CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 22367/04
by Bahman SAMADI
against Germany

The European Court of Human Rights (Fifth Section), sitting on 12 February 2008 as a Chamber composed of:

Peer Lorenzen, *President,*
Snejana Botoucharova,
Karel Jungwiert,
Rait Maruste,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 20 May 2004,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Bahman Samadi, is an Iranian national who was born in 1946 and lives in Munich. In 2002 he also acquired German nationality.

A. The circumstances of the case

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

1. Administrative proceedings

In 1964 the applicant entered Germany where he was granted temporary residence permits until 1984. In 1985 the Munich local authorities and, subsequently, the Oberbayern Regional Government refused to grant the applicant a further residence permit. His subsequent administrative action succeeded at third instance before the Federal Administrative Court. Accordingly, on 8 August 1989 the Bavarian Administrative Court of Appeal ordered the Munich local authorities to grant the applicant a residence permit.

2. First action for damages claiming official liability (Amtshaftungsklage)

a. Legal aid proceedings

On 27 September 1993 the Federal Constitutional Court refused to admit the applicant's constitutional complaint against the German courts' refusal to grant him legal aid for a proposed official liability action on account of the administrative proceedings (no. 2 BvR 1614/93).

b. Main proceedings

On 23 December 1992 the applicant unsuccessfully brought an action for damages before the Munich Regional Court claiming official liability against the Munich local authorities. The applicant's further remedies, *inter alia,* to the Munich Court of Appeal were all unsuccessful. On 18 January 1996, 12 November 1998 and 12 May 1999 the Federal Constitutional Court refused to admit the applicant's constitutional complaints (nos. 2 BvR 2891/95, 1 BvR 1558/98 and 2 BvR 765/99).

3. Second action for damages claiming official liability

a. Proceedings before the Regional Court

On 2 April 1993 and on 30 June 1998 the applicant lodged requests with the Munich Regional Court for legal aid for a proposed action for damages, claiming official liability of the Bavarian State.

On 9 November 1998 the applicant's lawyer brought an action before the Regional Court claiming damages amounting to 70,000 German marks (DEM). In particular, the applicant claimed damages for the refusal of the Oberbayern Regional Government to grant him a residence permit and for the alleged denial of justice by, *inter alia,* the first division of the Munich Court of Appeal, which had been involved in his first official liability proceedings.

On 19 April 1999 the Regional Court held an oral hearing during which the applicant lodged a complaint of bias against judges S. and H.

On 10 May 1999 the Regional Court refused the applicant's requests for legal aid as his proposed action lacked reasonable prospects of success. A subsequent complaint by the applicant before the Munich Court of Appeal was unsuccessful.

On 13 December 1999 the applicant extended his action, requesting a "declaration that he would be entitled to pursue his action against the Bavarian State with a value in dispute amounting to DEM 2,000,000".

On 29 December 1999 the Regional Court served the extension of his claim on the defendant.

On 5 April 2000 the Regional Court informed the applicant that judges S. and H. had ceased to be members of the chamber sitting in his case. Subsequently, the applicant withdrew his complaint of bias of 19 April 1999.

On 7 April 2000 the Regional Court asked the applicant to comment on the assessment of the value in dispute concerning the extension of his claim.

On 19 April 2000 he submitted that the value in dispute amounted to DEM 2,000,000.

On 5 May 2000 the Regional Court fixed the value in dispute at DEM 2,000,000. On 9 May 2000 it requested the applicant to pay court fees in the amount of DEM 24,390. On 15 May 2000 the applicant complained about the assessment of the value in dispute (*Streitwertfestsetzung*) and reiterated his request for legal aid, which the Regional Court refused on 8 June 2000.

On 13 December 2000 the applicant complained about the Regional Court's failure to schedule an oral hearing. On 3 January 2001 the Regional Court informed him that it could not schedule a hearing until he had paid court fees in advance (*Gerichtskostenvorschuss*) as requested on 9 May 2000. The applicant unsuccessfully complained about that "decision" before the Regional Court and the Court of Appeal.

On 26 March 2001 the applicant paid the requested advance. On 17 May 2001 he claimed damages also for the behaviour of the judges involved in the fixing of his court fees.

On 21 May 2001 the applicant reiterated his complaint against the Regional Court's order of 9 May 2000 and requested the reimbursement of his court fees. On 27 March 2002 the Regional Court declared the complaint inadmissible. A further complaint by the applicant to the Court of Appeal was unsuccessful.

In the meantime, on 23 January 2002 the Regional Court had dismissed the applicant's action. It argued that the applicant's submissions had not disclosed any intentional or negligent breach of official duties by the Oberbayern Regional Government (*schuldhafte Amtspflichtverletzung*) given in particular that two panels of judges had confirmed the Regional Government's decision. As to the conduct of the administrative and civil judges, the applicant had failed to substantiate that their alleged misconduct amounted to a criminal offence within the meaning of Article 839 § 2

sentence 1 of the Civil Code (*Spruchrichterprivileg*) (see "Relevant domestic law" below).

b. Proceedings before the Court of Appeal

On 4 March 2002 the applicant appealed against that judgment before the Munich Court of Appeal.

Between 12 and 16 April 2002 the President of the Court of Appeal's first division and three further members of that division declared that they would be excluded from hearing the applicant's case according to section 41 no. 1 of the Code of Civil Procedure as the applicant's liability action had also been directed against themselves.

On 2 July 2002, following a further declaration of the members of the Court of Appeal's first division to be excluded from hearing the applicant's case, a judge of the Court of Appeal's tenth division noted in a memorandum that the judges of the court's first division had *ipso jure* been excluded from the appellate proceedings as the applicant's claim for damages had apparently also been directed against the judges of the first division.

On 5 December 2002 the applicant requested legal aid for the appellate proceedings.

On 7 October 2003, after having considered the course of the proceedings, the Deputy President of the Court of Appeal's tenth division declared that only the Bavarian State and not the judges of the first division had been sued by the applicant. Therefore, the latter were not a party to the proceedings and thus not excluded from them.

On 20 October 2003 the Court of Appeal informed the parties that on 7 October 2003 the Deputy President of the Court of Appeal's tenth division had decided that the judges of the first division had not been excluded from the proceedings.

On 14 November 2003 the applicant responded that his action had been exclusively directed against the Bavarian State and not against the judges of the Court of Appeal. Nevertheless, he stressed that the judges should be excluded from the proceedings according to Article 41 no. 1 of the Code of Civil Procedure (see "Relevant domestic law" below) as the claim for damages concerned the judges' alleged misconduct during his first set of official liability proceedings.

On 26 February 2004 the applicant informed the Court of Appeal that he wished to reinstate his request for legal aid which he had withdrawn on 9 December 2003.

On 3 June 2004 the substitute judges of the Court of Appeal's first division decided that the regular judges of the first division were not excluded from adjudicating the applicant's case and refused to grant him leave to appeal on points of law (*Rechtsbeschwerde*) in this connection. Nevertheless, on 7 June 2004 the President of the first division declared

that, in her view, she was excluded from the proceedings. On 21 June 2004 the substitute judges of the Court of Appeal's first division declared the applicant's request to reconsider their decision of 3 June 2004 inadmissible as he had not been represented by a lawyer.

In the meantime, on 14 June 2004 the applicant had lodged a complaint of bias against the judges of the Court of Appeal's first division, in accordance with Article 42 of the Code of Civil Procedure (see "Relevant domestic law" below).

On 24 August 2004 the substitute judges of the Court of Appeal's first division rejected that complaint, arguing that the applicant had lost his right to lodge complaints of bias, in accordance with Article 43 of the Code of Civil Procedure. In particular, the applicant had stated his intention to pursue the case without having previously challenged the judges under Article 42 of the Code of Civil Procedure. Moreover, the Court of Appeal refused to grant him leave to appeal on points of law in this connection. On 11 October 2004 the substitute judges of the Court of Appeal's first division refused to reconsider their decision.

On 19 October 2004 the Court of Appeal refused the applicant's request for legal aid. On 4 November 2004 and 20 January 2005 the Court of Appeal held oral hearings.

On 17 March 2005 the ordinary judges of the Court of Appeal's first division dismissed the applicant's appeal and confirmed the Regional Court's judgment. In addition, they pointed out that the mere fact that the Federal Administrative Court had quashed the previous decisions of the Bavarian administrative courts had not been sufficient to establish a breach of official duties by those courts. In particular, the legal issues raised by the applicant during the administrative proceedings were very complex. Therefore, they could have been the object of different arguable legal opinions which could not be qualified as intentional or negligent breach of a duty. As to the conduct of the Regional Court and the Court of Appeal during the applicant's first official liability proceedings, there was no indication that they had rendered any erroneous decisions, given in particular that all of those decisions had been confirmed by higher courts, in particular, by the Federal Court of Justice. As to the alleged length of the proceedings, it acknowledged that the "fact that the conduct of the proceedings had been left to the applicant had led to an unequalled chaos with regard to the facts and the procedure of the case, during which the courts concerned might have lost the overview and whose victim had eventually been the applicant". However, the fact that the applicant's numerous motions and complaints had not always been decided promptly was due to the complexity of the proceedings caused by the applicant's own conduct, which could have been avoided if he had been advised and represented by a competent and reliable legal counsel.

The Court of Appeal allowed the appeal on points of law as the case raised questions in respect of the judges' impartiality. In particular, it remained unclear whether the judges sitting in an action for damages claiming official liability for an alleged breach of their own duties would be excluded *ipso jure* from the proceedings within the meaning of Article 41 no. 1 of the Code of Civil Procedure or biased according to Article 42 of that Code.

c. Proceedings before the Federal Court of Justice

On 20 April 2005 the applicant requested the Federal Court of Justice to grant him legal aid.

On 21 December 2005 the Federal Court of Justice refused his request, as his proposed appeal on points of law lacked reasonable prospects of success. It argued that the applicant's action for damages had been unfounded mainly for the same reasons already given by the lower instances. As to the alleged partiality of the first division of the Court of Appeal, the Federal Court of Justice set out that the questions raised by the Court of Appeal in this connection were not relevant in the instant case because the Court of Appeal's findings in its judgement of 17 March 2005 were not based on a potential breach of Articles 41 and 42 of the Code of Civil Procedure for the following reasons. Firstly, the Court of Appeal could not have reasoned differently on the merits from its actual reasoning in its judgment. Secondly, there was no fundamental error in the application of the law (*absoluter Revisionsgrund*). In particular, the requirements of Article 547 no. 2 of the Code of Civil Procedure (see "Relevant domestic law" below) were not fulfilled as on 3 June 2004 the Court of Appeal had already refused the applicant's request to exclude the judges in dispute.

On 18 January 2006 the applicant lodged an appeal on points of law and requested the Federal Court of Justice to reinstate the proceedings in so far as he had failed to lodge his appeal on points of law within the statutory time-limit. On 26 January 2006 the Federal Court of Justice reinstated the applicant in the previous proceedings.

On 7 February 2006 the applicant submitted his statement of grounds for appeal. On 12 April 2006 the Federal Court of Justice reinstated the applicant in the previous proceedings in so far as he had failed to lodge his statement of grounds within the statutory time-limit. Moreover it refused the applicant's request to reconsider its refusal to grant him legal aid for the same reasons as given in its decision of 21 December 2005.

On 1 June 2006 the Federal Court of Justice informed the applicant that it intended to dismiss the applicant's appeal on points of law according to Article 552 (a) of the Code of Civil Procedure.

The applicant's lawyer thereafter withdrew from the case. On 29 June 2006, the Federal Court of Justice appointed legal counsel for

the applicant as he was not able to find another lawyer who wanted to represent him.

On 30 November 2006 the Federal Court of Justice dismissed the applicant's appeal on points of law according to Article 552 (a) of the Code of Civil Procedure for the reasons set out in its previous decisions of 21 December 2005 and 12 April 2006. Moreover, it refused a further request by the applicant for legal aid.

On 22 February 2007 the Federal Court of Justice rejected the applicant's complaint that he had not been heard (*Gehörsrüge*) arguing that it had duly taken into account the applicant's submissions and that it had considered them unfounded.

d. Proceedings before the Federal Constitutional Court

On 23 June 2001 the Federal Constitutional Court refused to admit the applicant's constitutional complaints against the Regional Court's refusal to grant him legal aid, about the assessment of the value in dispute and his obligation to pay court fees in advance (no. 1 BvR 922/01).

On 27 November 2003 the Federal Constitutional Court refused to admit his constitutional complaint against, *inter alia,* the Regional Court's judgment of 23 January 2002 (no. 2 BvR 1963/03).

On 5 April 2006 the Federal Constitutional Court refused to admit his complaint against the Court of Appeal's decisions of, *inter alia,* 3 June 2004, and against the Federal Court of Justice's decision of 21 December 2005 (no. 1 BvR 624/06).

Finally, on 19 June 2007 the Federal Constitutional Court refused to admit the applicant's fourth constitutional complaint against the Federal Court of Justice's decisions of 30 November 2006 and 22 February 2007 (no. 2 BvR 647/07).

B. Relevant domestic law

1. Provisions concerning the exclusion of judges

Pursuant to Article 41 of the Code of Civil Procedure a judge is excluded *ipso jure* from all judicial acts that relate to proceedings where he or she is a party to the dispute.

Article 42 §§ 1 and 3 of the Code of Civil Procedure provides that the parties to the dispute may challenge a judge if they doubt his or her complete impartiality.

Pursuant to Article 43 of the Code of Civil Procedure parties are banned from challenging a judge when they have stated their intention to pursue the case or lodged requests without having previously raised the grounds for the judges' bias.

In case of doubts as to whether judges are excluded *ipso jure* from the proceedings, sections 45 and 48 of the Code of Civil Procedure provide that the court to which the judges in dispute belong decides *ex officio* and in the absence of those judges about their exclusion.

2. Provisions concerning compulsory legal representation

Pursuant to Article 78 § 1 of the Code of Civil Procedure parties must be represented by a legal counsel in proceedings before Regional Courts and Courts of Appeal.

3. Provisions concerning an appeal on points of law

Article 547 no. 2 of the Code of Civil Procedure establishes that a judgment shall always be considered to be based on a violation of the law if a judge participates in a decision although he or she is excluded *ipso jure* from the proceedings and if a respective complaint of bias has not been rejected.

Under Article 552 a of the Code of Civil Procedure, a court determining an appeal on points of law (*Revisionsgericht*) may, by unanimous decision, dismiss an appeal on points of law which has previously been admitted by the appeal court (*Berufungsgericht*) if it considers that the conditions for leave to appeal have not been fulfilled and if the appeal on points of law lacks any prospects of success.

4. Provisions governing official liability

Pursuant to Article 34 of the Basic Law, taken in conjunction with Article 839 of the Civil Code, the state or a public body is liable to pay compensation to an individual for any damage arising from an intentional or negligent breach of official duties committed by its officials.

Article 839 § 2 sentence 1 of the Civil Code contains the so-called judges' privilege clause (*Spruchrichterprivileg*) which provides that if an official breaches his or her public duties through a judgment in a legal dispute, he or she is responsible for damage arising therefrom only if the breach of duty consists of a criminal act.

In accordance with Article 34, third sentence, of the Basic Law the civil courts have jurisdiction to adjudicate official liability claims.

COMPLAINTS

The applicant complained under Articles 6 § 1 and 14 of the Convention that the judges of the Munich Court of Appeal had not been impartial as

they had decided on his case although their own misconduct had been the object of his action.

In respect of the administrative proceedings the applicant complained under Articles 6, 8, 13 and 14 of the Convention and Article 2 of Protocol No. 4 about the alleged unfairness of the proceedings and the erroneous application of the law.

The applicant further complained under Articles 6 and 13 of the Convention about the decisions rendered by the German courts in respect of his first action claiming official liability and about their respective refusals to grant him legal aid.

As to the second set of official liability proceedings, the applicant complained under Articles 6 and 13 of the Convention about the length of the proceedings and the lack of an effective legal remedy to complain about the length of the proceedings and the impartiality of the Court of Appeal's judges. He also complained that the Court of Appeal had not been competent to decide on his complaint against the assessment of the value in dispute and that the German courts had refused to examine whether the administrative courts and the courts involved in his first official liability action had intentionally or negligently breached their duties. Furthermore, he alleged that the Federal Court of Justice had not held an oral hearing and that the Regional Court and the Court of Appeal had not consulted the related court files. Finally, he complained that he had been denied legal aid and that the Regional Court had decided on his legal aid request only after six years.

THE LAW

1. The applicant complained about the alleged lack of impartiality of the judges of the Munich Court of Appeal's first division, relying on Articles 6 and 14 of the Convention. The relevant parts of Article 6 § 1 provide 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."

The Court notes that the applicant's complaint under Article 14 is in substance identical to his complaint under Article 6 § 1 and therefore does not give rise to a separate issue. Consequently, the Court will examine the applicant's complaint concerning the impartiality of the judges under Article 6 § 1 alone.

However, it considers that it cannot, on the basis of the case file, determine the admissibility of this complaint at the present stage and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of

Court, to give notice of this part of the application to the respondent Government.

2. In so far as the applicant complained about the length of his second official liability proceedings, the period to be considered began on 9 November 1998 when the applicant, represented by a lawyer, lodged his action before the Regional Court and ended on 19 June 2007 with the decision of the Federal Constitutional Court. It thus amounted to eight years and seven months for proceedings at four instances.

The Court observes that the Regional Court rendered its judgment after three years and two months and that the Court of Appeal rejected the applicant's appeal after three years. However, in the Court's view the proceedings were prolonged by the applicant's numerous unmeritorious requests for legal aid, which necessitated several further intermediate decisions. Moreover, many of the applicant's complaints and motions for bias were lodged by the applicant without being represented by a lawyer although such representation was required under German law in the applicant's proceedings. Thus, the German courts had to take further decisions on those inadmissible complaints which inevitably prolonged the proceedings.

In so far as the applicant was represented by a lawyer, the Court notes that, according to the findings of the Munich Court of Appeal, the applicant's counsel nevertheless left the conduct of the proceedings to the applicant which resulted in an "unequalled chaos" and, hence, in delays of the proceedings. The Court considers in this connection that if an applicant – as in the instant case – was represented by a lawyer of his or her own choosing in civil proceedings and if that lawyer did not duly advice the applicant and failed to work towards a proper conduct of the applicant's case during the proceedings before the national courts, delays which resulted from the lawyer's failures cannot be attributed to the courts of the respondent state.

Furthermore, the Court notes that the applicant caused a delay of almost eleven months in the proceedings before the Regional Court because he failed, despite an explicit request of the Regional Court, to pay court fees in advance.

In so far as the proceedings before the Federal Court of Justice were concerned, the Court observes that the applicant prolonged the proceedings in that he failed to respect the statutory time-limits to lodge his appeal on points of law and to submit the statement of grounds. Thus, he was reinstated to pursue his appeal on points of law with the Federal Court of Justice only on 12 April 2006, thirteen months after the Court of Appeal had dismissed his appeal on 17 March 2005.

Under these circumstances, the Court considers that the overall length of the proceedings can still be considered reasonable within the meaning of Article 6 § 1 of the Convention.

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

3. As regards the applicant's complaint of the lack of an efficient remedy to complain about the length of the proceedings, the Court reiterates that Article 13 is applicable even in the absence of an infringement of the applicant's Convention rights. It suffices that the applicant had an arguable claim in terms of the Convention (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, §§ 64-65, and *Costello-Roberts v. United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, § 59). However, the Court has also held that an applicant had no arguable claim to be the victim of an infringement of his right to an effective remedy within the meaning of Article 13 if, as in the present case, the applicant's previous complaints about the length of proceedings had been inadmissible for being manifestly ill-founded (see *Ocone v. Italy* (dec.), no. 48889/99, 19 February 2004; *Tomaselli v. Italy* (dec.), no. 19785/03, 18 March 2004; and *Capo and Puleo v. Italy* (dec.), no. 43656/98, 13 May 2004).

In the light of the foregoing and having regard to the applicant's conduct during the proceedings, the Court considers that the applicant's claim was not arguable.

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

4. As regards the applicant's remaining complaints, in the light of all the material in its possession the Court considers that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that these complaints must be rejected under Article 35 §§ 3 and 4 of the Convention as being manifestly ill-founded.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the impartiality of the judges in respect of the second set of official liability proceedings;

Declares the remainder of the application inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President