



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

FIFTH SECTION

CASE OF BALLHAUSEN v. GERMANY

(Application no. 1479/08)

JUDGMENT

STRASBOURG

23 April 2009

FINAL

23/07/2009

This judgment may be subject to editorial revision.

In the case of Ballhausen v. Germany,

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

Rait Maruste, *President*,
Karel Jungwiert,
Renate Jaeger,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 31 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 1479/08) 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 Dieter Ballhausen (“the applicant”), on 4 January 2008.

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

3. On 27 March 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).

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1953 and lives in Duderstadt.

A. Background to the case

5. On 25 May 1997 the applicant had a traffic accident and suffered severe injuries. He disagreed with the insurance companies involved about the seriousness of his permanent injuries and the amount of insurance

benefits due. Three expert medical opinions concerning the degree of his invalidity produced differing results. The dispute resulted in three sets of court proceedings, only one of which is the subject of the present application.

B. Proceedings before the Göttingen Regional Court

6. On 28 November 2001 the applicant brought a claim for 219,000 German marks (DEM, 111,972.92 euros (EUR)) plus interest before the Göttingen Regional Court. The claim was registered under file number 2 O 503/01. Prior to the institution of the proceedings he had already been paid DEM 231,000.00 (EUR 118,108.42) by the insurance company.

7. On 15 May 2002 the court suggested a friendly settlement, which the parties did not accept.

8. On 8 August 2002 a hearing was held.

9. On 29 August 2002 the Regional Court ordered a comprehensive expert report regarding the degree of the applicant's invalidity up to 25 May 2000. The expert was asked not to take into account any developments in the applicant's health which occurred after that date.

10. On 19 September 2002 the court sent the files to the appointed expert.

11. On 16 October 2002 it received the expert's observation that additional expert reports in the field of thoracic surgery, neurology and psychiatry were also necessary. He suggested two suitable experts.

12. On 31 October 2002 both the applicant and the defendant consented to the two additional expert opinions and agreed with the proposed choice of experts.

13. On 14 February 2003 the court received the additional opinion from the thoracic surgery expert, dated 30 January 2003. It informed the applicant but failed to inform the defendant.

14. On 24 June and 16 September 2003 the applicant asked the court about the status of the proceedings and urged it to expedite the completion of the outstanding expert opinions.

15. On 26 June and 20 November 2003 the court replied to him that the case files had been sent to an expert in the parallel proceedings.

16. On 26 January 2004 the applicant asked the court to retrieve the case files from the parallel proceedings.

17. On 4 May 2004 the applicant informed the court that the expert opinion in the parallel proceedings had already been concluded in 2003 and asked about the whereabouts of the case files.

18. On 26 July 2004 the court informed the applicant that the expert opinion which had been drawn up in the parallel proceedings would also be considered in the present proceedings.

19. On 30 September 2004 the applicant opposed this, observing that on 31 October 2002 the parties had agreed upon the experts to be appointed in these proceedings and that the expert opinion in the parallel proceedings was deficient and concerned the applicant's state of health at the present time, not on 25 May 2000.

20. On 13 June 2005 the case files and the medical documentation were resubmitted to the main expert.

21. In the summer of 2005 the defendant was notified of the opinion of the thoracic surgery expert and criticised it on several grounds.

22. On 14 September 2005 the main expert reminded the court of the need to appoint an additional expert for a neurological and psychiatric expert opinion.

23. On 1 December 2005 the court appointed the expert whom the parties had agreed upon on 31 October 2002 to prepare the additional neurological and psychiatric expert opinion.

24. On 6 December 2005 the case files were sent to the neurological and psychiatric expert.

25. On 10 January 2006 that expert indicated that he wished to involve an additional expert who would draw up a separate expert opinion with regard to the psychiatric aspects. On 31 January 2006 the applicant consented.

26. On 23 February 2006 the applicant was examined by both experts.

27. On 16 March 2006 the applicant challenged the main expert on grounds of bias, on the basis of his conduct as an expert in the parallel proceedings.

28. On 24 March 2006 the court requested the main expert to send back the case files so that it could rule on the challenge for bias.

29. On 3 April 2006 the main expert submitted his comments on the challenge for bias and sent the case files back to the court.

30. On 11 August 2006 the applicant urged the court to decide on the challenge for bias and to set a time-limit for the submission of the neurological and psychiatric expert opinions.

31. On 24 August 2006 the court informed the applicant that the neurological and psychiatric experts had undertaken to submit their opinions by 10 September 2006.

32. On 10 October 2006 the court urged the neurological and psychiatric experts to submit the opinions but received no answer.

33. On 11 October 2006 the applicant inquired whether the neurological and psychiatric expert opinions had been submitted.

34. On 21 October 2006 the present case was transferred to the Sixth Civil Division of the Regional Court and was filed under the number 6 O 95/06.

35. On 8 December 2006 the applicant again asked the court to set a time-limit for the neurological and psychiatric expert opinions.

36. On 31 January 2007 the court asked the neurological expert to submit the expert opinions but received no answer.

37. On 8 February 2007 the applicant reminded the court to urge the expert to submit the neurological and psychiatric expert opinions.

C. Proceedings before the Federal Constitutional Court

38. On 12 January 2007 the applicant lodged a complaint with the Federal Constitutional Court concerning the undue length of the proceedings.

39. On 2 February 2007, the Federal Constitutional Court requested the Regional Court to provide a status update on the proceedings, which the latter transmitted on 22 February 2007 after having requested the neurological and psychiatric experts to return the files. The submissions of the Regional Court, however, mainly explained the circumstances of the parallel proceedings.

40. Following a corresponding request by the Federal Constitutional Court, the Regional Court transmitted copies of the case files on 9 June 2007 and returned the original files to the neurological and psychiatric expert.

41. On 20 September 2007 the Federal Constitutional Court found a violation of the applicant's right to an effective remedy pursuant to Articles 2(1) and 20(3) of the Basic Law (*Grundgesetz*) in the present case on account of the length of the proceedings before the Göttingen Regional Court by explicitly referring to Article 6 § 1 of the Convention. It observed that the delay between the order of 29 August 2002 to prepare a comprehensive expert opinion and the forwarding of the case files to the neurological and psychiatric expert on 6 December 2005 was contrary to the principle of expeditious proceedings. In this connection it noted that the Regional Court had been aware of the necessity of a neurological and psychiatric expert opinion since 16 October 2002 but had failed to pursue the proceedings which were merely handled as a file joined to the parallel proceedings between June 2003 and August 2004, at least. It found that the Regional Court should have produced copies of the entire case files to facilitate expeditious proceedings and simultaneous examination by the numerous experts. It also found that the court had failed to adopt adequate procedural measures, which the applicant had suggested on several occasions, to facilitate the submission of the neurological and psychiatric expert opinions. It further observed that the Regional Court had failed to decide on the applicant's challenge for bias against the main expert without giving any reasons. It stated that the Regional Court would subsequently have to take all appropriate measures to expedite the proceedings.

42. On 15 October 2007 the Federal Constitutional Court sent back the case files to the Regional Court.

D. Further proceedings before the Göttingen Regional Court

43. On 25 October 2007 the Eighth Civil Division of the Regional Court, under the new file number 8 O 133/07, set a time-limit of 19 November 2007 for the neurological expert to submit his opinions.

44. On 23 November 2007 the applicant suggested that the neurological expert's appointment be withdrawn and that a partial judgment be pronounced.

45. On 29 November 2007 the court extended the time-limit for the neurological expert until 17 December 2007, on pain of a fine of EUR 500.

46. On 21 December 2007 a neurological expert opinion dated 17 December 2007 and an additional psychiatric expert opinion dated 6 June 2006 were submitted to the court. The neurological expert opinion was forwarded to the applicant on 7 January 2008.

47. On 21 December 2007 the Regional Court dismissed the applicant's challenge for bias against the main expert.

48. On 21 January 2008 the applicant appealed against this decision. His appeal was dismissed by the Braunschweig Court of Appeal on 7 March 2008.

49. On 10 June 2008 the neurological expert was heard by the Regional Court with a view to solving preliminary questions regarding the main expert opinion. The Court further heard the thoracic surgery expert regarding his expert opinion dated 30 January 2003.

50. On 16 July 2008 the files were sent to the main expert for the preparation of an expert opinion.

51. The case is still pending before the Regional Court to this date.

THE LAW

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

52. The applicant complained that the length of the proceedings was 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..."

53. The Government referred to the decision of the Federal Constitutional Court of 20 September 2007, in which the latter had explicitly referred to Article 6 § 1 of the Convention and had thus implicitly found that the length of the proceedings in the instant case failed to comply with the “reasonable time” requirement laid down in this provision. The Government therefore refrained from submitting additional legal arguments.

54. The period to be taken into consideration began with the applicant’s action brought before the Göttingen Regional Court on 28 November 2001 and has not yet ended. It has thus already lasted for more than seven years and three months before the first-instance court so far.

A. Admissibility

55. The Court notes that the application 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

56. The applicant complained under Article 6 § 1 of the Convention about the length of the proceedings. He complained in particular that the Göttingen Regional Court had failed to adopt adequate procedural measures suggested by him on several occasions with a view to facilitating the submission of the neurological and psychiatric expert opinion and to expediting the proceedings. He submitted that due to the length of the proceedings he faced increasing financial, health and psychological problems.

57. The Government, with reference to the decision of the Federal Constitutional Court of 20 September 2007 finding a violation of the Basic Law in the instant case by explicitly referring to Article 6 § 1, took the view that there was no need to submit additional legal arguments.

58. However, as regards the applicant’s conduct in the proceedings the Government pointed out that he had already lodged a challenge for bias against the main expert in the parallel proceedings. The Government stated that even though such a challenge in the parallel proceedings had been dismissed by the Braunschweig Court of Appeal on 26 October 2007, the applicant nevertheless maintained his challenge for bias against the same expert in the proceedings at hand and lodged an appeal against its dismissal.

59. The Government further contended that the involvement of the Federal Constitutional Court resulted in the proceedings being considerably accelerated.

60. As to what was at stake in the case, the Government pointed out that the insurance company sued by the applicant had already paid out EUR 118,108.42 to the applicant prior to the proceedings.

61. 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).

62. The Court accepts that the applicant's case is quite complex and that the determination of the applicant's claim requires the taking of several expert opinions regarding his state of health.

63. With respect to the applicant's conduct the Court observes that the applicant had made suggestions to the Regional Court as to how to expedite the proceedings on several occasions. As regards the challenges for bias he brought against the main expert in the proceedings, the Court finds that this cannot be considered to have significantly contributed to the total duration of the proceedings. In any event the applicant cannot be held responsible for availing himself of the remedies at his disposal under German law. The Court notes, however, that it took the Regional Court from 16 March 2006 to 21 December 2007 to decide on the applicant's challenge for bias without there being any indication that this delay was due to the conduct of the applicant.

64. As to the conduct of the proceedings by the Regional Court, the Court, while accepting that a certain time is necessary for the taking of several expert opinions, finds that there have been substantial periods of delay during the proceedings in this connection. Although the Regional Court had ordered a comprehensive expert opinion on 29 August 2002 and had been aware of the necessity of an additional neurological and psychiatric expert opinion since 16 October 2002, the case files were only forwarded to the appointed neurological and psychiatric expert on 6 December 2005. The Court further observes that it has not been established that the Regional Court adopted adequate procedural measures with a view to facilitating and expediting the submission of the neurological and psychiatric expert opinion as suggested several times by the applicant. In fact, for the period between June 2003 and August 2004, the Regional Court made no effort to retrieve the files from the parallel proceedings or to produce copies with a view to accelerating the simultaneous preparation of the outstanding expert opinions. Copies of the case files were only produced in June 2007 following the corresponding request by the Federal Constitutional Court.

65. As to what was at stake for the applicant, the Court observes that the proceedings concerned a claim for damages in respect of injuries resulting from a traffic accident and that they accordingly did not belong to a category that by its nature calls for special expedition (such as custody of children (see *Niederböster v. Germany*, no. 39547/98, § 33, ECHR 2003-IV), civil status and capacity (see *Mikulić v. Croatia*, no. 53176/99, § 44, ECHR 2002-I) or labour disputes (see *Frydlender*, cited above, § 45)). It further notes that the insurance company had already paid out the sum of EUR 118,108.42 to the applicant prior to the institution of the court proceedings.

66. However, the Court can neither ignore the Regional Court's failure to expedite the taking of the expert opinions nor the fact that following the Federal Constitutional Court's finding that the Regional Court had failed to conduct the proceedings expeditiously, the explicit request to the Regional Court to accelerate the proceedings and the return of the case files to the Regional Court in October 2007, more than one year and five months have passed to this date without the Regional Court having taken appropriate measures to expedite the proceedings and with no end to the proceedings being imminent.

67. Therefore the Court concludes 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 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant argued that due to the accident he had had to take early retirement and was subject to a loss of earnings of at least EUR 1,200 per month over several years without further specifying the total amount of his claim.

70. In respect of non-pecuniary damage for the excessive length of the proceedings before the Regional Court which had caused him chronic stress as well as health, psychological and social problems the applicant sought EUR 20,000 for the period up to 20 September 2007, departing from the assumption that the conduct of the proceedings by the Regional Court

accounted for a delay of at least three years for which he claimed EUR 20 per day. He further claimed an amount of EUR 50 per day for the period from 21 September 2007 to 20 September 2008, that is a total amount of EUR 18,000 for this period and a further EUR 100 per day as from the 21 September 2008. He finally requested the Court to order the Government to terminate the proceedings by 31 March 2009 at the latest and, should the Government not comply with that order, he claimed another EUR 150 per day as from the latter date.

71. The Government argued that the applicant's claims for pecuniary damage had no connection with the delays to the proceedings since the amounts claimed were dependent solely on the outcome of the proceedings on the merits rather than on the length of the proceedings.

72. As regards the non-pecuniary damage claimed, the Government maintained that the applicant's claims were excessive and left the matter to the Court's discretion. In doing so, it requested the Court to take account of the fact that the Federal Constitutional Court had found a violation of Article 6 § 1 of the Convention in its judgment of 20 September 2007 and that the involvement of the Federal Constitutional Court resulted in the proceedings being considerably accelerated. It further argued that as regards the amounts sought for the prevention of a continuing violation of Article 6 the applicant's claims were contrary to the purpose of Article 41 since this provision does not provide for an order that carries a penalty for non-compliance.

73. The Court observes that the pecuniary damage alleged was not caused by the length of the proceedings before the Regional Court and does not discern a causal link between the violation found and the pecuniary damage alleged. In particular, it cannot speculate as to what the outcome of the proceedings would have been had they satisfied the requirements of Article 6 § 1 as to their length (see *Sürmeli v. Germany* [GC], no. 75529/01, § 144, ECHR 2006-...). Accordingly, it considers that no award can be made to the applicant under this head.

74. With regard to non-pecuniary damage, the Court considers that the finding of a violation of Article 6 § 1 by the Federal Constitutional Court does not constitute just satisfaction for the damage sustained by the applicant and reiterates that it has not been established that the Regional Court had taken all appropriate measures to accelerate the proceedings following the Federal Constitutional Court's judgment of 20 September 2007. However, as far as the applicant requests the Court to oblige the Government to terminate the proceedings by a certain date and claims damage for future periods, the Court finds that these claims go beyond the violation found by it for the period to this date and do not fall within the scope of Article 41. Finally, the Court finds that the non-pecuniary damage claimed for the period to this date is excessive. Ruling on an equitable basis and having regard to the nature of the

Convention violation it has found, the Court awards the applicant EUR 9,000 under that head.

B. Costs and expenses

75. The applicant also claimed EUR 166.10 in respect of costs and expenses incurred before the Court for correspondence, telecommunications and photocopying. He specified that he did not have any documentary evidence relating to his claim.

76. The Government argued that owing to the lack of appropriate evidence for expenses incurred it could not establish how the costs were calculated.

77. 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 are reasonable as to quantum. In the present case, regard being had to the lack of documentary evidence as regards the costs and expenses adduced, the Court rejects the applicant's claim for costs and expenses.

C. Default interest

78. 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 application admissible;
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 9,000 (nine thousand euros), plus any tax that may be chargeable, 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 23 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Rait Maruste
President