



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

FIFTH SECTION

CASE OF DEIWICK v. GERMANY

(Application no. 7369/04)

JUDGMENT

STRASBOURG

26 March 2009

FINAL

26/06/2009

This judgment may be subject to editorial revision.

In the case of Deiwick v. Germany,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 3 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 7369/04) 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 Hans-Jürgen Deiwick (“the applicant”), on 19 February 2004.

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

3. On 27 May 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. Judge Jaeger, the judge elected in respect of Germany, withdrew from sitting in the case (Rule 28 of the Rules of Court). On 20 June 2008, the Government, pursuant to Rule 29 § 1 (a), informed the Court that they had appointed in her stead another elected judge, namely Judge Mark Villiger.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. Background to the case

5. The applicant was born in 1923 and lives in Hamburg.

6. From 1970 he practised as a physician affiliated to the statutory public health insurance scheme.

7. In 1992 the Health Care Reform Act (*Gesundheitsstrukturgesetz*) amended the relevant provisions of the Social Security Act, Book V (*Sozialgesetzbuch V*) and introduced a retirement age of 68 for those medical practitioners who were affiliated to the statutory public health insurance scheme with effect from 1 January 1999 (see “Relevant domestic law” below).

2. Proceedings before the domestic authorities

8. On 11 May 1998 the Hamburg Regional Registration Committee for Physicians (*Zulassungsausschuss für Ärzte*) decided that according to section 95 § 7 of the Social Security Act, Book V (see “Relevant domestic law” below) the applicant’s authorisation to practise as a physician under the statutory public health insurance scheme would expire on 1 January 1999 as the applicant already had reached his 68th birthday prior to that date.

9. On 27 July 1998 the applicant lodged an administrative appeal against that decision, which the Hamburg Appeals Board for Physicians (*Berufungsausschuss*) dismissed on 30 September 1998.

10. On 19 November 1998 the applicant brought an action before the Hamburg Social Court to have the previous decisions annulled without submitting his statement of claim.

11. On 21 December 1998 the applicant, without awaiting the outcome of the proceedings before the Social Court, lodged a constitutional complaint which the Federal Constitutional Court refused to admit on 15 February 1999.

12. On 21 May 1999 the applicant submitted a statement of claim to the Hamburg Social Court which it forwarded to the defendant on 16 July 1999.

13. On 21 December 1999 the Social Court forwarded the defendant’s statement of 26 July 1999 to the applicant.

14. On 18 February 2000 the Social Court forwarded the defendant’s further statements of 18 January 2000 to the applicant and requested him to comment on them which the applicant did on 3 September 2001.

15. Between 21 September 2001 and 22 May 2002 the case file was erroneously stored in the Social Court’s archives.

16. On 17 October 2002 the Social Court informed the applicant that it intended to render a decision (*Gerichtsbescheid*) without holding an oral hearing and invited the applicant to submit written comments within one month. On 15 November 2002 the applicant submitted his comments.

17. On 20 August 2003 the Hamburg Social Court dismissed his action, referring to the established case-law of the Federal Constitutional Court according to which the introduction of a compulsory retirement age for doctors had been compatible with the Basic Law (*Grundgesetz*).

18. On 23 September 2003 the Social Court served that decision on the applicant.

3. *Proceedings before the Court*

19. On 18 August 1999 the applicant lodged his first application with the Court, alleging that the revocation of his authorisation to practise as a physician under the statutory public health insurance scheme violated his rights under Article 14 of the Convention and Article 1 of Protocol No. 1.

20. On 20 May 2003 the Court declared his application (no. 55004/00) inadmissible for being manifestly ill-founded.

II. RELEVANT DOMESTIC LAW

21. On 21 December 1992 the Health Care Reform Act introduced a retirement age of 68 for medical practitioners affiliated to the statutory public health insurance scheme. The amendment entered into force on 1 January 1999. Accordingly, section 95 § 7 of the Social Security Act, Book V as amended by the Health Care Reform Act provides, *inter alia*, that authorisation to practise as a physician under the statutory public health insurance scheme expires on 1 January 1999 if the practitioner has already reached his or her 68th birthday before that key date.

22. According to the case-law of the Federal Constitutional Court (see, decision of 31 March 1998, nos. 1 BvR 2167/93 and 1 BvR 2198/93), section 95 § 7 of the Social Security Act was compatible with the medical practitioners' freedom of profession, their property rights and the principle of equality as guaranteed by the Basic Law.

THE LAW

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

23. 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...”

24. The period to be taken into consideration began on 27 July 1998 when the applicant lodged his administrative appeal (see, among other authorities, *Janssen v. Germany*, no. 23959/94, § 40, 20 December 2001, and *König v. Germany*, judgment of 28 June 1978, Series A no. 27, § 98) and ended on 23 September 2003 when the Hamburg Social Court served its decision on the applicant. It thus lasted five years and two months at one level of compulsory administrative review and one level of jurisdiction.

A. Admissibility

25. 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*

26. 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. He submitted that the case had raised no particular difficulties and that a speedy decision of the Social Court had been of considerable interest to him.

27. The Government submitted that the proceedings had not been of a particular complexity and that the legal issue at stake had already been decided by a previous decision of the Federal Constitutional Court (see, paragraph 22 above).

28. According to the Government a delay of a total of two years was attributable to the applicant’s own conduct as he had submitted his statement of claim and comments to the Social Court belatedly. The Government acknowledged that the Social Court had contributed to substantial delays in the proceedings as it failed to forward swiftly the

statement of claim, the statement of defence and the defendant's further written submissions to the other party. Furthermore, the Social Court significantly delayed the proceedings in that it erroneously placed the case files in the archives for a period of one year and one month. Finally, the Social Court failed to speedily decide on the applicant's action after the final statements of the parties were submitted and to serve the decision swiftly on the applicant.

29. As to what was at stake for the applicant, the Government maintained that the applicant's interest in the proceedings had been relatively low as Federal Constitutional Court had already clarified the legal issue in dispute. Therefore the applicant had to expect from the very beginning that his action would be dismissed.

2. The Court's assessment

30. 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).

31. The Court observes that the applicant's action did not raise any factual or legal issues of particular complexity, given in particular, that the only legal question at stake had already been clarified by the Federal Constitutional Court before the applicant lodged his action with the Social Court.

32. As to the applicant's conduct, the Court considers that substantial delays of a total of two years resulted from the fact that the applicant failed to submit his statement of claim and the comments requested by the Social Court on 18 February 2000.

33. Turning to the conduct of the authorities, the Court notes that the preliminary administrative proceedings were pending for two months before the Appeals Board, whereas the proceedings before the Social Court lasted four years and ten months. The Court observes that there were considerable periods of inactivity on the part of the Social Court: Thus the court repeatedly failed to immediately forward the parties' statements to the other party, which contributed to a delay of eight months. Furthermore, the proceedings came to a standstill when the Social Court erroneously deposited the case files in the archives for a period of one year and one month. After the applicant had submitted his final statement it took the Social Court nine months to render its decision and another month to serve it on the applicant. Under these circumstances the Court considers that the Social Court failed to conduct the applicant's proceedings with the required diligence.

34. As to the importance of what was at stake, the Court observes that the applicant, in bringing his action before court although the issue at stake had been previously settled by the Federal Constitutional Court, showed a certain personal interest in having a judicial examination of his own case. However, having regard to the overall circumstances, the Court considers that the domestic courts and authorities were not under a specific duty to exercise exceptional diligence in the applicant's case.

35. 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

36. The applicant further complained under Articles 8 and 14 of the Convention, Article 1 of Protocol No. 1 and Article 1 of Protocol No. 12 about the revocation of his authorisation to practise as a doctor under the statutory public health insurance scheme.

37. The Court has examined the remainder of the applicant's complaints as submitted by him. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant claimed altogether 1,000,000 euros (EUR) in respect of pecuniary and non-pecuniary damages.

40. He submitted that he had incurred costs of EUR 70,000 in respect of the loss of income under the statutory public health insurance scheme (*vertragsärztliches Einkommen*), EUR 15,000 *per annum* for partial loss of income under the private health insurance scheme (*privatärztliches*

Einkommen), EUR 3,084.11 for the recycling of his X-ray equipment and further unspecified damage incurred during the domestic proceedings.

41. As to non-pecuniary damages, the applicant left the matter to the Court's discretion.

42. The Government contested the alleged pecuniary claims, arguing that they were unsubstantiated. In any event, they were not caused by the length of the proceedings.

43. As regards the applicant's claim for pecuniary damages, the Court notes that the applicant's costs and financial losses allegedly incurred merely related to the outcome of the proceedings. It notes in particular that the applicant did not even contend that those damages had been related to the length of the proceedings as such. There are therefore no grounds for an award under this head.

44. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 1,500 under that head.

B. Costs and expenses

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

C. Default interest

46. 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 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to him, 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 26 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Peer Lorenzen
President