



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

FIFTH SECTION

CASE OF BOZLAR v. GERMANY

(Application no. 7634/05)

JUDGMENT

STRASBOURG

5 March 2009

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of Bozlar v. Germany,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 10 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 7634/05) 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 an Italian national, Ms Maria Giulietta Bozlar (“the applicant”), on 25 February 2005.

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

3. On 20 February 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 § 3).

4. In accordance with Article 36 § 1 of the Convention and Rule 44 of the Rules of Court the Italian Government were invited to exercise their right to intervene in the proceedings, but they did not indicate that they wished to exercise this right.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in Cellino San Marco in Italy and lives in Berlin.

6. On 11 November 1998 the applicant underwent a kidney transplant operation at the Charité Medical University in Berlin. Following complications after the operation, the transplanted kidney had to be removed and the applicant underwent a further operation.

7. On 9 May 2001 the applicant brought an action against the Charité Medical University claiming that they were medically liable for the unsuccessful kidney transplant. In particular, she requested the court to award her an adequate amount of damages for pain and suffering (*Schmerzensgeld*) and to declare that the defendant was liable for all future damage to her health (including latent damage) and any stress, worry or inconvenience caused by the defendant's alleged malpractice.

8. On 16 October 2001 the Berlin Regional Court ordered an urological expert report on the question whether the defendant, due to alleged insufficient post-operative treatment, had discovered the applicant's urinary leak too late. On 15 November 2001 the Regional Court appointed the first expert who informed the court on 5 December 2001 that he would be unable to prepare the report.

9. On 22 January 2002 the Regional Court requested the Lower Saxony Medical Association to designate an expert. On 28 March 2002 the Regional Court commissioned a second expert and set him a time-limit of three months for the preparation of his report. Between October 2002 and March 2003 the court inquired of the expert three times as to whether he had prepared his report. On 29 April 2003 it ordered him to deliver the latter within six weeks and announced its intention to impose a fine on him in case of non-compliance with that time-limit.

10. On 26 August 2003 the Regional Court imposed a fine on the second expert, discharged him, and appointed a third expert. On 13 October 2003 the court set him a time-limit of six months for the preparation of his report. On 24 November 2003 the Regional Court requested the applicant to pay a further advance on the expert's costs which the applicant paid on 19 December 2003. On 23 and 30 September 2004 the Regional Court extended the time-limit for the preparation of the expert's report until 17 November 2004 after the expert had informed the court that his assistant whom he had entrusted with the preparation of the report had unexpectedly become unavailable. On 6 December 2004 the Regional Court received the expert report dated 12 November 2004. The expert invoiced for 28 hours' work in the preparation of his report.

11. On 4 February 2005 the applicant requested the Regional Court to extend the time-limit for the submission of her comments on the report. On 22 February 2005 she submitted her comments.

12. On 10 May 2005, after having held a hearing, the Regional Court dismissed the applicant's action as being unfounded.

13. On 27 May 2005 the judgment was served on the applicant's representative.

THE LAW

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

14. 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...”

15. The period to be taken into consideration began on 9 May 2001 when the applicant lodged her action with the Regional Court and ended on 27 May 2005 when the judgment of the Regional Court was served on the applicant. It thus lasted four years and three weeks for one level of jurisdiction.

A. Admissibility

16. 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

17. The applicant maintained that the duration of the proceedings was in breach of the “reasonable time” requirement laid down in Article 6 § 1 of the Convention given in particular that the proceedings had substantial consequences for her livelihood. In her view the Regional Court contributed to the length of the proceedings *inter alia* in that it had granted the third expert an extended period of six months for the preparation of his report and in that it took the court four months after that time-limit elapsed until it inquired of the expert as to his progress with the report.

18. The Government contended that there had been only one question of fact in dispute between the parties which could be resolved after having obtained the expert report. They further pointed out that the minor delays of some two and a half months were attributable to the applicant due to extensions of time-limits at her request.

19. The Government acknowledged that the Regional Court had contributed to substantial delays in the proceedings as it had failed to promptly take the necessary steps for the appointment of the second expert.

Furthermore, the Regional Court failed to effectively prevail upon the second expert to prepare his report upon the expiration of the three-month time-limit. Finally, the Regional Court could have reduced the length of the proceedings if it had set shorter time-limits for the parties to comment on the appointment of the third expert. However, the Government contended that a shorter time-limit for the third expert and an earlier inquiry into the progress of his report would not have led to the swifter preparation of the report as a period of three months had already proved insufficient for the second expert. Moreover, the third expert had needed further time for the preparation of his report as his assistant had unexpectedly become unavailable. As to what was at stake for the applicant, the Government accepted that the proceedings were of considerable personal interest to her.

2. The Court's assessment

20. 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).

21. The Court observes that the applicant's action claiming medical liability did not raise any questions of law or fact of particular complexity. Only one question of fact was disputed between the parties which had been clarified by one expert report.

22. As to the applicant's conduct, the Court considers, as do the parties, that only a minor delay of no more than two and a half months resulted from the fact that the applicant had requested the extension of the time-limits to make further submissions and from the fact that she had paid the requested further advance on the expert's costs after four weeks.

23. Turning to the conduct of the authorities, the Court notes that several delays in the proceedings resulted from the inactivity of the experts who either failed to prepare their reports at all or failed to submit them within the set time-limits. Nevertheless, in cases where the cooperation with an expert proves necessary, it is the responsibility of the domestic courts to ensure that the proceedings are not excessively prolonged (see, among other authorities, *Volkwein v. Germany*, no. 45181/99, § 39, 4 April 2002; and *Martins Moreira v. Portugal*, judgment of 26 October 1988, § 60, Series A no. 143). In the instant case the Court observes that it took the Regional Court one month and three weeks to request the Medical Association to designate a new expert after the first expert had informed the court about his unavailability. Furthermore, the Regional Court waited some four months after the time-limit had elapsed for the submission of the (second) expert's report until it inquired of that expert as to the progress in his report. Instead of setting a short time-limit for the

delivery of his report, it addressed further fruitless reminders to the expert until it set him a final time-limit of six weeks. Even after that time-limit elapsed on 10 June 2003 the Regional Court waited until 26 August 2003 until it finally discharged the second expert. As to the conduct of the proceedings regarding the third expert, the Court considers that a period of six months for the preparation of a report which necessitated no more than 28 working hours appears excessive in view of the particular circumstances of the instant case, notably the considerable time that had already elapsed before the third expert was commissioned. Under these circumstances the Court considers that the Regional Court failed to conduct the applicant's proceedings with the required diligence.

24. As to what was at stake for the applicant the Court observes that the applicant's proceedings concerned an action claiming medical liability for damage following an unsuccessful kidney transplant operation. Those proceedings were meant to provide redress for the pain suffered as a result of the unsuccessful operation. The Court, like the parties, therefore considers that those proceedings were of particular importance to the applicant.

25. Having examined all the material submitted to it, the Court 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. OTHER ALLEGED VIOLATIONS

26. The applicant complained under Article 6 of the Convention about the outcome of her medical liability proceedings.

27. The Court observes that the applicant failed to seek any legal remedy against the impugned decision. In particular, she did not lodge a constitutional complaint with the Federal Constitutional Court.

28. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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."

30. The applicant claimed compensation for non-pecuniary damage.

A. Damage

31. The applicant sought compensation for non-pecuniary damage. In particular, she claimed 3,000 euros (EUR) for the distress and frustration she had experienced as a result of the length of the proceedings. Furthermore she claimed “damages for pain and suffering” amounting to EUR 10,000 on account of the unsuccessful kidney transplant operation.

32. The Government left the matter to the Court’s discretion.

33. The Court does not discern any causal link between the violation found and the non-pecuniary damage alleged in respect of the unsuccessful kidney transplant operation; it therefore rejects this claim. However, the Court considers that the applicant must have sustained non-pecuniary damage in respect of the length of the proceedings. Ruling on an equitable basis, it therefore awards her EUR 3,000 under that head.

B. Costs and expenses

34. The applicant did not submit any claim under this head; the Court therefore makes no award in this respect.

C. Default interest

35. 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 3,000 (three thousand euros), plus any tax that may be chargeable to her, 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 5 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President