

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 29878/07
by Andreas STEINDEL
against Germany

The European Court of Human Rights (Fifth Section), sitting on 14 September 2010 as a Chamber composed of:

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 11 July 2007,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Andreas Steindel, is a German national who was born in 1967 and lives in Achersleben. He was represented before the Court by Mr G. Jurczyk, a lawyer practising in Magdeburg.

A. The circumstances of the case

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

The applicant practices as an ophthalmologist. From January 2001 to 31 December 2004 he held a license as a statutory health insurance physician (*Zulassung zur vertragsärztlichen Versorgung*). Having renounced his licence, he exclusively treats patients in private practice.

On 28 December 2004 the Association of Medical Practitioners (*Ärztekammer Sachsen-Anhalt)* ordered the applicant to participate in the medical emergency services organised by the Association of Statutory Health Insurance Physicians (*Kassenärztliche Vereinigung Sachsen-Anhalt, KVSA*). His duty was suspended until determination of the modalities of his remuneration.

On 15 March 2005 the KVSA informed the applicant about the modalities of his remuneration during emergency services. He was further informed that, notwithstanding the fact that he was not a member of the KVSA, his services and remunerations within the framework of the emergency services were subject to the KVSA's supervision.

On 17 March 2003 the applicant informed the KVSA that he refused to serve in the emergency service and would only be willing to serve in an emergency service which was organised by the Association of Medical Practitioners.

On 21 March 2005 the Association of Medical Practitioners informed the applicant that he was statutorily obliged to participate in the emergency service. They pointed out that the emergency service was a common project by the KVSA and the Association of Medical Practitioners and that all pertinent decisions were taken jointly by both associations.

On 22 July 2005 the applicant lodged a motion against the Association of Medical Practitioners. He argued that he was not obliged to participate in the emergency service organised by the KVSA, because he did not practice as a statutory health insurance physician. He further alleged that the order lacked a sufficient legal basis.

On 21 March 2006 the Magdeburg Administrative Court (*Verwaltungsgericht*) dismissed the applicant's motion as being unfounded. According to that court, the impugned order was compatible with the pertinent law. The emergency service was set up jointly by the Association of Medical Practitioners and by the KVSA in order to avoid overlapping emergency services.

The pertinent provisions did not violate the applicant's rights under the Basic Law. The infringement on the applicant's right to freedom of profession was neither disproportionate nor excessive. Furthermore, there was no violation of the right to equal treatment, as all medical practitioners were equally obliged to provide emergency services to their patients outside

consultation hours. This duty constituted an intrinsic part of a medical practitioner's occupation. The organisation of emergency services released the medical practitioner from the obligation to be available for his patients "around the clock", at nights and during the weekends. Having regard to the fact that all medical practitioners – and not only those who held a license as statutory health insurance physicians – profited from this service, it was justified to order all practitioners to participate in the emergency service.

The fact that the emergency service was organised by the KVSA did not turn the applicant into a member of that organisation; he merely profited from its organisational structures.

On 6 September 2006 the Saxony-Anhalt Administrative Court of Appeal (*Oberverwaltungsgericht*) refused to allow the applicant leave to appeal. Further to the administrative court's considerations, the Court of Appeal found that the duties imposed on the applicant were not excessive, as it was merely envisaged to oblige the applicant to serve on six days during a three-months-interval. The Court of Appeal further considered that it was justified to oblige all medical practitioners, irrespective of the fact if they were willing to assure "around the clock" availability to their own patients. The system could only function if, as a matter of principle, all physicians concerned took part in it.

On 11 January 2007 the Federal Constitutional Court refused to admit the applicant's constitutional complaint as there was no indication of a violation of the applicant's basic rights (application no. 1 BvR 2572/06).

B. Relevant domestic law

According to section 20 § 2 of the Law on the Associations of Medical Practitioners for Saxony-Anhalt (*Gesetz über die Kammern für Heilberufe*) the Medical Association is entitled to issue regulations on medical emergency service.

Section 26 of the Medical Association's professional Code of Conduct (*Berufsordnung der Ärztekammer Sachsen-Anhalt*) provides that every resident medical practitioner is obliged to participate in emergency service. Regulations on the organisation of the emergency service have been jointly issued by the Medical Association, representing all medical practitioners, and by the KVSA, representing only those physicians practicing under the public health insurance scheme.

Non-compliance with the obligations under the Medical Association's professional Code of Conduct can lead to disciplinary proceedings. The disciplinary court has the capacity to issue formal reprimands, impose fines and to advice the authorities to revoke a physician's license (sections 46 and 48 of the Law on the Associations of Medical Practitioners).

COMPLAINTS

The applicant complained under Article 4 § 2 of the Convention about being forced to participate in the emergency service organised by the Association of Statutory Health Insurance Physicians, in spite of the fact that he was not a member of the association and did not practice under the public health insurance scheme.

The applicant further complained that the obligation to participate in the emergency service violated his property rights under Article 1 of Protocol no. 1 to the Convention.

Relying on Article 14 of the Convention, the applicant finally complained of having been discriminated against in his capacity as a physician in private practice.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION

The applicant complained that his obligation to participate in the medical emergency service constituted forced or compulsory labour within the meaning of Article 4 of the Convention which, insofar as relevant, reads as follows:

> "...
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> 3. For the purpose of this article the term 'forced or compulsory labour' shall not include:
>
> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;
>
> (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
>
> (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
>
> (d) any work or service which forms part of normal civic obligations."

The applicant submitted that he had given up practicing under the public health insurance scheme in order to avoid the inherent restrictions. By ordering him to participate in the emergency service which was organised by the Association of Statutory Health Insurance Physicians, the authorities forced him to perform tasks which were not part of his

professional duties as a private practitioner as opposed to a physician working under the public health insurance scheme.

The Court reiterates that paragraph 2 of Article 4, which prohibits "forced or compulsory labour", enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 (see *Zarb Adami v. Malta*, no. 17209/02, § 43, ECHR 2006-VIII).

When deciding whether the service required by the applicant falls within the prohibition of "forced or compulsory labour", the Court will have regard to all the circumstances of the case in the light of the underlying objectives of Article 4. The Court reiterates that paragraph 3 of Article 4 forms a whole with paragraph 2 and indicates what the term "forced or compulsory labour" shall not include. This being so, paragraph 3 serves as an aid to the interpretation of paragraph 2. The four subparagraphs of paragraph 3, notwithstanding their diversity, are grounded on the governing ideas of the general interest, social solidarity and what is normal in the ordinary course of affairs (see *Van der Mussele v. Belgium*, 23 November 1983, § 38, Series A no. 70, *Karlheinz Schmidt v. Germany*, 18 July 1994, § 22, Series A no. 291-B and *Zarb Adami*, cited above, § 44). The final sub-paragraph, namely sub-paragraph (d), which excludes "any work or service which forms part of normal civil obligations" from the scope of forced or compulsory labour, is of special significance in the context of the present case (compare also *Van der Mussele*, cited above, § 38).

Turning to the circumstances of the instant case, the Court observes that the services to be rendered did not fall outside the ambit of a physician's normal professional activities. Notwithstanding the fact that the applicant, in his private practice, did not perform services which were remunerated under the public health insurance scheme, it cannot be said that the service differed from a physician's usual work.

Secondly, it should be noted that the services performed during emergency services are remunerated. A further compensatory factor is to be found in the advantage that the emergency service in principle frees the applicant from the obligation to be available for his patients outside consultation hours, notwithstanding the fact that the applicant chose not to make use of this option.

Moreover, the obligation to which the applicant objects is part of a scheme which is devised to unburden all practising physicians from the obligation to be available during night-time and at weekends and to ensure the availability of medical services during these times. To this extent, it is founded on a concept of professional and civil solidarity and is aimed at averting emergencies.

Finally, the burden imposed on the applicant is not disproportionate. According to the findings of the Administrative Court of Appeal, it is

merely envisaged to oblige the applicant to serve on six days during a three-months-interval. This would leave the applicant ample time to take care of his patients in his private practice. Furthermore, his private patients are free to consult him when he is on service.

In the light of these considerations, the Court considers that the services required by the applicant do not amount to compulsory or forced labour for the purposes of Article 4 § 2 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.

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 4 § 2 OF THE CONVENTION

The applicant complained about having been discriminated against in his capacity as a physician in private practice. He relied on Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

According to the applicant, there was no objective and reasonable justification to oblige him to participate in the emergency service in the same manner and with the same remuneration as a physician practicing under the public health insurance scheme.

The Court notes, at the outset, that the criteria which serve to delimit the concept of compulsory labour include the notion of what is in the normal course of affairs. Work or labour that is in itself normal may in fact be rendered abnormal if the choice of the groups or individuals bound to perform it is governed by discriminatory factors (see *Van der Mussele*, cited above, § 43 and *Zarb Adami*, cited above, § 45). It follows that Article 14 in conjunction with Article 4 is applicable in the instant case.

The Court observes, however, that, under the pertinent regulations, the obligation to participate in the emergency service is imposed on all resident medical practitioners irrespective of the fact whether they work under the public health insurance scheme or in private practice. There is thus no indication that the applicant has been discriminated against in his capacity as a physician in private practice. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

Relying on Article 1 of Protocol No.1, the applicant finally complained that he was prevented from being available to his private patients during this period of emergency service, which would lead to a loss both of income and of the goodwill in his medical practice.

However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the applicant's rights under Article 1 of Protocol No. 1 to the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President