

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

FIFTH SECTION

CASE OF FRÖBRICH v. GERMANY

(Application no. 23621/11)

JUDGMENT

STRASBOURG

16 March 2017

FINAL

16/06/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Fröbrich v. Germany,

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

Erik Møse, *President,*
Angelika Nußberger,
André Potocki,
Faris Vehabović,
Síofra O'Leary,
Carlo Ranzoni,
Mārtiņš Mits, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 21 February 2017,

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

PROCEDURE

1. The case originated in an application (no. 23621/11) 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 Karl Hubert Fröbrich ("the applicant"), on 10 April 2011.

2. The applicant was represented by Mr J.H. Mader, a lawyer practising in Strausberg. The German Government ("the Government") were represented by one of their Agents, Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged, in particular, that he was not granted an oral hearing in the proceedings before the domestic courts concerning the withdrawal of the compensation and special pension he had been granted for a prison term served in 1958/59 in the former German Democratic Republic (GDR), in violation of Article 6 § 1 of the Convention.

4. On 24 June 2014 the complaint concerning the absence of an oral hearing was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1934 and lives in Strausberg. Before the reunification of Germany he lived in the former GDR, serving in the police force from 1952 to 1954.

A. The applicant's criminal conviction in the former GDR

6. On 13 June 1958, the Frankfurt (Oder) District Court convicted the applicant of "criminal assault against the local bodies of the State" (*"verbrecherischer Angriff gegen die örtlichen Organe der Staatsmacht*") after he had attacked a member of the GDR parliament of the ruling Socialist Unity Party. He was sentenced to one year and eight months' imprisonment and served 14 months in prison.

B. The rehabilitation proceedings after German reunification

7. On 8 February 1994 the Frankfurt (Oder) Regional Court annulled the 1958 judgment for its incompatibility with the principles of the rule of law and rehabilitated the applicant pursuant to Section 1 § 1 of the Criminal Rehabilitation Act (*Gesetz über die Rehabilitierung und Entschädigung von Opfern rechtsstaatswidriger Strafverfolgungsmaßnahmen im Beitrittsgebiet - Strafrechtliches Rehabilitierungsgesetz*) designed to rehabilitate and compensate prisoners of the GDR regime for deprivation of their liberty incompatible with the principles of the rule of law.

8. On 25 April 1994 the applicant lodged an application for compensation under the Criminal Rehabilitation Act. The application form contained instructions that, according to Section 16 § 2 of the Act (see Relevant domestic law and practice, paragraphs 23 and 24 below), such compensation could not be granted to a person who had offended against the principles of humanity and the rule of law. The applicant declared on the questionnaire that he had never acted in disregard of these principles and never worked for the former GDR's Ministry of State Security (*Ministerium für Staatssicherheit*). On 13 February 1995 the President of the Frankfurt (Oder) Regional Court, acting as the competent authority, awarded him compensation of 8,250 German marks, equivalent to about 4,218 euros (EUR), pursuant to Section 17 in conjunction with Section 16 §§ 1 and 3 of the Criminal Rehabilitation Act.

9. On 7 August 2007, after an amendment of the Act, the applicant also applied for a special, income-related pension which benefits former victims of imprisonment (*monatliche besondere Zuwendung für Haftopfer*). He

again confirmed that he had never offended against the principles of humanity and the rule of law and never worked for the former GDR's Ministry of State Security. On 14 November 2007 he was granted a special monthly pension of EUR 250 pursuant to Section 17a of the Criminal Rehabilitation Act, with the reservation that information held by the Federal Commissioner for the Records of the State Security Service of the former GDR ("the Federal Commissioner") must not contradict the applicant's statements. A respective request for information was submitted on 19 November 2007.

C. The proceedings at issue

10. On 25 February 2008 the Federal Commissioner informed the President of the Regional Court that the applicant, between 22 September 1953 and 25 November 1954, had been a secret informant of the Ministry of State Security while he was a member of the police force. This information was based on a number of documents, including 32 handwritten reports allegedly drafted by the applicant and a declaration to commit to serve as a secret informant to the state security service.

11. On 18 February 2009 the President of the Regional Court, relying on Section 48 §§ 1 and 2, third sentence, no. 2 of the Brandenburg Administrative Procedure Act (*Verwaltungsverfahrensgesetz für das Land Brandenburg*), withdrew the decisions granting compensation and a special pension and at the same time ordered the applicant to reimburse the amounts already received pursuant to Section 49a of the same Act. The President considered that the decisions had been unlawful from the beginning as the prerequisites for either entitlement had never been met and that the applicant could not legitimately rely on these decisions being maintained, as he had obtained them by giving information that was substantially incorrect. Referring to Section 16 § 2 of the Criminal Rehabilitation Act, he observed that the applicant, contrary to the statements in his applications, had worked as a secret informant for the Ministry of State Security and had produced at least five reports for the Ministry in which he put at real risk the persons on whom he had informed.

12. On 9 March 2009 the applicant applied for judicial review of that decision and asked to be heard in person. He claimed that the information contained in the documents of the Federal Commissioner was incomplete and not accurate. The fact that at the time of recruitment he was only 19 years old and had been severely traumatised when fleeing his home town in Silesia in 1945 and experiencing the bombing of Dresden on 13 February 1945, followed by several months of homelessness after the war had ended, also had to be taken into account. His father had returned, incapacitated for work, from Soviet captivity only in 1947 or 1948. While serving in the police forces he had not been aware of working for other government

agencies. The written commitment to the state security service might have been dictated to him when he was under the influence of alcohol but he had no memory of it whatsoever. In any case, he ruled out that the wording was his own and that he had known that the reports were to be used by the state security service.

13. On 16 February 2010 the Frankfurt (Oder) Regional Court, sitting as a chamber of three judges, dismissed the applicant's request for judicial review, finding that his work as a secret informant for the Ministry of State Security was of such nature, scope and duration that it was reprehensible enough to justify ruling out the applicant's eligibility for compensation payments pursuant to Section 16 § 2 of the Criminal Rehabilitation Act. Acknowledging that in a dictatorship which lasted for decades, minor involvement with the regime was frequent, it considered that the applicant's position as a secret informant of the state security service did not itself suffice to trigger the application of that provision. However, compensation provided under the Act was intended to benefit innocent victims only, but not those who had also participated in offences contrary to the principles of humanity and which were harmful to others or at least put them at risk. This could be assumed when a secret informant voluntarily reported on others and the reports could potentially cause persecution by the state security service. In that case compensation payments were ruled out, no matter how great the offender's own suffering had been. The courts were not to compare the extent of suffering involved.

14. The Regional Court observed that the applicant had penned a handwritten commitment to serve the state security service after he had already reported twice on others. Thus the applicant's submission that he had believed that he was reporting to police officers and not to the state security service was, in the light of that declaration, not credible ("*nicht glaubhaft*"). Furthermore, the five reports mentioned in the decision of the President of the Regional Court, as well as two more reports were capable of putting in danger the persons informed on. The applicant mainly reported on their contacts with West Germany and West Berlin. An intention to leave the former GDR without permission, in particular, could have led to severe criminal persecution of the persons involved. The reports were not meaningless but contained valuable information for the state security service. The applicant's claim that some reports were unknown to him and factually incorrect and that he did not recognise the names of the superior officers was irrelevant to the Regional Court's decision.

15. The Regional Court also pointed out that it was unnecessary to hear the applicant in person. His personality at the time and the circumstances of his recruitment would have been relevant only if there were indications that the applicant acted under insupportable pressure. However, there were no such indications and the applicant had made no claims in this regard. He had reported twice on others, even before being recruited by the state security

service. Further, the court could not see a connection between the applicant's experiences relating to the impact of war and the post-war period on him and his psychological strain at the time of recruitment on the one hand and his willingness to cooperate with the state security service on the other hand.

16. On 24 August 2010 the Brandenburg Court of Appeal dismissed the applicant's appeal, endorsing the Regional Court's reasons.

17. On 28 October 2010 the Federal Constitutional Court declined to consider the applicant's constitutional complaint without providing reasons (2 BvR 2329/10).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The withdrawal of beneficial administrative acts

18. At the material time, the provisions governing the withdrawal of beneficial administrative acts of the *Land* Brandenburg were contained in the Brandenburg Administrative Procedure Act and read, in so far as relevant, as follows:

Section 48: Withdrawal of an unlawful administrative act

"(1) An unlawful administrative act may, even after it has become non-appealable, be withdrawn wholly or in part either retrospectively or with effect for the future. An administrative act which gives rise to a right or an advantage relevant in legal proceedings or confirms such a right or advantage (beneficial administrative act) may only be withdrawn subject to the restrictions of paragraphs 2 to 4.

(2) An unlawful administrative act which provides for a one-time or continuing payment of money or a divisible material benefit, or which is a prerequisite for these, may not be withdrawn so far as the beneficiary has relied upon the continued existence of the administrative act and his reliance deserves protection relative to the public interest in a withdrawal. Reliance is in general deserving of protection when the beneficiary has utilised the contributions made or has made financial arrangements which he can no longer cancel, or can cancel only by suffering a disadvantage which cannot reasonably be asked of him. The beneficiary cannot claim reliance when: (...)

2. he obtained the administrative act by giving information which was substantially incorrect or incomplete (...)."

Section 49a: Reimbursement, interest

"(1) Where an administrative act is either withdrawn or revoked with retrospective effect, or where it becomes invalid as a result of the occurrence of a condition which renders it null and void, any payments or contributions which have already been made shall be returned. The amount of such a reimbursement shall be stipulated in a written administrative act."

B. The Criminal Rehabilitation Act

19. Section 1 § 1 of the Criminal Rehabilitation Act provided for the annulation of judgments rendered by courts of the former GDR in so far as they were incompatible with the principles of the rule of law and the rehabilitation of the person concerned.

20. Section 16 § 1 of the Act provided for compensation payments for the rehabilitated person for a deprivation of liberty he or she suffered.

21. Section 17 of the Act foresaw that a compensation of, at the relevant time, 550 German marks, equivalent to about EUR 281, for every calendar month of deprivation of liberty incompatible with the principles of the rule of law.

22. Section 17a of the Act foresaw that a person eligible for compensation may receive a monthly pension of, at the relevant time, EUR 250 if, in regard to his or her income, he or she lives in a financially difficult situation and has suffered imprisonment of at least 180 days.

23. Section 16 § 2 of the Act provided that compensation payments shall not be granted to a person who has either offended against the principles of humanity or the rule of law or has severely abused his or her position to his own advantage or to the detriment of others. It is constant case-law of the domestic courts that a person offended against the principles of humanity or the rule of law when he or she voluntarily collected information on fellow citizens, including through the intrusion of their private sphere and the abuse of their trust, in a targeted manner and passed on such information to the state security service, condoning, at least, that such information would be used to the detriment of the persons informed on, notably to suppress that person's human rights (see, *inter alia*, Rostock Court of Appeal, I WsRH 3/03, decision of 10 February 2004). Where the person was forced to work for the Ministry State Security through insupportable pressure, the requirements of Section 16 § 2 of the Act would not be met (Saxony-Anhalt Court of Appeal, 1 Ws Reh 618/08, decision of 15 December 2008).

24. While certain courts had considered it necessary to weigh harm that a claimant suffered against the harm he had caused others (Potsdam Regional Court, no. BR (OP) 15/08, decision of 21 November 2008), others, notably the Federal Administrative Court, in its judgment of 19 January 2006 (3 C 11/05), held that the courts were not to compare the extent of suffering involved. In that same judgment, the Federal Administrative Court also stated that for Section 16 § 2 of the Act to apply, it was not necessary to prove that persons on whom the claimant had reported actually suffered disadvantages. Rather, it was sufficient that the reports were capable of putting in danger the persons informed on (similarly Thuringia Court of Appeal, 1 Ws-Reha 14/04, decision of 13 July 2005; Berlin Administrative Court of Appeal, 6 B 1/04, judgment of 1 December 2004).

25. According to Section 11 § 3, first sentence, of the Act the courts, as a rule, adopted decisions in proceedings concerning the Act without holding an oral hearing. Section 11 § 3, second sentence, of the Act allowed the court to hold such a hearing if it finds it necessary to establish the facts, or for any other reason.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

26. The applicant complained that by deciding on the withdrawal of his compensation and special pension without holding an oral hearing, the domestic courts violated his right to an oral hearing as provided in Article 6 § 1 of the Convention, which – as far as relevant – reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by a ... tribunal ..."

27. The Government contested that argument.

A. Admissibility

28. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

29. The applicant, referring to his constitutional complaint, submitted that it was apparent from the documents available to the domestic courts that in 1952 he had been in a situation under pressure, which had been used to turn him into an informant against his will. He claimed that if he had been heard in person he would have been able to illustrate his desperate situation as an immature young man who consumed too much alcohol. Better than any file of the Ministry of State Security, he could have explained in person that he had never knowingly passed on information to harm others. Furthermore, the applicant referred to a judgment of the constitutional court of the *Land* of Brandenburg (Brandenburg

Constitutional Court) of 24 January 2014 (VfGBbg 2/13) which set aside lower instance decisions revoking compensation grants on the grounds that a former prisoner had committed to work for the state security service. The constitutional court, also considering Article 6 of the Convention, found, *inter alia*, that not holding a hearing, thus denying the claimant an opportunity to explain in person a situation of insupportable pressure because his submissions to that end had not been supported by evidence from the files of the state security service, was in breach of relevant provisions of the *Land*'s constitution.

30. The applicant added that it could not have been expected of him to have known the very nature of the Ministry of State Security, considering that it had only been founded in 1950. Furthermore, the domestic courts had uncritically assumed everything in the state security service's files to be true without giving the applicant an opportunity to explain his case in person. Moreover, making reference to case-law of certain domestic courts, the applicant submitted that the injustice suffered by him had to be weighed against the actual disadvantages which had occurred to the people he had reported on. For this purpose it had been necessary to hear him in person. The hearing would have shown that the applicant's own suffering outweighed the negative effects his reports had on others. The applicant emphasised that there was no evidence that any of the people he had reported on had suffered any disadvantages because of his reports which he described as "meaningless" and "empty". The applicant further emphasised that in 1954 he was immediately removed from office after he had thrust his uniform and his police service card on the street while civilians were watching.

(b) The Government

31. The Government submitted that there was no breach of Article 6 because, in the particular circumstances of the case, an oral hearing before the domestic courts had not been necessary. Referring to the judgments in the cases of *Schlumpf v. Switzerland* (no. 29002/06, § 64, 8 January 2009) and *Lorenzetti v. Italy* (no. 32075/09, § 32, 10 April 2012), they argued that an oral hearing was dispensable where the court was able to clear up the matter fairly and reasonably on the basis of the court files or the written statements submitted by the parties to the proceedings. The possibility of refraining from hearing the concerned party in person was not limited to rare, exceptional cases (with reference to *Fexler v. Sweden*, no. 36801/06, § 57, 13 October 2011). Referring to the case of *Suhadolc v. Slovenia* ((dec.), no. 57655/08, 17 November 2011), the Government argued that leaving the question of whether or not to hold an oral hearing to the discretion of the competent judges was not *per se* incompatible with the Convention.

32. The Government further pointed out that the sole decisive factor was the question of whether or not the applicant had been active, to a considerable degree, as an informant serving the authorities of the former GDR. This was something the domestic courts were able to establish based on the reports at hand that had been drawn up by the applicant, whose authorship he had not disputed and for which, moreover, there was incontestable proof. Other aspects had not been relevant for the Regional Court because domestic law neither required the matter to be balanced against the applicant's personal life history, nor was it a prerequisite under Section 16 § 2 of the Criminal Rehabilitation Act that one of the persons on whom the applicant had informed suffered any disadvantage as a result of his reports. Likewise, his economic and personal circumstances as submitted to the Regional Court were not of any relevance. In particular, his submissions lacked any elements which might excuse his activities as an informant. There was no need to hear the applicant in person in order to discuss different opinions on how to interpret the law. In conclusion, the domestic courts would not have benefited in any way from hearing the applicant orally.

2. The Court's assessment

33. The Court, at the outset, observes that the instant case does not involve criminal charges against the applicant. The impugned decision to revoke the previous granting of compensation does not concern the applicant's criminal rehabilitation as such. The Regional Court's decision of 8 February 1994 to annul the 1958 judgment (see paragraph 7 above) was not affected. The Court has already decided that when a person faces an interference with his or her means of subsistence and is claiming an individual, economic right flowing from specific rules laid down in a statute this must be considered "civil" in the meaning of Article 6 § 1 (see *Salesi v. Italy*, 26 February 1993, § 19, Series A no. 257-E). This also applies to individual compensation claims for injustices suffered under a former regime (*Wos v. Poland* (dec.), no. 22860/02, § 76, ECHR 2005-IV, concerning a victim of Nazi persecution). The aim of the applicant's request for judicial review was to receive further compensation for his criminal persecution under the former GDR's rule and to keep the amounts already received. He was granted a pension according to Section 17a of the Criminal Rehabilitation Act (see Relevant domestic law and practice, paragraph 22 above). Regard being had in particular to the eligibility criteria of a claimant's financial difficulties, the Court is thus satisfied that the right in question was "civil" in character, in the autonomous sense of Article 6 § 1 of the Convention.

34. The Court reiterates that, in proceedings before a court of first and only instance, the right to a "public hearing" within the meaning of Article 6 § 1 entails an entitlement to an "oral hearing" unless there are

exceptional circumstances that justify dispensing with such a hearing (see *Göç v. Turkey* [GC], no. 36590/97, § 47, ECHR 2002-V, with further references). By rendering the administration of justice transparent, an oral hearing in public contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see *Mehmet Emin Şimşek v. Turkey*, no. 5488/05, § 28, 28 February 2012; *Szücs v. Austria*, 24 November 1997, § 42, *Reports of Judgments and Decisions* 1997-VII). In proceedings before two instances, in general, at least one instance must provide such a hearing if no such exceptional circumstances are at hand (see *Salomonsson v. Sweden*, no. 38978/97, § 36, 12 November 2002; *Alatulkkila and Others v. Finland*, no. 33538/96, § 53, 28 July 2005).

35. The exceptional character of the circumstances that may justify dispensing with an oral hearing in proceedings concerning a "civil" right essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations (*Madaus v. Germany*, no. 44164/14, § 23, 9 June 2016; see also *Jussila v. Finland* [GC], no. 73053/01, § 42, ECHR 2006-XIV, which concerned the criminal limb of Article 6 § 1 of the Convention). This does not mean that refusing to hold an oral hearing may be justified only in rare cases (see *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005). The Court has accepted exceptional circumstances in cases where the proceedings concerned exclusively legal or highly technical questions (see *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002; and *Speil v. Austria* (dec.), no. 42057/98, 5 September 2002). There may be proceedings in which an oral hearing may not be required: for example, where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (*Jussila*, cited above, § 41, with reference to *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002, which concerned the civil limb of Article 6 § 1 of the Convention).

36. Thus, it needs to be examined whether there were any exceptional circumstances which justified dispensing with an oral hearing in the instant case. That would not be the case where there were issues of credibility or contested facts that were decisive for the outcome of the proceedings.

37. The Court observes that the Regional Court, in its decision of 16 February 2010 (see paragraphs 13 to 15 above), established that the applicant had knowingly contributed reports to the state security service and that seven reports were capable of putting in danger the persons reported on to be persecuted by the state security service. That court found the applicant's claim that he had believed to be reporting to regular police forces not to be credible as the former GDR's authorities file on the

applicant contained a handwritten statement in which he committed to the state security service to serve as a secret informant. Considering the facts to be sufficiently established, the court found no reason to investigate the case further or to call witnesses. It did not consider hearing the applicant in person to be necessary because he had not submitted circumstances indicating that he committed himself to the state security service under insupportable pressure. The Court notes that the present case thus differs from the case decided by the Brandenburg Constitutional Court (see paragraph 29 above), in which the claimant was denied an opportunity to explain in person a situation of insupportable pressure merely because his submissions had not been supported by evidence from the files of the state security service.

38. The Regional Court, whose reasoning was endorsed by the Court of Appeal, considered all other factual information presented by the applicant to be irrelevant for its decision. The Court notes that according to the case-law of certain domestic courts, including the Federal Administrative Court, concerning Section 16 § 2 of the Criminal Rehabilitation Act (see Relevant domestic law and practice, paragraphs 23 and 24 above), the applicant's own suffering was not to be weighed against the risk to which he had exposed others. Therefore, the details of the applicant's deprivation of liberty had no bearing. Likewise, according to the case-law of the domestic courts, neither the applicant's personal circumstances at the relevant time nor the question whether any of the persons on whom the applicant had reported actually suffered disadvantages, were relevant aspects for the application of the said provision. Hence, even if the domestic courts had assumed the applicant's factual submissions in this respect to be true, they would not have drawn different conclusions (compare *Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003; compare and contrast *Özata v. Turkey*, no. 19578/02, § 36, 20 October 2005).

39. The Court further notes that the applicant did not repeat his claim that he had believed to be reporting to regular police forces rather than to the state security service, which the Regional Court found not to be credible in light of documentary evidence, neither in his appeal against the Regional Court's decision nor in his constitutional complaint. Nor did he rely on this argument in his application to the Court.

40. Thus, the applicant did not raise issues of credibility or contested facts that were decisive for the outcome of the proceedings. The domestic courts were in a position to fairly and reasonably decide the case on the basis of the parties' submissions and other written materials.

41. The foregoing considerations are sufficient for the Court to conclude that there were exceptional circumstances within the meaning of its case-law to justify dispensing with an oral hearing.

42. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 16 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Erik Møse
Deputy Registrar	President