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

FIFTH SECTION

DECISION

Application no. 10152/13
Dirk GRAMANN
against Germany

The European Court of Human Rights (Fifth Section), sitting on 13 January 2015 as a Committee composed of:

Boštjan M. Zupančič, *President,*
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 6 February 2013,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Dirk Gramann, is a German national, who was born in 1971. When lodging his application he was detained in Moers-Kapellen Prison, North Rhine-Westphalia. He was represented before the Court by Ms M. Oerder, a lawyer practising in Mönchengladbach.

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

A. The circumstances of the case

3. By judgment of 28 June 2010 the Mönchengladbach District Court, having held a hearing, convicted the applicant of three counts of fraud and imposed an accumulated prison sentence of one year and six months.

4. The applicant's counsel appealed against this judgment.

5. On 20 May 2011 the Mönchengladbach Regional Court, having held a hearing, dismissed the appeal. The applicant appealed against this decision on points of law.

6. By written submissions of 20 September 2011 the Prosecution's Office moved that the applicant's appeal on points of law was well-founded and applied for a remittal of the case to the Regional Court. It argued that the District Court's findings were erroneous in respect of the damage caused by the fraud.

7. On 4 October 2011 the Düsseldorf Court of Appeal sent its written legal opinion on the case to the applicant's counsel and the Public Prosecutor after having discussed the motions within the panel. It endorsed the Regional Court's findings and pointed out that even if the damage it had presumed might have been erroneous, the sentence itself was adequate considering the applicant's guilt. In the Court of Appeal's opinion the applicant's appeal therefore was manifestly ill-founded and could be dealt with in a written procedure according to Article 349 § 2 of the Code of Criminal Procedure (see paragraph 14 below). As a consequence, the Prosecution's Office moved that the applicant's appeal be dismissed, reasoning shortly that the Regional Court's findings were sufficient and adequate.

8. On 18 October 2011 the applicant challenged the judges sitting in his case for bias, arguing that Article 349 § 2 of the Code of Criminal Procedure did not allow a court to submit its legal opinion to the parties. As the court had done so, the conduct of the judges raised doubts as to their impartiality. The applicant further argued that the conditions for the application of Article 349 § 2 of the Code of Criminal Procedure were not fulfilled because the appeal was not manifestly ill-founded and therefore the judges wanted to avoid the necessary oral hearing, trying to prevent a "constructive dialogue". Apart from that the applicant also was of the opinion that the Düsseldorf Court of Appeal had been obliged under a Federal Law provision (Article 121 of the Courts Organisation Act, see paragraph 13 below) to submit the case to the Federal Court of Justice because it wanted to ignore a provision concerning the fixing of the length of a sentence and other courts of appeal had previously been of a different opinion. In not doing so it had violated the applicant's right to a lawful judge.

9. After having given the Prosecution's Office and the applicant's counsel several times the opportunity to make submissions and having submitted the comments given by the challenged judges on the motion for bias to the parties, the Düsseldorf Court of Appeal rejected the applicant's motion for bias on 28 December 2011. It argued that the procedure by the competent panel was in accordance with Article 349 § 2 of the Code of Criminal Procedure and widely acknowledged in the scientific literature and the German courts' case law. It stressed that the Prosecution's Office was legally independent from the court and stated that there was no indication that the court had influenced the Prosecution's Office by sending its legal opinion.

10. On 4 January 2012 the Düsseldorf Court of Appeal dismissed the appeal as manifestly ill-founded on the basis of the written submissions without an oral hearing, referring to its legal opinion of 4 October 2011.

11. On 2 February 2012 the applicant lodged a constitutional complaint with the Federal Constitutional Court, asserting a violation of Article 6 § 1 of the Convention. The applicant repeated the reasons given in his motion for bias, stressing that the Prosecution's Office had been influenced by the court's legal opinion simply because of the fact that the court submitted its legal opinion and held, as the deciding body, a very strong position. The applicant furthermore took the view that the conviction of fraud was unlawful.

12. On 27 July 2012 the Federal Constitutional Court declined to consider the constitutional complaint without providing reasons (file no. 2 BvR 403/12). On 6 August 2012 the applicant was served this decision.

B. Relevant domestic law and practice

13. Article 121 of the Courts Organisation Act provides that a Court of Appeal in criminal matters has to submit its case to the Federal Court of Justice if it wants to diverge from a decision of another Court of Appeal or of the Federal Court of Justice.

14. Article 349 § 2 of the Code of Criminal Procedure provides that the Court of Appeal may dismiss an appeal as being manifestly ill-founded without an oral hearing if the Prosecution's Office applies accordingly and the decision is unanimous. Article 349 § 3 of the Code of Criminal Procedure provides that the Prosecution's Office shall inform the complainant of the application pursuant to paragraph 2 and of the grounds therefor. The complainant may submit a written response to the court hearing the appeal on points of law within two weeks. Otherwise an oral hearing is held.

15. In a decision of 26 October 2006 (file no. 2 BvR 1656/06) the Federal Constitutional Court held that Article 349 § 2 of the Code of Criminal Procedure did not prohibit a court of appeal to submit its legal opinion to the parties after the Prosecution's Office had submitted its motion in regard to an appeal on points of law. It stressed that the purpose of Article 349 § 2 of the Code of Criminal Procedure was to ensure that an oral hearing was held if the court of appeal and the prosecution's office did not agree on an appeal on points of law. This would not forbid a legal discussion once the prosecution's office had formed its opinion independently and submitted its application to the court of appeal. Different considerations may apply if the court of appeal submitted its legal opinion to the prosecution's office before the prosecution's office had submitted its

motion to the court, because in that case the prosecution's office had not had the possibility of an autonomous choice.

16. In a decision of 14 January 2012 (file no. 4 StR 469/11) the Federal Court of Justice held that a court of appeal was allowed to submit its legal opinion to the Prosecution's Office once the Prosecution's Office had submitted its motion on the appeal to the court if the court of appeal thought this advisable. In a decision of 15 September 1999 the Berlin Court of Appeal (file no. (4) 1 Ss 384/98) found that a court of appeal could submit its legal opinion to the Prosecution's Office when it was of the opinion that the Prosecution's Office had overlooked common case-law when motivating its application. Accordingly the appellants' respective challenges for bias were dismissed by these courts.

COMPLAINTS

17. The applicant complained under Article 6 § 1 of the Convention that the judges had been partial because they had forwarded their legal opinion to the Prosecution's Office and that his right to an oral hearing had been violated because the Düsseldorf Court of Appeal had dismissed his appeal on points of law without oral hearing. Relying on Article 6 § 1 of the Convention he alleged furthermore a violation of his right to a lawful judge because the Düsseldorf Court of Appeal had not submitted the case to the Federal Court of Justice. Moreover, his right to equality of arms had been breached as a result of the application of Article 349 § 2 of the Code of Criminal Procedure.

18. He further complained under Article 5 § 1 of the Convention about his unlawful detention as a result of the unlawfulness of the Court of Appeal's decision.

THE LAW

A. Alleged violation of Article 6 § 1 of the Convention on account of the Court of Appeal's partiality

19. The applicant complained about a violation of his right to impartial judges because the Düsseldorf Court of Appeal had forwarded its legal opinion on the case to the Prosecution's Office.

20. He relied on Article 6 § 1 of the Convention, which, insofar as relevant, reads as follows:

"In the determination of ...any criminal charge against him, everyone is entitled to a fair and public ... hearing ... by an independent and impartial tribunal ..."

21. The Court recalls that there are two aspects to the question of "impartiality": the tribunal must be subjectively free of personal prejudice or bias and must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect (*Grieves v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII (extracts)). As to the second test, it means determining whether, quite apart from the personal conduct, there are ascertainable facts which may raise doubts as to the judges' impartiality. In this respect even appearances may be of some importance (see *Castillo Algar v. Spain*, 28 October 1998, Reports of Judgment and Decisions 1998-VIII, § 45, and *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI).

22. The applicant's concern in the present case related to the possible partiality of the court because it submitted its legal opinion to the Prosecution's Office.

23. The Court notes that the applicant did not suggest that anyone involved in his process was subjectively biased against him. It is satisfied that the judges' personal conduct did not raise any legitimate doubts as to their impartiality.

24. Given the applicant's misgivings in the present case, the Court must therefore examine whether his concerns were justified under the objective test.

25. The Court observes that the Court of Appeal's conduct could be questionable if forwarding a court's legal opinion to the parties was uncommon in the domestic judicial practice or even prohibited by law. Article 349 § 2 of the Code of Criminal Procedure does not prohibit explicitly from a court from submitting its legal opinion to the parties. Neither can it be called uncommon. In this respect the Court notes that the lawfulness of a court's sending its legal opinion to the prosecution's office and counsel in proceedings under Article 349 § 2 of the Code of Criminal Procedure was dealt with in a decision of the Federal Constitutional Court (see paragraph 15 above). It held that this provision did not prohibit a court of appeal to submit its legal opinion to the parties after the prosecution's office had submitted its motion in regard to an appeal on points of law. Moreover the Federal Court of Justice and the Berlin Court of Appeal dismissed motions for bias in cases where the respective court had submitted its legal opinion in the way the Düsseldorf Court of Appeal had done in the present case (see paragraph 16 above). The Court concludes that the conduct of the Düsseldorf Court of Appeal was neither prohibited nor can it be called uncommon.

26. The Court therefore has to examine whether there can be legitimate doubts as to the impartiality of the judges because of the manner in which the Düsseldorf Court of Appeal forwarded its legal opinion to the parties.

The Court notes that the Court of Appeal awaited the submissions of counsel and the Prosecution's Office. Only then the court discussed the case and formed its legal opinion on it. The Court of Appeal submitted its opinion to the parties in writing with the possibility to comment on it. In doing so, it gave the parties the possibility to reflect on the court's opinion and discuss it openly. The Court of Appeal neither forwarded its legal opinion before the Prosecution's Office had submitted its own motion nor demanded a special motion. Therefore the Prosecution's Office was free to subscribe to this opinion or to refrain from doing so. Hence the Court cannot find any ascertainable facts which lead to the conclusion of the judges' partiality in the present case.

27. Consequently, the applicant's complaint in this regard is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. The remainder of the applicant's complaints

28. In the applicant's submission, his right to an oral hearing had been violated because the Düsseldorf Court of Appeal had decided on written submissions only, although the Prosecution's Office's change of opinion showed that the appeal at least could not be called manifestly ill-founded. Therefore the conditions of application of Article 349 § 2 of the Code of Criminal Procedure had not been fulfilled and an oral hearing had been obligatory.

29. Furthermore the applicant complained about a violation of his right to a lawful judge because the Court of Appeal had not submitted the case under a Federal Law provision (Article 121 of the Courts Organisation Act) to the Federal Court of Justice. The applicant argued that, because the Court of Appeal wanted to ignore a provision concerning the fixing of the length of a sentence and other courts of appeal had previously been of a different opinion, it had been obliged to submit the case to the Federal Court of Justice.

30. The applicant alleged a violation of his right to equality of arms as a result of the application of Article 349 § 2 of the Code of Criminal Procedure. This provision would privilege the prosecution's appeal on points of law.

31. Lastly, the applicant argued that his detention was not lawful, alleging that the judgment of the Court of Appeal was unlawful.

32. The Court has examined the applicant's above complaints as submitted by him. Having regard to all the material in its possession, the Court finds that, even assuming the exhaustion of domestic remedies in all respects, these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

33. It follows that this part of the application must likewise be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 5 February 2015.

Stephen Phillips
Registrar

Boštjan M. Zupančič
President