

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Applications no. 12977/09, 15856/09, 15890/09, 15892/09 and 16119/09
by Henry DUDEK
against Germany

The European Court of Human Rights (Fifth Section), sitting on 23 November 2010 as a Chamber composed of:

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Registrar,*

Having regard to the above application lodged between 26 February 2009 and 18 March 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Henry Dudek, is a German national who was born in 1947 and lives in Lohne. He was represented by Noreck Hoyer Dudek, a firm of lawyers practising in Hannover. The German Government ("the Government") were represented by their Deputy Agent, Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice.

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is a dentist and member of the Lower Saxony Association of Contractual Dentists (*Kassenzahnärztliche Vereinigung Niedersachsen*) ("the Association"), the self-governing body of the contractual dentists practising in the *Land* Lower Saxony. The Association is responsible for, *inter alia*, entering into contracts with public health insurers on behalf of its members, checking costs brought to account by its members, distributing reimbursements for contractual work paid by public health insurers, and allocating the effects of austerity measures in the public health sector among its members in conformity with decisions of its council. Contractual dentists are free to treat other patients, in particular those who are insured by private health insurers. The Association is not concerned with remuneration for such work.

The applicant was involved in numerous sets of proceedings against the Association or Committees affiliated with it before the social courts concerning aspects of his remuneration as a contractual dentist.

On 25 August 2009 the President of the Fifth Section communicated the complaints regarding the length of the proceedings to the Government, together with those concerning eleven other sets of domestic proceedings which had been decided or were then still pending before the same judicial formations.

1. Application no. 12977/09

On 4 February 2003 the Association deducted an amount of 97.06 Euros ("EUR") from expenses for material and laboratory services brought to account by the applicant in regard to the orthodontic treatment of one patient because the applicant had significantly exceeded the initial estimations by the public health insurer concerned in regard to those specific expenses.

On 6 February and 12 June 2003 the applicant made unsuccessful administrative complaints.

On 22 January 2004 he brought an action against the Association before the Hanover Social Court ("the Social Court").

On 12 January 2009 the applicant requested the Social Court to take additional evidence, namely that the initial calculations of public health

insurers were not binding for the dentist concerned and that he had not exceeded the initial global estimations of expenses.

On 14 January 2009 the Social Court held an oral hearing at the end of which it dismissed the action, refused leave to appeal and refused to hear additional evidence.

On 7 February 2009 the applicant lodged a complaint against the refusal to be granted leave to appeal before the Lower-Saxony Bremen Social Court of Appeal ("the Social Court of Appeal"). On the same day he lodged a constitutional complaint with the Federal Constitutional Court in which he complained that the Social Court had taken no action. On 3 March 2009 the Federal Constitutional Court declared the constitutional complaint inadmissible, without giving further reasons (1 BvR 383/09).

On 4 February 2010 the Social Court of Appeal dismissed the complaint; on 1 April 2010 it dismissed the applicant's appeal for the right to be heard against this decision.

Also on 4 April 2010 it dismissed as inadmissible the applicant's appeal against the Social Court's refusal to hear additional evidence; it subsequently ordered that no court fees be imposed in view of an incorrect instruction on the right to appeal issued by the Social Court.

In the proceedings before the Court, the applicant requested at least EUR 15,000 in regard to non-pecuniary and 44,178.98 German marks ("DEM") (= EUR 22,588.35) in regard to pecuniary damage.

2. Application no. 15856/09

On 14 October 2002 EUR 71.05 were deducted from the expenses for personnel and drugs brought to account by the applicant.

On 12 November 2002 the applicant made an unsuccessful administrative complaint.

On 14 April 2003 he brought an action against the Complaints Committee at the Dentistry Economic Efficiency Office before the Social Court.

On 23 July 2008 the Social Court dismissed the action on the grounds that the deduction had been lawful because the applicant's expenses had been excessive in comparison to other dental practices.

On 15 September 2008 the applicant lodged a complaint against the refusal to be granted leave to appeal before the Social Court of Appeal.

On 7 February 2009 the applicant lodged a constitutional complaint with the Federal Constitutional Court in which he complained that the Social Court had taken no action. On 3 March 2009 the Federal Constitutional Court declared the constitutional complaint inadmissible, without giving further reasons (1 BvR 330/09).

On 28 April 2010 the Social Court of Appeal dismissed the complaint.

In the proceedings before the Court, the applicant requested at least EUR 15,000 in regard to non-pecuniary and DEM 135,296.12 (= EUR 69,175.81) in regard to pecuniary damage.

3. Application no. 15890/09

On 11 March 2003 EUR 208 were deducted from the expenses brought to account by the applicant for the practice overhead in regard to costs for personnel as well as drugs.

On 14 April 2003 the applicant made an unsuccessful administrative complaint.

On 15 December 2003 he brought an action against the Complaints Committee at the Association before the Hanover Social Court.

On 12 January 2009 he requested the Social Court to take additional evidence, namely that he was entitled to the expenses requested for the practice overhead; that the expenses brought to account by him were to be calculated using specific criteria; and that the practice overhead of unamortised dental practices such as his was higher than the one of amortised practises.

On 14 January 2009 the Social Court held an oral hearing at the end of which it dismissed the action, refused leave to appeal and refused to hear additional evidence.

On 7 February 2009 the applicant lodged a complaint against the refusal to be granted leave to appeal before the Social Court of Appeal. On the same day he lodged a constitutional complaint with the Federal Constitutional Court in which he complained that the Social Court had taken no action. On 3 March 2009 the Federal Constitutional Court declared the constitutional complaint inadmissible, without giving further reasons (1 BvR 347/09).

On 4 February 2010 the Social Court of Appeal dismissed the complaint; on 1 April 2010 it dismissed the applicant's appeal for the right to be heard against this decision.

Also on 4 April 2010 it dismissed as inadmissible the applicant's appeal against the Social Court's refusal to hear additional evidence; it subsequently ordered that no court fees be imposed in view of an incorrect instruction on the right to appeal issued by the Social Court.

In the proceedings before the Court, the applicant requested at least EUR 15,000 in regard to non-pecuniary and DEM 135,296.12 (= EUR 69,175.81) in regard to pecuniary damage.

4. Application no. 15892/09

On 21 January 2003 EUR 213.16 were deducted from the expenses brought to account by the applicant for the practice overhead in regard to costs for personnel as well as drugs.

On 23 January 2003 the applicant made an unsuccessful administrative complaint.

On 21 July 2003 he brought an action against the Complaints Committee of the Dentistry Economic Efficiency Office before the Hanover Social Court.

On 22 July 2008 he requested that a scheduled oral hearing be adjourned until a decision on his legal aid request became final.

On 23 July 2008 the Social Court held an oral hearing and dismissed the action.

On 14 September 2008 the applicant lodged a complaint against the refusal to be granted leave to appeal before the Social Court of Appeal, which dismissed the complaint on 28 April 2010.

On 7 February 2009 the applicant lodged a constitutional complaint with the Federal Constitutional Court in which he complained that the Social Court had taken no action. On 3 March 2009 the Federal Constitutional Court declared the constitutional complaint inadmissible, without giving further reasons (1 BvR 382/09).

In the proceedings before the Court, the applicant requested at least EUR 15,000 in regard to non-pecuniary and DEM 135,296.12 (= EUR 69,175.81) in regard to pecuniary damage.

5. Application no. 16119/09

On 5 May 2004 the Prosthodontics Conciliation Committee ("the Conciliation Committee") at the Association ordered the applicant to reimburse EUR 312.17 for the defective implantation of a lower jaw prosthesis. On 8 June 2004 the applicant made an unsuccessful administrative complaint. On 4 April 2005 he brought an action against the Conciliation Committee before the Hanover Social Court, which granted the action on 25 February 2009.

In the proceedings before the Court, the applicant requested at least EUR 15,000 in regard to non-pecuniary damage.

COMPLAINTS

The applicant complained under Articles 6 and 13 of the Convention that that the length of the proceedings before the social courts had been excessive.

THE LAW

The applicant's complaints relate to the length of the proceedings before the social courts. The proceedings at issue in application no. 12977/09 began on 6 February 2003 and ended on 4 April 2010, thus lasting seven years, one month and 28 days for three levels of jurisdiction. The proceedings at issue in application no. 15856/09 began on 12 November 2002 and ended on 28 April 2010, thus lasting seven years, five months and 17 days for three levels of jurisdiction. The proceedings at issue in application no. 15890/09 began on 14 March 2003 and ended on 4 April 2010, thus lasting seven years and 23 days for three levels of jurisdiction. The proceedings at issue in application no. 15892/09 began on 23 January 2003 and ended on 28 April 2010, thus lasting seven years, three months and six days for three levels of jurisdiction. The proceedings at issue in application no. 16119/09 began on 8 June 2004 and ended on 25 February 2009, thus lasting four years, eight months and 19 days for one level of jurisdiction.

According to the applicant, the length of the proceedings was in breach of the "reasonable time" requirement laid down 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 ... hearing within a reasonable time by [a] ... tribunal..."

He further alleged a violation of Article 13, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government, while acknowledging that the length of the proceedings at issue had been excessive and therefore refraining from making additional legal arguments, submitted that these proceedings had not been of great importance to the applicant for they had only concerned minor sums of money and the applicant was financially secure.

The Court notes the pettiness of the sums of money at issue (no. 12977/09: EUR 97.06; no. 15856/09: EUR 71.05; no. 15890/09: EUR 208; no. 15892/09: 213.16; no. 16119/09: EUR 312.07), and the fact that these sums concerned the applicant's dental practice whose very existence was not put in jeopardy by the amounts involved. It observes that the applicant's insistence on the payment of these – when considered from the perspective of the continuing existence of his dental practice: clearly – petty sums by the respondent Association or Committees affiliated with it may have been prompted by the applicant's subjective perception that important question of principle were at issue and that he had been short-changed by the Association and the majority of its self-governing council concerning remuneration.

In view of the pettiness of the sums of money at issue the Court must determine whether the complaints are admissible under Article 35 of the Convention, as amended by Protocol No. 14, which entered into force on 1 June 2010 and which reads, in so far as relevant, as follows:

> "3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
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> (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
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> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

The Protocol added a new admissibility requirement to Article 35 of the Convention in its § 3 (b). In accordance with Article 20 of the Protocol, the new provision shall apply from the date of its entry into force to all applications pending before the Court, except those declared admissible. In the absence of an effective domestic remedy against the excessive length of civil proceedings under German law (see in particular *Sürmeli v. Germany* [GC], no. 75529/01, ECHR 2006-VII; *Herbst v. Germany*, no. 20027/02, 11 January 2007; and *Rumpf v. Germany*, no. 46344/06, 2 September 2010), however, such claims have not been "duly considered by a domestic tribunal". It follows that the applications cannot be dismissed using the new inadmissibility requirement.

The Court will therefore turn to the question whether the applications must be rejected under Article 35 § 3 (a) of the Convention, as amended by Protocol No. 14. Since the applicant's length-of-proceedings complaints under Article 6 § 1 of the Convention are not manifestly ill-founded, it remains to be determined whether the applications amounted to an abuse of the right of individual application. In its decision in the case of *Bock v. Germany* ((dec.), no. 22051/07, 19 January 2010) the Court dismissed an application for abuse of the right of individual application on the following grounds:

> "The Court ... had regard to the disproportion between the triviality of the facts, namely the pettiness of the amount involved and the fact that the proceedings concerned a dietary supplement, not a pharmaceutical product, and the extensive use of court proceedings - including the appeal to an *international* court - against the background of that Court's overload and the fact that a large number of applications raising serious issues on human rights are pending. Furthermore, the Court observes that proceedings as the one at issue in the instant case also contribute to the congestion of the courts at the domestic level and thus to one of the causes for excessive length of court proceedings. In the examination of the case the Court further took into consideration the applicant's comfortable financial situation as a government official and the fact that there was no question of principle involved as evidenced by the lack of an appeal after the first instance dismissal of the applicant's claim. Finally, it also considered the nature and scope of the alleged Convention violation. In this

> respect the Court notes, that the issue of excessive length of court proceedings has been dealt with by the Court in numerous cases - in particular also against the respondent Government - in which the principles of the reasonable time requirement of Article 6 § 1 have been laid down..."

The Court notes that its decision in *Bock*, cited above, predates the entering into force of Protocol No. 14. The Court is of the opinion that the approach chosen in the *Bock* decision is still applicable following the establishment of the new admissibility requirement in Article 35 § 3 (b) of the Convention for the following reasons.

The wording of Article 35 § 3 of the Convention clearly establishes that the new requirement is an alternative to and not a replacement of the other inadmissibility criteria contained in Article 35 § 3 (a) of the Convention. A holding that the new requirement rendered parts of the Court's case-law on its admissibility requirements predating the entering into force of Protocol No. 14 nugatory, would also run counter to the purpose of its introduction. The requirement shall, in the long run, enable the Court to more rapidly dispose of unmeritorious cases and thus allow it to concentrate on its central mission of providing legal protection of human rights at the European level (see Explanatory Report to Protocol No. 14, CETS No. 194 (hereinafter referred to as "Explanatory Report"), §§ 39 and 77-79). The High Contracting Parties clearly wished that the Court devote more time to cases which warrant consideration on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes (see Explanatory Report, § 77). More recently, the High Contracting Parties invited the Court to give full effect to the new admissibility criterion and to consider other possibilities of applying the principle *de minimis non curat praetor* (see Action Plan adopted by the High Level Conference on the Future of the European Court of Human Rights, Interlaken, 19 February 2010, § 9(c)).

Having carefully examined the circumstances of the case at hand and being mindful of the Court's overload and the fact that a large number of applications raising serious issues on human rights are pending before it, the Court considers that the criteria for abuse of the right of individual application as established in its *Bock* decision have been met.

As regards the domestic proceedings, the Court does not see any important questions of principle that had been involved. The applicant did not establish that the deductions concerned recurring problems or that they had been linked to structural and serious problems of remuneration of contractual dentists under German law. The Court further notes in regard to application no. 16119/09 that the Social Court resolved the dispute before it to the applicant's advantage.

The applicant's extensive use of court proceedings, including numerous parallel proceedings before the domestic courts, as well as his behaviour in

those proceedings, had contributed to the congestion of the courts at the domestic level and thus to one of the causes for excessive length of court proceedings. Furthermore his behaviour before the Court was not beyond reproach. He kept sending voluminous submissions after the time-limits to do so had already expired and despite clear information by the Court that those submissions would not be included in the case-files. Moreover, the applicant's requests for just satisfaction, in particular in regard to pecuniary damage, appear to be completely out of proportion to the petty sums at issue in the impugned domestic proceedings.

The Court lastly considered that the issue of excessive length of court proceedings has been dealt with by the Court in numerous cases – also against the respondent Government – in which the principles of the reasonable time requirement of Article 6 § 1 of the Convention have been laid down, and that the Court has already specified the obligation which arises under the Convention for the respondent Government with regard to the lack of an effective remedy against excessively long court proceedings (compare, among many others, *Sürmeli v. Germany*; *Herbst v. Germany*; and *Rumpf v. Germany*, all cited above).

Accordingly, it is appropriate to reject the applications as a whole as an abuse of the right of individual application pursuant to Article 35 § 3 (a) of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President