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

FIFTH SECTION

DECISION

Application no. 33371/17
Uwe KRÜGER
against Germany

The European Court of Human Rights (Fifth Section), sitting on 31 October 2017 as a Committee composed of:

Erik Møse, *President,*
Yonko Grozev,
Gabriele Kucsko-Stadlmayer, *judges,*
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*

Having regard to the above application lodged on 28 April 2017,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Uwe Krüger, is a German national who was born in 1947 and lives in Berlin. He was represented before the Court by Mr C. Binder, a lawyer practising in Karlsruhe.

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

3. In 2000 the applicant commissioned an auction house to sell a plot of land he owned near Berlin, which the auction house did.

4. In 2009 the applicant lodged an application against the buyer for the return of the plot and adjustment of the Land Register. He argued, *inter alia*, that he had been severely mentally ill in 1999 and 2000, rendering him legally incompetent, and that the authorisation to auction the house was thus invalid. He claimed that he was therefore still entitled to the plot of land.

5. On 24 June 2010 the Regional Court found that the applicant had not proved his legal incapacity at the relevant time and rejected his application for transfer of the land. The applicant subsequently appealed.

6. During the course of the appeal proceedings, the Court of Appeal ordered an expert opinion on the applicant's legal capacity and heard the applicant's doctors. Although the expert had been instructed to draw up his written report after hearing the doctors, he had submitted the report before hearing the witnesses and confirmed his opinion afterwards in a written amendment. The applicant lodged a challenge for bias against the expert for non-compliance with the court's orders. The application was dismissed, the reason being that the expert had compiled the initial report objectively on the basis of the applicant's medical files without prejudice to the hearings and had subsequently confirmed his initial findings thoroughly on the basis of the doctors' oral statements in an additional four-page report.

7. During the last hearing of the appellate proceedings the Court of Appeal indicated to the parties that the applicant's appeal was likely to be unsuccessful.

8. In the evening of 21 September 2015 – three days before the announcement of the Court of Appeal's decision – the presiding judge found a dead blackbird with the applicant's case file number round its neck at the door of her private residence. She filed a criminal complaint with the police, for menace. When interviewed and asked for possible suspects, the judge named the applicant and explained to the police officers that only a few persons knew the court-file number, that the parties had been informed about the likely outcome of the proceedings and that, based on the likely outcome, the applicant might intend to make her revoke the already-written judgment.

9. Before the scheduled announcement of the Court of Appeal's decision on 24 September 2015, the applicant lodged a challenge for bias against the presiding judge, alleging that she was not impartial as she had not equally suspected the other party to the proceedings, when interviewed by the police.

10. On 10 November 2015 the Court of Appeal – without the participation of the judge at issue – refused the applicant's challenge for bias. The court held that in principle a criminal complaint by a sitting judge against one of the parties could justify fears as to the impartiality of a judge. However, whether such fears were objectively justified had to be assessed on the circumstances of the particular case. Since in the present case there were reasonable facts for suspecting the applicant, namely the limited amount of persons aware of the case file number and the fact that the Court of Appeal had indicated to the parties that the applicant's appeal was likely to be unsuccessful, the applicant's challenge for bias was unfounded.

11. On 12 November 2015 the Court of Appeal – with the participation of the said judge – rejected the applicant's appeal, upheld the judgment of the Regional Court and refused to grant leave to appeal on points of law.

12. The applicant's subsequent complaint against the Court of Appeal's refusal of leave to appeal on points of law and his constitutional complaint (2 BvR 1683/16) were to no avail.

13. The investigation against the applicant was discontinued by the competent public prosecutor in April 2016.

COMPLAINTS

14. The applicant complained under Article 6 § 1 of the Convention that the proceedings before the Court of Appeal were unfair. He alleged that the court-appointed expert as well as the presiding judge of the Court of Appeal were not impartial. In addition, he complained about the outcome of the civil proceedings and claimed that the refusal of his claims was arbitrary.

THE LAW

15. The applicant complained of a violation of 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 ... hearing ... by an independent and impartial tribunal established by law."

A. Outcome of the domestic proceedings

16. The Court finds that, in so far as the applicant challenged the outcome of the proceedings, the application is of a "fourth-instance" nature (see *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28, 29, ECHR 1999-I). The applicant was able to make submissions before the courts, which answered those submissions in decisions that do not appear arbitrary or manifestly unreasonable. Accordingly, this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

B. Impartiality of the court-appointed expert

17. With regard to the applicant's challenge to the impartiality of the court-appointed expert, the Court reiterates that Article 6 § 1 of the Convention guarantees a right to a fair hearing by an independent and impartial "tribunal" and does not expressly require that an expert heard by that tribunal fulfil the same requirements. Nonetheless, the opinion of an expert who has been appointed by the competent court to address issues

arising in the case is likely to carry significant weight in that court's assessment of those issues. In its case-law the Court has recognised that the lack of neutrality on the part of a court-appointed expert may in certain circumstances give rise to a breach of the principle of equality of arms inherent in the concept of a fair trial (see *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007).

18. The Court notes, however, that the applicant based his challenge for bias on the premature submission of the written opinion, contrary to the Court of Appeal's order. It also observes that the premature written opinion concerned the medical files and that the expert, after hearing the witnesses, amended his opinion regarding the new information and gave reasons for maintaining the same opinion as in his initial report. Having regard to all the material before it, the Court therefore concludes that the rejection of the applicant's challenge to the expert for bias does not disclose any appearance of a violation of the principle of equality of arms. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Impartiality of the Court of Appeal

19. In so far as the applicant alleges a lack of impartiality of the Court of Appeal, the Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to 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 *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009). The Court has recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (*Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII).

20. As to the subjective test, the Court has previously held that the personal impartiality of a judge must be presumed until there is proof to the contrary. As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for

personal reasons (see *Micallef*, cited above, § 94). The Court observes that the applicant did not submit, either in his challenge for bias or in his submission to the Court, that the conduct of the presiding judge during the proceedings was hostile towards him in any way. Therefore, it concludes that there is no reason to call the presumption of personal impartiality into question.

21. The Court notes that the applicant based his allegations of partiality in essence on the fact that the judge had filed a criminal complaint and named the applicant as a possible suspect and will therefore consider this allegation under the objective test. Under the objective test it has to be determined whether, quite apart from the personal conduct of any of the members of a tribunal, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see *Kyprianou*, cited above, § 118). In *Kyprianou* the Court held that a confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench (ibid, § 127).

22. The Court notes, however, that, in the present case the judge was, on the one hand, presiding in civil proceedings pending before the Court of Appeal and, on the other hand, the victim of a criminal threat. The judge was at no time involved in the investigation against the applicant, other than being interviewed by the police about possible suspects. Nonetheless, the Court agrees with the Court of Appeal, that, in principle, a criminal complaint by a sitting judge against one of the parties could justify fears as to his or her impartiality. Nonetheless, it also observes that the Court of Appeal concluded that there were objective reasons for the criminal complaint and the suspicion against the applicant and that consequently neither could objectively justify fears as to the impartiality of the presiding judge. The Court also agrees with this conclusion of the Court of Appeal. It additionally notes that, given the indications to the parties concerning the outcome of the proceedings during the last hearing of the appeal proceedings and the fact that at the time of the incident the final judgment had already been drafted, the applicant had no reason to believe that the judge's decision was unduly influenced by the suspicions raised against him. In sum, the Court concludes that, based on the objective test, there are no reasons to justify objectively the applicant's fears as to the impartiality of the Court of Appeal either.

23. Having regard to the above, the Court finds that none of the material in its possession discloses any appearance of a violation of the right to an impartial tribunal. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with 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 23 November 2017.

Anne-Marie Dougin	Erik Møse
Acting Deputy Registrar	President