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

FOURTH SECTION

DECISION

Application no. 37412/09
Branko GVOZDIĆ
against Slovenia

The European Court of Human Rights (Fourth Section), sitting on 26 September 2017 as a Committee composed of:
Vincent A. De Gaetano, *President,*
Georges Ravarani,
Marko Bošnjak, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*
Having regard to the above application lodged on 29 June 2009,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Branko Gvozdić, was born in 1962 and lives in Sežana.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.
3. The applicant is a lawyer and a member of the Slovenian bar. In 2006 he was defence counsel for a certain Z.F. in criminal proceedings before the Nova Gorica District Court. He was Z.F.'s second consecutive counsel in the proceedings.
4. On 31 August 2006 the applicant sent a fax message to the District Court.
5. A hearing, which the applicant did not attend, was held on 4 September 2006 in the criminal case against Z.F. The record of this hearing read, in so far as relevant:

> "[The applicant informed the presiding judge that] after a telephone conversation [with] and [after sending] written notice to his client he had, under section 12 of the Attorneys Act, returned his mandate [to represent him] in the proceedings pending before the court under registration number K 3/2003. Therefore, it was obvious that he would not be present at the next hearing, which was to be held on the morning of Monday 4 September 2006, of which his client had been informed."

6. After the presiding judge had read out the applicant's fax message the state prosecutor submitted for the record that "under section 12 of the Attorneys Act a lawyer must, even after a mandate has been returned, represent the interests of the client and carry out all duties necessary [for the protection of the client's interests] for a month after the cancellation". In the prosecutor's opinion the applicant had acted against the cited law and the Code of Attorneys' Professional Ethics. She proposed that he be fined.

7. Subsequently, the court decided to fine the applicant. The applicant was also ordered to pay lump-sum court costs. In a decision of 4 September 2006 the court stressed the importance of the right to a trial within a reasonable time and that it was the duty of a judge to prevent procedural abuse in order to ensure that this right was respected. The applicant must have been aware that without his presence the hearing could not be held. Nevertheless, he had given no reasons for his absence and had failed to give reasons for not acting in compliance with section 12 of the Attorneys Act. The court noted that it was only after the decision on the fine had been declared at the hearing that the defendant had notified the court that he was also cancelling the mandate. This was, in the court's opinion, a result of the fact that the applicant had realised that "the situation was serious". The court concluded that the applicant must have realised that he should have continued to represent his client for a month after he had returned the mandate. It gave brief grounds for its decision regarding the amount of the fine and the amount of court costs the applicant would have to pay.

8. The applicant appealed. He argued that it was not his intention to delay the proceedings and that the fact that the hearing had not been held had not caused a delay; that the first-instance judge had himself cancelled several hearings without giving any reasons; that the defendant's previous lawyer in the proceedings had also returned her mandate in a similar fashion, but had not been penalised; that by giving the decision the court had acted in a biased manner; that the court could have, *ex officio*, appointed another defence lawyer, that since his client had incurred no damage the applicant had not been under any obligation to provide his services for a further month; and that, in any event, Z.F. had subsequently cancelled the mandate. He also complained about the decision regarding the amount of the fine and the lump-sum court costs.

9. The higher court dismissed the appeal. It agreed with the conclusions of the first-instance court and added that the circumstances of the case – including the length of the proceedings and the number of hearings and actions undertaken by the parties involved – confirmed that the reasoning of

the first-instance court had been sound and that its assessment of the applicant's actions had been correct in law. It noted that his complaints regarding the amount of the fine and lump-sum court costs were unsubstantiated. The court further noted that Z.F. had many times complained of the unreasonable length of the proceedings and the damage he had allegedly suffered because of it.

10. The applicant lodged a constitutional complaint against this decision, repeating the complaints raised in his appeal to the higher court. Additionally, he complained that the higher court had failed to respond to all his complaints and that he had not been afforded a hearing before being fined. He also alleged that one of the three judges of the higher court had been biased because that judge's daughter had at the material time been undergoing treatment in a hospital where the father of the first-instance judge had once been the head of a department and where the brother of the first-instance judge had been working.

11. By a decision of 17 February 2009 the Constitutional Court dismissed the applicant's constitutional complaint.

B. Relevant domestic law

12. Under section 373 of the Criminal Procedure Act a judgment may be challenged on the grounds of a court's erroneous or incomplete determination of the facts.

13. Under section 379 of the Criminal Procedure Act, a second-instance court may decide an appeal either during a session held in camera or at an open hearing. Section 380 of the Criminal Procedure Act provides that such a court shall hold a hearing when the facts of the case need to be established again and there are good reasons for not remitting the case to the first-instance court for re-examination.

COMPLAINTS

14. The applicant complained under Article 6 of the Convention about the first-instance court fining him without hearing him first. He also complained about the alleged bias of one of the higher court judges. Under Article 13 of the Convention he complained that the higher court had not responded to all the complaints he had raised in his appeal.

THE LAW

15. The applicant complained that his rights under Article 6 of the Convention had been violated because the first-instance court had fined him without hearing him first. He furthermore complained that one of the judges of the higher court had lacked impartiality. He also complained under Article 13 of the Convention that the higher court had not responded to all his complaints. The Court, being the master of the characterisation to be given in law to the facts of the case (see, among many other authorities, *Söderman v. Sweden* [GC], no. 5786/08, § 57, ECHR 2013), considers that the latter complaint should also be examined under Article 6 of the Convention, which, in so far as relevant, reads as follows:

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

16. The Court does not consider it necessary to determine whether Article 6 of the Convention is applicable to the disciplinary proceedings brought against the applicant. Indeed, even assuming this provision to be applicable under its criminal head, the application is in any event inadmissible for the reasons specified below.

17. In so far as the applicant complains that no hearing was held before the first-instance court, the Court notes that under the Criminal Procedure Act the higher court has jurisdiction to review the first-instance courts' decisions as to the facts and law (see paragraph 12 above). It can also decide to hold a hearing (see paragraph 13 above). However, in his appeal the applicant neither raised his complaint regarding the lack of a hearing nor requested that a hearing be held before the higher court. Instead, he merely disagreed with the first-instance decision (see paragraph 8 above).

18. Consequently, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

19. As to the complaints regarding the alleged bias of one of the judges of the higher court, the Court has repeatedly held that the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is to say whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 191, ECHR 2003‑VI, and *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 104, ECHR 2013).

20. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Morel v. France*,

no. 34130/96, § 41, ECHR 2000‑VI, and *Micallef v. Malta* [GC], no. 17056/06, § 94, ECHR 2009).

21. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000‑XII, and *Micallef*, cited above, 96).

22. In the present case, as to the subjective test, the applicant has not argued (let alone shown) that one of the higher court judges demonstrated any personal hostility towards him or that his conduct during the proceedings implied any negative attitude on his part.

23. The Court shall further examine whether the conduct of that judge may prompt objectively justified doubts as to his impartiality from the point of view of an external observer (see the above-mentioned "objective test"). The gist of the applicant's complaint is that that judge's daughter was at the material time being treated in the hospital where the father of the first-instance judge used to be the head of a department and where that judge's brother was working. The Court notes in this respect that the applicant does not allege that either of the two relatives of the first-instance judge were actually involved in the treatment of the daughter of the higher-court judge. Nor has it been argued, let alone shown, that the father of the first-instance judge worked at that hospital at the material time. In any event, the applicant's argument seems to be based on the assumption that the medical treatment of the daughter of the higher court's judge could have been negatively affected in some manner had he given a negative decision in respect of the lower court's judgment. In the Court's view, this assumption not only has not been substantiated by any case-specific factual elements, but it also is clearly incompatible with the basic obligations of the medical profession.

24. Regarding the applicant's complaint of a lack of adequate reasoning in the decision of the higher court, the Court reiterates that although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I).

25. In the present case, the Court observes that the decision of the higher court was fully reasoned and provided a specific reply to the applicant's submissions (see paragraph 9 above). More specifically, the higher court referred to the actions of the applicant, the client and the previous lawyer, explicitly agreed with the assessment of the applicant's actions made by the

lower court and endorsed its reasoning regarding the determination of a fine and lump-sum court costs.

26. 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.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 19 October 2017.

Andrea Tamietti
Deputy Registrar

Vincent A. De Gaetano
President