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

FOURTH SECTION

DECISION

Application no. 13129/19
Prasannakumary MANNANTHARA NATARAJAN
against Germany

The European Court of Human Rights (Fourth Section), sitting on 9 April 2024 as a Committee composed of:

Faris Vehabović, *President*,
Anja Seibert-Fohr,
Sebastian Răduleţu, *judges*,
and Veronika Kotek, *Acting Deputy Section Registrar*,

Having regard to:

the application (no. 13129/19) 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") on 5 March 2019 by an Indian national, Ms Prasannakumary Mannanthara Natarajan ("the applicant"), who was born in 1961 and lives in Tuitjenhorn, The Netherlands;

the decision to give notice of the complaint under Article 6 § 1 of the Convention concerning the national courts' refusal to request the Court of Justice of the European Union to give a preliminary ruling to the German Government ("the Government"), represented by their Agent, Mr H.-J. Behrens, of the Federal Ministry for Justice, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application concerns social law proceedings concerning the calculation of the applicant's pension rights in Germany with regard to the time which she had spent in the United Kingdom to bring up her son. The applicant requested a referral for a preliminary ruling from the Court of Justice of the European Union ("the CJEU").

2. Both the Social Court and the Social Court of Appeal dismissed the applicant's claim and her referral request with reference to European Union ("EU") law and case-law of the CJEU. The applicant, represented by counsel, lodged an appeal against the Social Court of Appeal's denial of leave to appeal on points of law to the Federal Social Court. Without explicitly requesting a referral to the CJEU she formulated questions on whether she had had sufficient ties with the German social security system before educating her son abroad, submitting that these were to be decided in accordance with specific judgments of the CJEU.

3. On 10 January 2018 the Federal Social Court declared the applicant's appeal inadmissible. It found that it was not properly reasoned (*nicht formgerecht begründet*) because the applicant had not sufficiently substantiated one of the statutory reasons to admit the appeal on points of law, in particular that the legal matter was of fundamental importance. The questions formulated by the applicant had not comprised an abstract-general question of law but were tailored to her individual situation. Furthermore, she had failed to substantiate that her questions required clarification. The court added that a more detailed reasoning of its decision could be dispensed with under section 160a § 4 of the Social Court Act. It did not give any further reasoning as to a referral to the CJEU.

4. On 14 February 2018 the applicant lodged a constitutional complaint, alleging several violations of the German Basic Law. She argued, in particular, that her case should have been referred to the CJEU for a preliminary ruling. In this regard she complained, amongst other things, of a violation of her right to a decision by the legally competent judge (*gesetzlicher Richter*), referring to the case-law of the Federal Constitutional Court considering the CJEU as a legally competent judge within the meaning of Article 101 § 1 of the Basic Law and to a catalogue of questions which had not been submitted to the CJEU. She alleged that there had also been a violation of her right to be heard because, most importantly, the Federal Social Court had not taken into account her submissions in this regard.

5. On 14 March 2018 the Registry of the Federal Constitutional Court replied to the applicant's submissions regarding, *inter alia*, her complaint of a violation of her right to be heard under Article 103 § 1 of the Basic Law and gave her the opportunity to comment on the subsidiarity of the constitutional complaint (with a reference to section 178a of the Social Court Act) as it could not be deduced from her submissions whether a complaint for a violation of the right to be heard (*Anhörungsrüge*) had been allowed and necessary in the present case and whether she had undertaken the relevant steps.

6. On 1 April 2018 the applicant replied that she had not lodged a complaint for a violation of her right to be heard with the Federal Social Court. She repeated that she had complained of a violation of her right to a decision by the legally competent judge adding that she "alleged an

infringement of her right to be heard by the Federal Social Court only with regard to the aforementioned submissions, which concerned the incorrect application of, or failure to apply, EU law and the deviation from EU law" and referred to her constitutional complaint. Lastly, she argued that a complaint for a violation of the right to be heard would have been unreasonably difficult because of the short statutory time-limit of two weeks, because of a lack of success of such a remedy in practice as the same judges of the Federal Social Court would have decided about the complaint, and because it would have been too difficult and costly to lodge that complaint simultaneously with the constitutional complaint, although this possibility was indicated in the Federal Constitutional Court's information sheet for lodging constitutional complaints.

7. On 12 September 2018 the Federal Constitutional Court declined to accept the applicant's constitutional complaint for adjudication (1 BvR 785/18), without providing any reasons.

8. The applicant complained under Article 6 of the Convention that the national proceedings were unfair and in particular that the national courts did not provide (sufficient) reasons for their decisions not to refer the case for a preliminary ruling to the CJEU.

THE COURT'S ASSESSMENT

9. The Government submitted that the applicant had failed to exhaust domestic remedies, both by failing to lodge a complaint for a violation of the right to be heard against the Federal Social Court's decision prior to her constitutional complaint and because the Federal Social Court had found her appeal against the denial of leave to appeal on points of law inadmissible.

10. The applicant argued notably that a complaint for a violation of the right to be heard would have been unreasonably difficult and repeated her arguments to that effect (see paragraph 6 above).

11. The general principles concerning the exhaustion of domestic remedies and the principle of subsidiarity have been summarised in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). The Court emphasises, in particular, that the principle of subsidiarity is one of the fundamental principles on which the Convention system is based. In order to enforce it, applicants are required to make use of effective remedies at domestic level (ibid., § 74). Furthermore, it is for the Government to prove that a remedy was appropriate, effective and available to the applicant, and it is for the latter to show that this remedy was for some reason inadequate and ineffective in the particular circumstances of the case (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V). The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those

allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII).

12. Turning to the present case, the Government argued that the applicant could have complained of a violation of the right to be heard under section 178a § 1 of the Social Courts Act concerning her allegation that the Federal Social Court had not addressed her arguments regarding the case-law of the CJEU and had not given any reasons for refusing a referral to the CJEU.

13. The Court notes in that regard that the complaint for a violation of the right to be heard was introduced in Germany by a law of 9 December 2004 following a Plenary ruling of the Federal Constitutional Court of 30 April 2003 (1 PBvU 1/02) to the effect that the legal protection in cases of violations of the procedural right to be heard needed to be reinforced. The complaint was subsequently codified, as regards proceedings before the social courts, in section 178a § 1 first sentence, number 2 of the Social Courts Act, which provides specific redress in cases where a "court has violated the right of a party to be heard in a manner relevant to the decision". This covers situations in which applicants allege that their submissions have not been duly taken into account by the court concerned. As underlined by the Government, the purpose of this extraordinary remedy is not to review the substantive correctness of a judicial decision but only to guarantee to the parties to the proceedings that their arguments have been properly heard by the court.

14. The Government further explained that such a complaint could have led to the continuation of the proceedings before the Federal Social Court and, where appropriate, to a decision to refer the case to the CJEU if the applicant had asserted that the Federal Social Court had not taken into account an essential submission regarding the existence of a ground for granting leave to appeal on points of law and had therefore wrongly dismissed her appeal as formally inadmissible. In this context the Government underlined that a case might be of fundamental importance in the sense of section 160 § 2 no. 1 of the Social Courts Act if it raised a relevant question requiring uniform interpretation of EU law which made the need for a referral to the CJEU very likely in the appeal proceedings on points of law.

15. The Court further takes note of the Government's submission that the Federal Constitutional Court in its settled case-law requires, for the sake of exhaustion of remedies and subsidiarity of a constitutional complaint, that a complaint for a violation of the right to be heard has to be lodged when an applicant intends to invoke before it a violation of that right under Article 103 § 1 of the Basic Law. This requirement equally applies in cases where not only a violation of that right but also of other constitutional rights are referred to (see, among many other authorities, BVerfGE 134, 106, 113, and BVerfG, decision of 25 April 2005 (1 BvR 644/05) – "Queen Mary II") in order to set in motion one single procedure for the constitutional complaint as a whole. The Court observes that this case-law is outlined in the Federal Constitutional Court's information sheet (see paragraph 6 above) which

indicates, *inter alia*, that the failure to lodge a complaint for a violation of the right to be heard that is not clearly without prospect of success can lead to the inadmissibility of the constitutional complaint.

16. As regards the present case, the Court notes that in her constitutional complaint the applicant had explicitly mentioned a violation of her right to be heard and also repeated in her additional explanations (see paragraph 6 above) that her constitutional complaint included an allegation of a violation of her right to be heard with regard to her submissions concerning EU law. Given the above submissions, the Court therefore concludes that the Government has satisfied their burden of proof (see paragraph 11 above) to the effect that a complaint for a violation of the right to be heard was an appropriate, effective and available remedy to the applicant.

17. The applicant, on her part, questioned the effectiveness of the complaint for a violation of her right to be heard, notably because of the short time-limit to lodge such a complaint and because of the fact that section 178a of the Social Courts Act would not rule out the possibility of the same judges deciding upon their own decision.

18. It follows from the Court's case-law that time-limits of two weeks or less to lodge a given domestic remedy do not raise an issue under the Convention as such (see *Ugilt Hansen v. Denmark* (dec.), no. 11968/04, 26 June 2006, and *Hennings v. Germany*, 16 December 1992, § 26, Series A no. 251-A; for an example of a 10-day deadline according to domestic law, see *Fernando Alexandre v. Portugal* (dec.) [Committee], no. 26997/10, § 24, 10 May 2012). In the present case the Court observes that, due to the specific nature of the complaint in question as explained by the Government (see paragraph 13 above), the applicant had only to point out that specific points of her submissions had not been addressed by that court and to state why they should have been discussed in the decision. There is nothing to indicate that it would have been too difficult and costly for the applicant to lodge such a complaint for the violation of the right to be heard simultaneously with her constitutional complaint.

19. Furthermore, while the performance of the same judges of different functions in the same proceedings may raise an impartiality issue (compare *Scerri v. Malta*, no. 36318/18, § 76, 7 July 2020), the Court considers that the situation in the present case would not have raised any such issues in view of the very nature of the complaint. Indeed, as pointed out by the Government, this complaint is conceived, in domestic law, as an extraordinary remedy aiming only to rectify, by way of self-control of the judges involved, an infringement of the right to be heard (see paragraph 13 above) and, therefore, would have required that the same judges who had rendered the impugned decision decide upon the applicant's complaint.

20. The Court, reiterating that mere doubts on the part of the applicant regarding the effectiveness of a particular remedy will not absolve him or her from the obligation to try it (see *Vučković and Others*, cited above, §§ 74 and

84), observes that the applicant has therefore failed to substantiate (see paragraph 11 above) why a complaint for a violation of her right to be heard would have been inadequate or ineffective in the specific circumstances of her case.

21. It follows that the applicant, by omitting to lodge a complaint for a violation of the right to be heard, has failed to provide the Federal Social Court with the possibility to address her grievance which she brought before the Federal Constitutional Court, and later before the Court, namely that the Federal Social Court had not duly considered her submissions regarding the necessity to request a preliminary ruling from the CJEU as it had not provided (sufficient) reasons for its decision not to do so (see also, *mutatis mutandis*, *Harisch v. Germany*, no. 50053/16, § 12, 11 April 2019).

22. The Court concludes that the present application must be declared inadmissible for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 2 May 2024.

Veronika Kotek Acting Deputy Registrar	Faris Vehabović President