



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF EVELYNE DEIWICK v. GERMANY

(Application no. 17878/04)

JUDGMENT

STRASBOURG

11 June 2009

FINAL

11/09/2009

This judgment may be subject to editorial revision.

In the case of Evelyne 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 Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 19 May 2009,

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

PROCEDURE

1. The case originated in an application (no. 17878/04) 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, Mrs Evelyne Deiwick (“the applicant”), on 15 May 2004.

2. The applicant was represented by Mr Hans-Jürgen Deiwick, her husband. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. On 9 January 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. On 7 February 2008, on account of the fact that Judge Renate Jaeger, the judge elected in respect of Germany, withdrew from sitting in the case (Rule 28 of the Rules of Court), the respondent 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

5. The applicant was born in 1936 and lives in Hamburg.

6. At the material time the applicant was working as a general practitioner in Hamburg.

A. Administrative proceedings

7. On 31 August 1993 the review board at the Hamburg Regional Medical Association (*Prüfungsausschuss bei der Kassenärztliche Vereinigung Hamburg*), after having examined the applicant's economic efficiency (see "Relevant domestic law and practice" below), decided to reduce by 15% the fees payable to her for the first quarter of 1993 and as far as initial check-ups were concerned. It argued that the fees claimed for her initial check-ups exceeded the average for that category by 72% and that there was thus a presumption of a lack of economic efficiency which the applicant had failed to rebut. Instead of 33,200 euros (EUR) the applicant was therefore awarded a reduced sum of EUR 32,200 in quarterly fees.

8. By a letter dated 8 November 1993 the applicant lodged an administrative appeal.

9. On 20 October 1994 the appeal board at the Hamburg Medical Association (*Beschwerdeausschuss bei dem Prüfungsausschuss der Kassenärztlichen Vereinigung Hamburg* – "the appeal board") dismissed her appeal. It also held that the applicant had failed to rebut the presumption of her lack of economic efficiency by demonstrating any particularities of her practice or consequent savings justifying the remuneration claimed for initial check-ups. That decision was served upon the applicant on 25 January 1995.

B. Proceedings before the Hamburg Social Court

10. By a letter dated 20 February 1995 the applicant appealed to the Hamburg Social Court.

11. On 8 March 1995 the court requested the appeal board to submit its pleadings.

12. In April 1995 the AOK Hamburg, a public health-insurance company, requested a third-party summons (*Beiladung*).

13. On 4 July 1995 the applicant requested the court not to schedule the hearing before mid-September 1995.

14. On 9 August 1995, following a reminder from the court, the appeal board submitted that the claim should be dismissed, referring to the reasons stated in its decision. It also asked for an extension of the time allowed for submitting additional observations.

15. On 5 September 1995 the court issued a third-party summons to the Hamburg Medical Association and the health-insurance funds.

16. On 3 June 1996 the applicant requested the court not to schedule a hearing between 24 June and 19 July 1996.

17. On 30 May 1997 the court scheduled the hearing for 17 September 1997.

18. On 17 September 1997, at the hearing, the court requested the appeal board to supply further information as regards reductions of the fees paid to the applicant in previous quarters.

19. On 5 November 1997 the appeal board submitted the information requested.

20. In her reply of 13 February 1998 the applicant requested that further inquiries be carried out as to the facts. She also complained about the length of the proceedings.

21. In March 1998 the court suggested that the appeal board and the third parties submit further observations.

22. In April 1998 the appeal board filed its pleadings.

23. On 23 June 1998 the applicant requested the court not to schedule the hearing before 15 September 1998.

24. On 7 July 1998 the court scheduled the hearing for 7 October 1998. The AOK, a further insurance company, a regional insurance association and also the Hamburg Medical Association were summoned as interested parties.

25. On 7 October 1998 it dismissed the applicant's claim. It held that the appeal board had complied with its duty to provide clarification. It also confirmed the finding that the applicant had failed to rebut the presumption of her lack of economic efficiency as regards initial check-ups.

C. Proceedings before the Hamburg Social Court of Appeal

26. By a letter dated 13 November 1998 the applicant appealed to the Hamburg Social Court of Appeal.

27. On 2 March 1999 the appeal board filed submissions in reply.

28. On 29 April 1999 the court served those submissions on the applicant and the third parties.

29. On 27 July 1999 the applicant requested the court not to schedule the hearing before mid-September 1999.

30. Between the end of November and mid-December 1999 the court moved to a new address.

31. In April 2000 the applicant's newly appointed lawyers requested access to the files.

32. Following a renewed request of 4 July 2000 the court requested them first to submit the form of authority.

33. On 24 July 2000 the applicant requested the court not to schedule the hearing before the end of September 2000.

34. On 31 July 2000 the applicant's lawyers submitted the form of authority.

35. On 2 October 2000, following a direction of 21 September 2000 to that effect, access to the files was granted.

36. On 6 November 2000, at the court's request, the applicant's lawyers informed the court about her intention to make further observations.

37. Following two reminders from the court, the lawyers informed the court in March 2001 that they would no longer be representing the applicant.

38. Following a request by the court, the applicant informed it in June 2001 that she would make further submissions and that she was on holiday in August 2001.

39. On 18 June 2001 the applicant submitted further observations, including applications for the taking of evidence.

40. The same day the court requested the parties to indicate whether they agreed with a rapporteur's decision.

41. In a letter dated 4 September 2001 the applicant refused to give her consent.

42. On 20 December 2001 the court scheduled the hearing for 27 March 2002.

43. On 22 February 2002 the applicant asked the court to adjourn the hearing since she had to undergo an operation. Owing to her illness she could not pursue her claim for one year.

44. On 20 January 2003 the court scheduled the hearing for 4 February 2003.

45. On 4 February 2003 the Hamburg Social Court of Appeal dismissed her appeal. It also held that the value of the subject matter of the litigation was EUR 1,000 and refused leave to appeal.

D. Proceedings before the Federal Social Court and the Federal Constitutional Court

46. On 30 March 2003 the applicant appealed against the refusal of leave to appeal.

47. On 11 September 2003 the Federal Social Court dismissed that appeal.

48. On 17 October 2003 the applicant lodged a constitutional complaint.

49. On 25 November 2003 the Federal Constitutional Court refused to accept her constitutional complaint for adjudication.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Action for failure to act

50. Section 88 of the Social Courts Act provides:

“(1) Where no decision has been made regarding an application for the performance of an administrative act within a reasonable time and without sufficient grounds, a court action shall be admissible six months after an application for the performance of the administrative act has been submitted. ...

(2) The same applies where no decision on an administrative appeal was made, providing that three months shall apply as a reasonable time-limit.”

B. Remuneration of panel doctors

51. Remuneration of panel doctors does not involve a direct transaction between the doctor and the insured patient, or between the doctor and the patient's statutory health-insurance fund, but between the doctor and the competent Regional Medical Association. On a quarterly basis the doctor submits an invoice for services rendered, which are worth a certain number of points (indicated in the uniform assessment standard (*einheitlicher Bewertungsmaßstab* – “EBM”)). The fees actually paid depend on the amount the relevant Regional Medical Association has received from the public health-insurance funds and further factors such as practice budgets and case group averages.

52. In order to ensure the proper allocation of the (limited) financial means, the review board at the Regional Medical Association, which is composed of three members of the Regional Medical Association and three members of the statutory insurance funds, reviews the economic efficiency of general practitioners by assessing whether the services rendered have been medically necessary, effective, in line with the recognised quality standards and proportionate to the costs produced (section 106 §§ 1 and 2 of the Fifth Book of the German Social Code). Section 106 § 3 of the Code furthermore provides for possible reduction of the fees payable, in particular in cases of repeated inefficiency.

THE LAW

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

53. 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...”

54. The Government contested that argument.

A. Admissibility

55. The Government contended that the applicant had not exhausted domestic remedies as regards the complaint about the length of the proceedings. They argued that in the preliminary proceedings she could have brought a complaint for failure to act under section 88 of the Social Courts Act, which would have been an effective challenge to the length of these preliminary proceedings.

56. The applicant contested this view.

57. The Court notes that the appeal board rejected the applicant’s administrative appeal on 20 October 1994, about 11 months after she had lodged the appeal on 8 November 1993. In view of this comparatively short period (see, by contrast, *Glösen v. Germany*, no. 1679/03, §§ 13-15 and 67, 10 January 2008) and bearing in mind that an action for failure to act would have deprived the applicant of one level of supervision and a (potentially favourable) decision by the appeal board – which in fact was what happened in previous proceedings brought by the applicant before the appeal board – the Court considers that in the instant case the applicant could not have been expected to bring such an action.

58. It follows that the Government’s objection on this account must be dismissed.

59. The Court moreover 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. Period to be taken into consideration

60. The Court notes that the relevant period started to run on 8 November 1993, when the applicant lodged her administrative appeal, and ended on 25 November 2003, when the Federal Constitutional Court rendered its decision. It thus lasted 10 years and 17 days for one level of compulsory administrative appeal and four levels of jurisdiction.

2. Reasonableness of the length of the proceedings

(a) The parties' submissions

61. The applicant maintained that the overall duration of the proceedings was in breach of the "reasonable time" requirement laid down in Article 6 § 1 of the Convention. She emphasised that the Government had failed to give any pertinent explanation for the years 1995 to 1997. The applicant admitted that she had caused a delay of one year owing to her illness. In her view, however, her repeated requests for a hearing not to be scheduled during the summer holidays had not contributed to the length of the proceedings and had merely been aimed ensuring the smooth progress of the case. The applicant also conceded that the case was of a certain complexity.

62. The Government argued that the case was complex since the remuneration of panel doctors was subject to highly complicated rules. They also pointed out that in the administrative and social court proceedings a number of persons and corporations had been involved and had had to be summoned as interested parties (*Beiladungserfordernis*).

63. The Government moreover considered that a period of two years and eight months was clearly attributable to the applicant. In this connection they relied in particular on her numerous and repeated requests not to schedule a hearing in the summer holidays, the failure of her lawyer to file further submissions as announced, her delayed answer as regards the proposal for a decision by the judge rapporteur, and also her illness.

64. As regards the authorities' conduct, the Government conceded that a delay of several months had been caused by the Social Court of Appeal's move to new premises.

65. The Government lastly emphasised that the proceedings had been only of minor importance to the applicant since merely EUR 1,000 had been at issue, whereas she had been granted the amount of EUR 32,000.

(b) The Court's assessment

66. 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).

67. The Court observes at the outset that the proceedings concerned the question whether the reduction of the applicant's quarterly fees in 1993 was justified on the ground that she had failed to work efficiently in economic terms, a question which is subject to a complex procedure and rather complicated rules. It also notes that a number of entities were summoned before the social courts as interested parties. The Court therefore agrees with the parties that the case was of a certain legal and factual complexity.

68. As regards the applicant's own conduct, the Court refers firstly to the above findings that the applicant could not have reasonably been expected to bring an action before the Social Court for failure to act (see paragraph 57 above). The Court observes, moreover, that, while it is true that the applicant repeatedly requested the national courts not to schedule a hearing in the summer, there is no indication that the courts in fact intended to do so during this time. The Government did not submit anything to the contrary. Only in 1998 did the Social Court take account of the applicant's request to that effect, and a delay of about one month is therefore attributable to her. Further delays of altogether almost two years were caused by the applicant before the Social Court of Appeal on the ground that she delayed the submission of the form of authority, her announced observations and her statement as regards a decision by the judge rapporteur, and finally also owing to her illness.

69. Turning to the conduct of the domestic authorities, the Court observes in particular that more than two and a half years elapsed before the first hearing took place before the Hamburg Social Court – which, moreover, merely resulted in the court's finding that further information was needed – and that the final decision was taken only after another year. No explanation of this considerable period of inactivity, apparently caused mainly by the excessive workload of the appeal board, has been given by the Government. In particular, except for one reminder in August 1995, the Social Court does not appear to have set any time-limits in order to ensure the progress of the proceedings. The Social Court of Appeal also caused substantial delays of more than 18 months – in particular on account of its move and its belated granting of access to the files.

70. As to what was at stake for the applicant in the dispute, it is true that the issue in these proceedings was the reduction by a mere 15% of the applicant's quarterly fees concerning initial check-ups (corresponding to EUR 1,000), whereas the applicant had been awarded fees in the amount of

EUR 32,200 for the first quarter of 1993. In this respect, the Court therefore agrees with the Government that the case did not require any particular diligence.

71. Nevertheless, assessing the circumstances of the case as a whole and in view notably of the time during which the proceedings were pending before the Hamburg Social Court, the Court considers that in the instant case the length of the proceedings failed to meet the “reasonable time” requirement. There has accordingly been a breach of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS

72. The applicant further complained under Article 6 of the Convention that the proceedings had been unfair, and under Article 8 and Article 1 of Protocol No. 1 about the reduction of her quarterly fees in 1993.

73. The Court has examined the remainder of the applicant’s complaints as submitted by her. 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 is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicant claimed EUR 1,000 in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage.

76. The Government contested these claims, arguing in particular that the pecuniary damage claimed had not been caused by the length of the proceedings.

77. As regards the applicant’s claim in respect of pecuniary damage, the Court notes that the alleged damage related to the outcome of the proceedings and consequently was not caused by the length of the proceedings as such. It therefore dismisses this claim.

78. The Court, on the other hand, considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards her EUR 500 under that head.

B. Costs and expenses

79. The applicant also sought EUR 1,160 corresponding to her lawyer's fees in the proceedings before the Federal Social Court.

80. The Government objected to the reimbursement of these costs, also arguing that they were not caused by the length of the proceedings.

81. The Court agrees with the Government that the costs do not relate to the violation it has found. It thus dismisses the claim for costs and expenses.

C. Default interest

82. 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. *Declared* the complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
2. *Held* that there has been a violation of Article 6 § 1 of the Convention;
3. *Held*
 - (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 500 (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. *Dismissed* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President