

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 40451/06
by Heiko PREHN
against Germany

The European Court of Human Rights (Fifth Section), sitting on 24 August 2010 as a Chamber composed of:

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 4 October 2006,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Heiko Prehn, is a German national who was born in 1962 and is currently in preventive detention in Berlin Tegel Prison. He was represented before the Court by Mr C. Tümmler, a lawyer practising in Berlin.

A. The circumstances of the case

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

1. Background to the case

On 12 September 1996 the Berlin Regional Court convicted the applicant of two counts of rape. It sentenced him to ten years' imprisonment and ordered his preventive detention (Article 66 of the Criminal Code, see Relevant domestic law below).

On 13 April 2005 the applicant requested the Berlin Regional Court to suspend the remainder of his sentence, which he would have served fully on 12 March 2006, and his preventive detention on probation.

The applicant was initially represented by counsel K.-B. By letter of 17 January 2006 he requested the Regional Court to appoint counsel B., practising in Bremen, to represent him in the proceedings, arguing that K.-B. was not qualified in respect of the subject-matter of the proceedings whereas counsel B. was specialised in execution of sentences and sexual offences.

On 16 February 2006 the presiding judge of the Regional Court dismissed that request, arguing that the applicant was already represented by counsel and that there was no reason to appoint counsel who was not practising within the court's judicial district.

On 21 February 2006 the presiding judge of the Berlin Regional Court informed the applicant that counsel K.-B. had withdrawn from the case and that it intended to appoint counsel K., practising in Berlin and specialised in criminal law, to represent him (Article 140 § 2 of the Code of Criminal Procedure, applied by analogy; see Relevant domestic law below). The applicant was invited to either give grounds if he objected to that appointment, to propose a different counsel practising in Berlin as officially appointed counsel or to mandate a new counsel.

By letter dated 20 February 2006, counsel B. submitted a power of attorney and applied for access to the case-file and to be officially appointed as the applicant had insufficient means to afford a lawyer.

Having received that letter, the presiding judge of the Regional Court asked counsel B. by letter dated 23 February 2006 whether he intended to act as the applicant's mandated counsel; otherwise, the court would appoint a lawyer practising in Berlin. The presiding judge further refused B. access to the case-file because it was not sure whether the files would be available for the hearing scheduled on 13 March 2006 if they were sent to Bremen after having been returned by the expert.

By a decision of the same day, the presiding judge of the Regional Court dismissed the applicant's fresh request to appoint counsel B. to represent him. He found that there was nothing to indicate that a firm relationship of

trust had developed between them which would justify appointing B. despite the considerable additional costs involved.

On 28 February 2006 the presiding judge of the Berlin Regional Court, having received no objections by counsel B., appointed counsel K. to act for the applicant.

On 7 March 2006 the Public Prosecutor General, in his submissions on the applicant's appeal against the decision of 23 February 2006, took the view that the applicant's appeal was well-founded as the Regional Court should have appointed him counsel B. as he had requested. The Public Prosecutor General considered that in cases in which the detainee, as in the present case, had proposed to appoint him defence counsel who met the professional requirements and was able to guarantee a proper conduct of the proceedings, the court had to appoint him the counsel he had chosen. This equally applied in cases in which the defendant had chosen a counsel who was not practising within the court's judicial district. Weighing the interests involved, the interest in proximity was outweighed by the defendant's interest in being defended by a counsel he particularly trusted in. The distance between Berlin and Bremen, having regard to the good traffic connections and modern means of communication, did not jeopardize a proper defence and conduct of the proceedings.

On 13 March 2006 the Berlin Court of Appeal dismissed the applicant's appeal against the Regional Court's decision of 23 February 2006 refusing to appoint him a counsel not practising within the court's judicial district as ill-founded.

It agreed with the Public Prosecutor General's view that the applicant had to be represented by counsel in the proceedings at issue pursuant to Article 140 § 2 of the Code of Criminal Procedure, applied by analogy, as the proceedings were complex, as the decision on the applicant's preventive detention was of importance and as the applicant could not defend himself in person in the hearing in which an expert report on him had to be examined.

However, unlike the Public Prosecutor General, the Court of Appeal considered that the Regional Court had not been obliged to appoint the applicant counsel B., who was not practising within its judicial district. The appointment of defence counsel named by the detainee required, as a rule, that he proposed a lawyer admitted to practise within the court's judicial district (Article 142 § 1 of the Code of Criminal Procedure; see Relevant domestic law below). This rule was adequate because defence counsel's proximity to the court was essential in order to conduct a proper defence.

It facilitated the conduct of the proceedings and counsel's communication with his client in detention – for which modern methods of communication did not make a difference – and with the other parties to the proceedings. The lack of proximity was a significant ground not to appoint a lawyer

chosen by the detainee for the purposes of Article 142 § 1 of the Code of Criminal Procedure. Counsel B. resided more than 100 kilometres away from the court and from the prison in which the applicant was detained.

The Court of Appeal further found that an external counsel could only be appointed in exceptional cases, in which there was a particular relationship of trust between him and the detainee. However, there was nothing to indicate and the applicant failed to substantiate that there was a firm relationship of confidence between him and counsel B. The applicant had never met in person counsel B. who had never previously defended him. The fact that counsel B. had applied for access to the case-file did not suffice to demonstrate such a relationship of trust. There was also nothing to indicate that counsel B. was more experienced in execution matters than counsel K. who had been appointed to represent the applicant.

2. The proceedings at issue

a. The proceedings before the Regional Court

On 4 April 2006 the presiding judge of the Berlin Regional Court dismissed the applicant's fresh request dated 24 March 2006, made in person, to appoint counsel B. to represent him in the proceedings concerning the execution of his sentence. Relying on Article 140 § 2 of the Code of Criminal Procedure, applied by analogy, the court found that the applicant had already been appointed counsel K. for the proceedings at issue and that there were no apparent grounds to appoint him another counsel.

b. The proceedings before the Court of Appeal

On 18 May 2006 the Berlin Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal.

The Berlin Court of Appeal disagreed with the applicant's view that he was not represented by counsel in accordance with the requirements of a fair trial. It further rejected counsel B.'s argument that the court's appointment of counsel K. was arbitrary in view of what was at stake in the proceedings, the applicant's preventive detention.

The Court of Appeal expressly endorsed the reasons it had given in its decision of 13 March 2006 (see above), in which it had already dismissed the applicant's request to appoint counsel B. by a final decision. These reasons also applied if the applicant had to be understood now to have requested the appointment of counsel B. to a more limited extent, namely only in order to appeal against a decision taken on his challenges for bias. Having regard to the complexity of the proceedings, the applicant had been appointed counsel K. for the entire proceedings concerning his preventive detention. As the Court of Appeal had dismissed the applicant's request to be appointed counsel B. by its final decision of 13 March 2006, the

applicant's new request to be appointed counsel B. for the proceedings or for parts thereof was inadmissible.

c. The proceedings before the Federal Constitutional Court

On 5 June 2006 the applicant lodged a constitutional complaint with the Federal Constitutional Court against the decision of the Berlin Court of Appeal of 18 May 2006. He complained about the failure to appoint him the counsel of his choice, B., and argued that this had deprived him of an effective defence and had led to his prolonged detention beyond 12 March 2006 when he had fully served his sentence.

On 27 June 2006 the Federal Constitutional Court declined to consider the applicant's constitutional complaint as it lacked prospects of success (file no. 2 BvR 1203/06).

The Federal Constitutional Court reiterated that the right of a defendant to a fair trial comprised the right, aimed at ensuring equality of arms, to defend himself by counsel of his own choosing. Therefore, if the requirements of Article 140 of the Code of Criminal Procedure were met, the defendant should be appointed the lawyer he or she trusted in unless there were important grounds not to do so. However, a defendant could not claim to be represented by a counsel proposed by him in all circumstances.

The Federal Constitutional Court found that the impugned decision of the Berlin Court of Appeal of 18 May 2006 complied with these constitutional requirements. In its thoroughly reasoned decision of 13 March 2006, to which the impugned decision had referred, the Court of Appeal considered that a lawyer who did not practise within the court's judicial district could only be appointed by the court if there was a special relationship of trust between that counsel and the applicant. It had not been arbitrary for the Court of Appeal to refuse to appoint the lawyer not practising within the court's judicial district proposed by the applicant as it was neither obvious in the circumstances of the case nor had the applicant substantiated that there was a special relationship of trust between him and that counsel.

3. Subsequent developments

On 18 September 2006 the Regional Court, having regard to the report submitted by a psychiatric expert it had consulted, ordered that the applicant be placed in preventive detention pursuant to Article 67c § 1 of the Criminal Code (see Relevant domestic law below).

B. Relevant domestic law

Article 140 of the Code of Criminal Procedure lays down the circumstances in which a defendant must be represented by defence counsel. Pursuant to paragraph 2 of Article 140, the presiding judge shall

appoint defence counsel on request or *ex officio* if the assistance of defence counsel appears necessary in view of the seriousness of the offence or in view of the factual or legal complexity of the proceedings or if it is evident that the defendant cannot defend himself in person. The latter provision is applied by analogy, in particular, to proceedings under Article 67c § 1 of the Criminal Code for review, before completion of the offender's prison term, of whether the execution of a preventive detention order against him or her is still necessary in view of its objective to protect the public from a dangerous offender (see Article 66 of the Criminal Code) or shall be suspended on probation.

Article 142 § 1 of the Code of Criminal Procedure, in its version in force at the relevant time, provided that defence counsel to be appointed shall be chosen by the presiding judge, if possible, from the group of lawyers admitted to practice before a court within the court's judicial district. The defendant is to be given the opportunity of naming an attorney-at-law within a time-limit to be specified. The presiding judge shall appoint defence counsel named by the defendant unless there are significant grounds for not doing so.

COMPLAINTS

The applicant complained that in the proceedings concerning his request to suspend the remainder of his sentence and his preventive detention on probation the domestic courts had refused to appoint him defence counsel of his choice, thereby denying him an effective defence.

The applicant further submitted that the Regional Court's decision on his preventive detention had been taken on the basis of a deficient expert report and outside the applicable delay for examination.

The applicant relied on Articles 1, 3, 4, 5, 6, 7 and 13 of the Convention and Articles 3 and 4 of Protocol No. 7 to the Convention.

THE LAW

A. Complaint concerning the failure to appoint the applicant counsel of his choice

In the applicant's submission, the courts had not allowed him to defend himself effectively by legal assistance of his own choosing in the proceedings concerning his request to suspend the remainder of his sentence and his preventive detention on probation.

The Court observes that the proceedings at issue no longer concerned the "determination ... of any criminal charge" against the applicant within the meaning of Article 6 § 1 of the Convention, the criminal charge against him having been determined when the judgment of the Berlin Regional Court of 12 September 1996 convicting him of rape became final (compare *Homann v. Germany* (dec.), no. 12788/04, 9 May 2007 with further references).

The Court therefore considers that the applicant's complaint falls to be examined under Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

1. The Court shall first examine whether the applicant, whose sentence was imposed and whose preventive detention was ordered by the Berlin Regional Court's judgment of 12 September 1996 convicting him of rape, was entitled to take proceedings under Article 5 § 4 to have the lawfulness of his continued detention decided by a court.

The Court reiterates that under Article 5 § 4 of the Convention detained persons are entitled to take proceedings for the review by a court of the lawfulness of their detention both at the time of the initial deprivation of liberty and, where new issues of lawfulness are capable of arising, periodically thereafter (see, *inter alia*, *Weeks v. the United Kingdom*, 2 March 1987, § 56, Series A no. 114; *Iribarne Pérez v. France*, 24 October 1995, § 30, Series A no. 325-C; and *Benjamin and Wilson v. the United Kingdom*, no. 28212/95, § 33, 26 September 2002).

The Court notes that the applicant in the present case objected, in particular, to his placement in preventive detention after having served his sentence. Execution of preventive detention is ordered if the Regional Court considers that the applicant risks being recidivist and is therefore still dangerous for the public (Article 66 and Article 67c § 1 of the Criminal Code, see Relevant domestic law above). The factor of dangerousness is susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of the applicant's detention. It follows that at that phase in the execution of his sentence, the supervision required by Article 5 § 4 was no longer incorporated in the judgment of the Berlin Regional Court of 1996 initially convicting and sentencing the applicant and that the applicant was therefore entitled to have the lawfulness of his preventive detention decided by a court at reasonable intervals (compare, *inter alia*, *Thynne, Wilson and Gunnell v. the United Kingdom*, 25 October 1990, §§ 68 et seq., 76, Series A no. 190-A; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 87, ECHR 2002-IV; and *Homann*, cited above).

2. As regards the exhaustion of domestic remedies, the Court further notes that the Berlin Court of Appeal already rejected the applicant's request

to be appointed counsel B. by a final decision in proceedings prior to those here at issue. It could therefore be argued that the applicant had been obliged to seek a ruling of the Federal Constitutional Court on his complaint in respect of this prior set of proceedings, which he failed to do. However, the Court observes that in the proceedings here at issue the domestic courts all re-examined, at least partly, the merits of the applicant's complaint. In view of the principles developed in its case-law (compare, for instance, *Jalloh v. Germany* (dec.), no. 54810/00, 26 October 2004; and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, §§ 43, 45, ECHR 2009-...), the Court will therefore examine the case on the assumption that non-exhaustion of domestic remedies cannot be held against the applicant.

3. As to the compliance with Article 5 § 4 of the domestic courts' refusal to appoint the applicant defence counsel B., the Court reiterates that the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation (see, *inter alia*, *Winterwerp v. the Netherlands*, 24 October 1979, § 60, Series A no. 33; and *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006-III (extracts)). However, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 should in principle also meet, to the largest extent possible, the basic requirements of a fair trial, such as the right to an adversarial procedure (see, *inter alia*, *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I). It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see, *inter alia*, *Winterwerp*, cited above, § 60; *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; and *Niedbała v. Poland*, no. 27915/95, § 66, 4 July 2000). The right to receive legal assistance, if necessary, is indeed implicit in the very notion of an adversarial procedure (see *Lagerblom v. Sweden*, no. 26891/95, § 49, 14 January 2003).

The Court further refers to its case-law developed in respect of Article 6 § 3 (c), which entitles an accused to be defended by counsel "of his own choosing". Notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where – as in the present case – it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Croissant v. Germany*, 25 September 1992, § 29, Series A no. 237-B; *Lagerblom*,

cited above, § 54; *Eurofinacom v. France* (dec.), no. 58753/00, ECHR 2004-VII (extracts); and *Vozhigov v. Russia*, no. 5953/02, § 41, 26 April 2007). Similarly, Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced (see *Erdem v. Germany* (dec.), no. 38321/97, 9 December 1999; and *Lagerblom*, cited above, § 55). The Court considers that these principles apply, *mutatis mutandis*, to the right to receive legal assistance in proceedings covered by Article 5 § 4.

In examining whether, in the present case, there were relevant and sufficient grounds for the domestic courts to consider that it was necessary in the interests of justice to appoint the applicant a different defence counsel (K.) than the counsel named by him (B.), the Court observes that the main reason for the Regional Court, as confirmed by the Court of Appeal, to appoint counsel K. instead of counsel B. was that, unlike K., B. was not practising within the courts' judicial district. The Court accepts that, as was stressed by the domestic courts, proximity of counsel to his client in detention and the court did not only avoid additional costs entailed by the appointment of an external counsel, but notably facilitated a proper defence and counsel's communication both with his client and the court. It lay within the domestic courts' margin of appreciation to consider that the fact that counsel resided more than 100 kilometres from the court and from the prison in which the applicant was detained and the fact that modern means of communication were only to a limited extent, if at all, available to exchange information with a detainee impeded the conduct of a proper defence in the present case. The said grounds correspond to an interest of justice which is relevant in the present context, in particular as a decision on the applicant's placement in preventive detention was to be given until 12 March 2006 and as the applicant also wished to obtain that decision speedily.

The Court further notes that the domestic courts acknowledged that a detainee nevertheless had to be appointed an external counsel in exceptional circumstances, namely if there was a firm relationship of trust between the detainee and that counsel. However, according to the findings of the domestic courts, such a relationship did not exist between the applicant and counsel B. who had never previously defended the applicant and had never met him in person.

Moreover, there was no evidence before the domestic courts that counsel K., who was specialised in criminal law, was unable to provide the applicant effective legal assistance. She was considered by those courts not to be less experienced in proceedings concerning the execution of sentences than counsel B. Finally, there was nothing to indicate that for any specified reason, the applicant was unable to place confidence in counsel K.

Having regard to the foregoing, the Court is satisfied that there were relevant and sufficient grounds for the domestic courts to consider that it was necessary in the interests of justice to appoint the applicant a different

defence counsel than the counsel named by him. By doing so, the domestic courts therefore did not disregard the applicant's right to receive legal assistance comprised in the right under Article 5 § 4 to a fair, adversarial procedure.

It follows that this part of the application is manifestly ill-founded pursuant to Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

B. Remainder of the applicant's complaints

The applicant further complained that the Regional Court had taken its decision on his preventive detention on the basis of a deficient expert report and disregarding the applicable delay for examination of whether his preventive detention was to be ordered, namely only after he had already fully served his sentence.

The Court notes that the order for the applicant's preventive detention was not at issue in the impugned decisions of the domestic courts which are the subject-matter of the present application. Therefore, this part of the application must be dismissed 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.

Claudia Westerdiek
Registrar

Peer Lorenzen
President