in that respect to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant is a German national and lives in Buchholz.

5. On 21 September 1995 the applicant was granted divorce and concluded an interim settlement (*Zwischenvergleich*) with her former husband regarding her maintenance claims in the amount of 1.600 German

marks (approximately 818 Euros (EUR)) subject to future variations from the date of the divorce.

6. On 10 August 2001 the applicant instituted claims in sequence before the Hamburg-Wandsbek District Court in order to first obtain information on her former husband's income and assets, and subsequently request the variation of her maintenance claims in accordance with the provided information. The claim was received by the court on 21 August 2001 and registered under file number "732 F 8/01".

7. The scheduled hearings of 11 and 18 December 2001 were postponed at the request of the applicant's former husband (the defendant).

8. On 5 February 2002 an oral hearing was set for 27 March 2002. At the hearing the Hamburg-Wandsbek District Court ordered an expert opinion regarding the applicant's invalidity.

9. From 8 May to 24 June 2002 the applicant was hospitalised due to her depressive disorder and the fact that she had suicidal tendencies at that time. On 4 June 2002 the clinic certified that the applicant should not take any active part in the court proceedings during her clinical treatment because it would put such a strain on her that her treatment would be jeopardised.

10. On 8 July 2002 the court rejected the applicant's allegation of bias of 17 April 2002.

11. On 2 September 2002 the applicant's counsel withdrew from representing her. On 25 September 2002 she applied for legal aid.

12. On 12 September 2002 the first expert, who was appointed by the court on 3 September 2002, declined the request due to other commitments. The subsequently appointed expert was rejected by the defendant on 10 October 2002 as he had treated the applicant previously.

13. On 17 October 2002 the applicant was granted legal aid for the pending proceedings on condition that she made payments by instalments. The court did not assign an attorney to the applicant.

14. On 21 November 2002 the power of attorney of the applicant's new counsel was submitted to the court. Subsequently, he was granted access to the files.

15. On 16 January 2003 the Hamburg-Wandsbek District Court revoked the legal-aid order as a result of the applicant's bank balance of EUR 57.706,55. On 28 February 2003 the Hanseatic Court of Appeal quashed the revocation of the legal-aid order as it found that the applicant had revealed her bank balance in her initial motion and that with regard to the applicant's justified trust in the order its revocation was disproportionate.

16. On 2 May 2003 the Hamburg-Wandsbek District Court rejected the applicant's new allegation of bias of 7 April 2003. Her appeal was dismissed by the Hanseatic Court of Appeal on 26 May 2003.

17. On 3 June 2003 the Hamburg-Wandsbek District Court appointed a new expert to determine the applicant's invalidity. The applicant requested

the extension of the evidence order to include information in the report as to her invalidity at the time of the divorce. On 27 August 2003 the evidence order was extended accordingly. The expert opinion was delivered on 19 December 2003, which established that the applicant had been continuously unfit to work since the divorce due to her mental illness.

18. On 28 December 2003 the applicant lodged an appeal against the modalities of the legal-aid order. In particular, she contested that the Hamburg-Wandsbek District Court failed to appoint an attorney for her and that she was unable to pay instalments.

19. On 19 January 2004 the Hamburg-Wandsbek District Court assigned the applicant an attorney, the counsel who was representing her at the time.

20. On 1 April 2004 the defendant suggested that the applicant's capacity to litigate be examined. On 25 May 2004 the expert answered the court's corresponding question to the effect that there was no doubt about her capacity to litigate throughout the proceedings.

21. On 15 August 2004 the applicant lodged a constitutional complaint with the Federal Constitutional Court about the length of proceedings before the Hamburg-Wandsbek District Court.

22. The Government submitted that on 18 August 2004 a hearing took place before the Hamburg-Wandsbek District Court which was postponed until 20 October 2004 due to the court's omission to summon the applicant's counsel. It appears from the files that the Hamburg-Wandsbek District Court set a joint hearing for two sets of proceedings which were pending before it between the applicant and her former husband. The second set of proceedings was initiated by the applicant's former husband.

23. On 24 August 2004 the Registry of the Federal Constitutional Court asked the Hamburg-Wandsbek District Court for information on the proceedings. The Hamburg-Wandsbek District Court subsequently replied that the date for a further oral hearing was set for 20 October 2004. The Registry of the Federal Constitutional Court informed the applicant on 13 September 2004 about the reply by the Hamburg-Wandsbek District Court and suggested that the examination of her constitutional complaint about the length of proceedings would not be pursued.

24. On 23 November 2004 the Hamburg-Wandsbek District Court dismissed the applicant's claim to obtain information as to her former husband's income and assets in a partial judgment. It found that the applicant already had sufficient information and failed to show that her husband's financial situation had changed. Furthermore, it invited the applicant to quantify her maintenance claims in order to pursue her claim to vary the interim settlement in this regard.

25. The applicant wrote to the Federal Constitutional Court on 24 November 2004 again complaining about the length of proceedings before the Hamburg-Wandsbek District Court. On 15 December 2004 the Registry of the Federal Constitutional Court replied to the applicant that her

constitutional complaint would be inadmissible in view of the judgment of 23 November 2004. Moreover, the applicant had failed to exhaust available domestic remedies against the judgment of the Hamburg-Wandsbek District Court of 23 November 2004.

26. On 31 January 2005 the partial judgment of 23 November 2004 was served on the applicant's counsel.

27. On 1 April 2005 the Hanseatic Court of Appeal rejected the applicant's motion for legal aid for appellate proceedings.

28. On 10 June 2005 the proceedings were terminated by a settlement between the applicant and her former husband before the Hanseatic Court of Appeal in the course of the other set of proceedings regarding post-marital proprietary claims. The applicant was awarded maintenance in the amount of EUR 782 and medical insurance payments in the amount of EUR 159.39. The formulation of the settlement was modified twice in 2006. These modifications did, however, not concern the regulation of the applicant's maintenance claims.

29. On 23 February 2006 the Hanseatic Court of Appeal modified the legal-aid order of 17 October 2002 upon the applicant's appeal of 28 December 2003 so that her obligation to pay by instalments was cancelled.

THE LAW

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

30. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

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

31. The period to be taken into consideration began on 10 August 2001 and ended on 10 June 2005 with the conclusion of a friendly settlement in the course of another set of proceedings. It thus lasted 3 years and 10 months for one level of jurisdiction.

A. Admissibility

32. The Court 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

1. Submissions made before the Court

33. In the applicant's view, the case was not of a complex nature. Furthermore, the taking of expert evidence was in her opinion unnecessary according to domestic law. Moreover, the first hearing was held more than seven months after the lodging of the claim. The second hearing was held five months after the submission of the supplementary expert opinion and ten months after the submission of the initial expert opinion. She underlined that the district court had failed to take any actions to further her claim to vary the interim settlement on her maintenance claims since the partial decision of 23 November 2004. In the applicant's view the proceedings were terminated in March 2006, when the friendly settlement of 10 June 2005 assumed its final wording. She alleged that the delays in the proceedings had to be ascribed to the Hamburg-Wandsbek District Court's inaction and its incorrect application of the procedural law. The applicant emphasised that the impugned proceedings concerned her maintenance claims and it therefore had been of fundamental importance for her. In this connection she referred to her poor state of health and the aggravation of her long lasting mental illness during the proceedings.

34. The Government maintained that the case had been of some complexity as the taking of expert evidence had been necessary. They pointed out that the applicant had not objected to the evidence order but requested to amend it. The Government further argued that the applicant's numerous appeals had contributed to the length of the proceedings. However, the Government acknowledged that several delays in the proceedings, which constituted approximately 19 months in their opinion, could be attributed to the Hamburg-Wandsbek District Court. Moreover, when assessing the importance of what was at stake for the applicant it had to be considered that the applicant's former husband had paid her EUR 450 maintenance per month throughout the proceedings and that she had lived rent-free in the former matrimonial home.

2. The Court's assessment

35. 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).

36. The Court observes that the case was of some factual complexity due to the nature of the evidence to be taken and assessed and that two sets of proceedings were pending simultaneously before the domestic courts

concerning post-marital proprietary claims. As to the necessity of the evidence order the Court recalls that, as a general rule, it is not the Court's task to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (*Garcia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Having regard to the parties' submissions and all the material submitted to the Court, it cannot be found that the evidence order was arbitrary or otherwise not pertinent to the proceedings.

37. As to the conduct of the applicant, the Court observes that the proceedings could not properly advance in May and June 2002 on account of the applicant's hospitalisation which hindered her to actively take part in the proceedings. Moreover, she unsuccessfully alleged bias of the first instance court twice. Further, on 2 September 2002 her first counsel withdrew from representing her. Subsequently, legal aid proceedings were pending until 28 February 2003. Her new counsel did not submit his power of attorney until 21 November 2002 and then had to familiarise himself with the case-file. In August 2003 the evidence order was extended in accordance with the applicant's motion of June 2003. Furthermore, the applicant's mental illness and her submissions to the domestic court cast doubt on her capacity to litigate. In April and May 2004 this question had to be clarified by the court with the assistance of the expert. Finally, the applicant failed to quantify her maintenance claims after the partial judgment of 23 November 2004. Thus, the approximately four and a half months delay which occurred after service of that judgment on the applicant's counsel on 31 January 2005 is attributable to the applicant.

38. As to the conduct of the authorities, the Court observes that several delays in the proceedings resulted from the repeated postponement of the first hearing which had been requested by the defendant, the difficulties in appointing an expert and the delays which occurred in scheduling the second hearing. The Court also acknowledges that the applicant's numerous motions and appeals made it difficult for the Hamburg-Wandsbek District Court to conclude the proceedings expeditiously. Nevertheless these delays are partly attributable to the national courts which should have acted with expedience given the interests at stake and the applicant's deteriorated health.

39. In the light of these factors and having regard to the overall duration of three years and ten months in one level of jurisdiction, the Court finds that the length of the proceedings failed to meet the "reasonable time" requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

40. Further, the applicant complained that she had not had an effective remedy at her disposal to complain about the length of the proceedings in the Hamburg-Wandsbek District Court. She alleged a violation of Article 13 of the Convention, which reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

41. The Government did not contest that argument. They submitted that the legislative procedure to introduce an effective remedy within the meaning of Article 13 of the Convention and in compliance with the Court’s judgment in the case of *Sürmeli* was in progress but could not have been concluded yet.

42. The Court 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

43. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief (see *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI). In the present case, having regard to its conclusion with regard to the excessive length of the proceedings (see paragraph 40 above), the Court considers that the applicant had an arguable claim of a violation of Article 6 § 1.

44. The Court reiterates that according to its recent case-law there is no effective remedy under German law capable of affording redress for the unreasonable length of civil proceedings. In particular, a complaint with the Federal Constitutional Court is neither capable of expediting pending proceedings nor of providing adequate redress for breaches of the “reasonable time” requirement which have already occurred (see *Sürmeli v. Germany* [GC], no. 75529/01, §§ 103-108, ECHR 2006-VII; *Herbst v. Germany*, no. 20027/02, §§ 65-66, 11 January 2007).

45. The Court has further taken due note of the Government’s submissions concerning the legislative procedure to introduce in German written law a new remedy in respect of inaction. The Court notes that the legislative measure has been under way for a considerable time and

encourages the speedy enactment of a law introducing an effective remedy in the German legal system, which would be capable of affording redress for the unreasonable length of civil proceedings.

46. Accordingly, the applicant did not have an effective remedy within the meaning of Article 13 of the Convention which could have expedited the proceedings in the Hamburg-Wandsbek District Court or provided adequate redress for delays that had already occurred.

47. There has therefore been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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.”

49. The applicant claimed compensation for pecuniary and non-pecuniary damages and the reimbursement of her costs and expenses.

A. Damages

50. The applicant claimed EUR 10,586.96 in respect of pecuniary and non-pecuniary damages.

51. She submitted that she had incurred costs of EUR 586.96 for her legal representation in proceedings in 2003 which the applicant's former husband had initiated to oppose the execution of the interim settlement of 1995. She submitted that those proceedings would not have been necessary if the Hamburg-Wandsbek District Court had given judgment within a reasonable time.

52. As to the non-pecuniary damages, the applicant argued that the length of the proceedings put a particular burden on her with respect to her pre-existing mental illness and its deterioration during the proceedings. Therefore, she held EUR 10,000 to be justified for non-pecuniary damages.

53. The Government contested the amount of non-pecuniary damages claimed. They submitted that the proceedings were not of fundamental importance for the applicant as she had had a bank balance of EUR 57,706.55, received monthly maintenance payments of EUR 450 and lived rent-free in the former matrimonial home.

54. As regards the applicants' claim for pecuniary damages, the Court recalls that it cannot speculate as to what the outcome of the proceedings at issue might have been if the violation of Article 6 § 1 of the Convention had not occurred (see, *inter alia*, *Schmautzer v. Austria*, judgment of 23 October 1995, Series A no. 328-A, p. 16, § 44; *Wettstein v. Switzerland*,

no. 33958/96, § 53, ECHR 2000-XII; and *Janssen v. Germany*, no. 23959/94, § 56, 20 December 2001). It further notes that there is insufficient proof of any causal connection between the excessive duration of the proceedings as such and the pecuniary damage allegedly sustained by the applicant in course of another set of proceedings. There are, therefore, no grounds for an award under this head.

55. As to the non-pecuniary damage claimed, the Court finds that it has to consider all the factors before it including the applicant's conduct (see *Gisela Müller v. Germany*, no. 69584/01, § 93, 6 October 2005). With regard to the circumstances of this specific case and ruling on an equitable basis, the Court awards the applicant EUR 1,000 under that head.

B. Costs and expenses

56. The applicant also claimed EUR 1,469.65 including value-added tax for the costs and expenses incurred before the Court.

57. The Government contested the amount of these claims and maintained that the applicant did not confine her submissions to the length of the proceedings but also contested their outcome before the Court.

58. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the fact that the costs claimed had been incurred solely with respect to the complaints communicated by the Court, as the applicant's counsel was merely involved in that later stage of the proceedings, and to the Court's case-law, the Court considers it reasonable to award the sum claimed in full.

C. Default interest

59. 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 remainder of the application admissible unanimously;
2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* unanimously that there has been a violation of Article 13 of the Convention;
4. *Holds* unanimously
 - (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, the following amounts:
 - (i) EUR 1,000 (one thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,469.65 (one thousand four hundred sixty-nine euros and sixty five cents) 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;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 October 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President