

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

FIFTH SECTION

DECISION

Application no. 36894/08
Christian VINKE
against Germany

The European Court of Human Rights (Fifth Section), sitting on 12 June 2012 as a Committee composed of:
Boštjan M. Zupančič, *President,*
Ann Power-Forde,
Angelika Nußberger, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*
Having regard to the above application lodged on 10 July 2008,
Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Christian Vinke, is a German national who was born in 1969 and is currently detained in Celle Prison.

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 7 February 2007 the applicant gave testimony in a criminal trial at Hanover Regional Court against M.P., who was accused of having murdered his former lover and their seven-month-old child. The applicant was the key witness in the trial, as the accused had allegedly confided details of the murders to the applicant while they were sharing a cell in

pre-trial detention. The applicant's application for the public to be excluded during his testimony was denied. He was photographed by the press before and after the court hearing.

On 8 February 2007 the newspaper *Bild,* a tabloid owned by Axel Springer AG, published in its Hanover edition an article on the murder trial under the headline 'He confided in me about the murders!" together with a photograph of the applicant and smaller photographs of the two victims and the suspected murderer. The photo of the applicant covered about a quarter of the page. Although slightly blurred, the applicant was clearly recognisable. An arrow linked the highlighted word "me" of the headline to the applicant's photograph. The article mentioned that the applicant had himself been convicted of murder and that the conviction had not yet become final.

2. Proceedings at issue

On 1 June 2007 the Hanover Regional Court, sitting in a single-judge formation, refused the applicant legal aid for proceedings against the Axel Springer AG. The court considered that the proceedings showed no reasonable prospects of success. The applicant had neither a right to a "cease and desist" injunction (*Unterlassungsanordnung*) against the publisher nor a well-founded claim for damages, as his personality rights were not affected by the publication. The publisher had a legal basis for the publication of the applicant's picture without his prior consent in section 23 of the Copyright (Arts Domain) Act (*Kunsturhebergesetz)* as he was a "relatively public figure" (*relative Person der Zeitgeschichte)* in connection with the criminal trial against M.P. That trial received significant media attention and the applicant exposed himself voluntarily as a witness, although he could have anticipated the media interest. In so far as the applicant claimed that due to the size of the photograph he could be wrongfully taken for the murderer, this argument was not founded: due to the numerous prior articles on the alleged suspect the picture of the suspected murderer was well known to the public. Moreover, the alleged suspect was also depicted in the article. The court took into consideration that the applicant was a convicted murderer himself. In regard to the applicant's complaint that he had already become the victim of reprisal in prison the court doubted – without further reasoning – a causal link between the publication of the photo in the *Bild* newspaper and the alleged reprisal. The court finally noted that, before deciding it had consulted the files of the public prosecutor in the M.P. murder case.

The applicant appealed the decision.

On 13 August 2007 the Hanover Court of Appeal partly granted legal aid on appeal, in so far as the applicant intended to sue for reimbursement of his lawyer's fees for the "cease and desist" order. The court remarked that it was not sufficiently clear in judicial practice whether a witness in a criminal

trial should be considered a relatively public figure under all circumstances. Therefore proceedings for reimbursement were not without any prospects of success. However, the rest of the appeal was dismissed. As regards the "cease and desist" order, the application for legal aid had become irrelevant, as the Axel Springer AG had meanwhile voluntarily conceded the matter. As regards the potential claim for damages, the court found that the claim did not seem to be well-founded. The applicant had failed to make out a plausible case that there had been a substantial infringement of his personality rights. The court could not establish that the particular publication in question had led to significant non-material damage. Public stigmatisation of the applicant as a fellow detainee and not finally convicted murderer would not lead to an incorrect perception of him, as the applicant had recently been convicted of the murder of his female companion although that conviction had not become final at the time of the publication. The applicant could not have been mistaken for the suspected murderer, as the headline linked the word "me" visibly to his picture. Even at a hasty glance one would notice this link. Lastly, the court dealt with the applicant's argument that he had been threatened with bodily harm by his fellow inmates and had continued to need protection from revenge. The court acknowledged that these circumstances might constitute an infringement of his personality rights; however the applicant had failed to substantiate that the publication in *Bild* had caused these threats. Referring to the submissions of the potential defendant – Axel Springer AG – the court held that the *Hannoversche Allgemeine Zeitung* had published nineteen days earlier an article with a recognisable picture of the applicant. Against this background it seemed highly probable to the court that the news had already been spread among his fellow inmates when the Axel Springer AG published the article and the picture in question in *Bild*, Hanover edition.

On 29 May 2008 a committee of three judges of the Federal Constitutional Court declined to review the constitutional complaint on the refusal of legal aid.

B. Relevant domestic law

1. The Basic Law

Article 2 § 1

"Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral law [*Sittengesetz*]."

2. The Copyright (Arts Domain) Act

Section 22 (1) of the Copyright (Arts Domain) Act provides that images can only be disseminated with the express approval of the person concerned.

Section 23 (1) no. 1 of that Act provides for exceptions to that rule, particularly where the images portray an aspect of contemporary society (*Bildnisse aus dem Bereich der Zeitgeschichte*) on condition that publication does not interfere with a legitimate interest (*berechtigtes Interesse*) of the person concerned (section 23 (2)).

3. Provisions governing legal representation and legal aid

Pursuant to Article 78 § 1 of the Code of Civil Procedure, representation by counsel is compulsory for parties to civil proceedings before the Regional Court, the Court of Appeal and the Federal Court of Justice.

According to Article 114 of the Code of Civil Procedure, a party who in view of his or her personal and economic situation cannot afford the costs of conducting proceedings is granted legal aid upon application if the intended legal action offers sufficient prospects of success and does not appear frivolous (*mutwillig*). A party who has been granted legal aid is officially allocated a lawyer of his or her choice who is ready to represent him or her if representation by counsel is compulsory (Article 121 § 1 of the Code of Civil Procedure). It is the court with jurisdiction to deal with the intended action itself which is called on to decide on applications for legal aid (Article 127 § 1 of the Code of Civil Procedure). An appeal lies against a decision refusing legal aid (Article 127 § 2 of the Code of Civil Procedure).

COMPLAINTS

Invoking Articles 8 and 10 of the Convention the applicant complained that he had not been granted legal aid to commence proceedings for damages and that the domestic courts had not properly balanced the interest in publicising the article with his personality rights stemming from Article 8 of the Convention, especially as the only interest of the *Bild* newspaper had been sensationalism. Following the publication he was threatened with reprisals by fellow inmates. He submitted that he was excluded from spare time (*Freistunde*) in prison as a protective measure for about six months.

THE LAW

The applicant complained under Articles 8 and 10 of the Convention that he had not been granted legal aid to commence proceedings for damages.

1. The Court considers that this complaint falls to be primarily examined under Article 6 § 1 which, in so far as relevant, provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The applicant claimed that it had been unfair not to grant him legal aid as his intended action for damages had been meritorious.

The Court reiterates its case-law on the application of Article 6 § 1 of the Convention as summarised in the decision in the case of *Herma v. Germany* (dec.), no. 54193/07, 8 December 2009:

> The Court recalls that, whilst Article 6 § 1 guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Gnahoré v. France*, no. 40031/98, § 38, ECHR 2000-IX; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 60, ECHR 2005-II). There is no obligation under the Convention to make legal aid available for all disputes in civil proceedings, as there is a clear distinction between the wording of Article 6 § 3 (c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which makes no reference to legal assistance (see *Del Sol v. France*, no. 46800/99, § 20, ECHR 2002-II; *Santambrogio v. Italy*, no. 61945/00, § 49, 21 September 2004; *Essaadi v. France,* no. 49384/99, § 30, 26 February 2002). Thus, the right of access to court is not absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. It may notably be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings (see *Del Sol*, cited above, § 23; *Steel and Morris*, cited above, § 62), provided that the legal aid system offers individuals substantial guarantees to protect them from arbitrariness (see *Gnahoré*, cited above, § 41; *Del Sol*, cited above, §§ 25-26).

The Court observes that the German legal aid system offers individuals substantial guarantees to protect them from arbitrariness (see also *Eckardt v. Germany* (dec.), no. 23947/03, 10 April 2007). There is no indication in the present case that the German courts did not duly examine the applicant's arguments. The claim of the applicant, that he was subject to threats in prison, was classified by the Hanover Court of Appeal as valid in principle, but unsubstantiated in that the applicant had not rendered plausible a causal link between the publication in the *Bild* tabloid and the threat of reprisals in prison. Referring to a letter submitted by the A.S. AG – the potential defendant – the court emphasised that there had been a prior publication about the applicant with a recognizable picture of him in the *Hannoverschen Allgemeinen Zeitung*. The domestic courts' interpretation of the applicable legal provisions could not therefore be considered as arbitrary.

The Court also notes in this context that decisions regarding legal aid do not become *res judicata*, i.e. the applicant was free to apply for legal aid again in order to substantiate his argument that his case did not lack sufficient prospects of success.

In view of the above circumstances, it cannot be said that the refusal of legal aid restricted the applicants' right of access to court in a disproportionate manner contrary to Article 6 § 1 of the Convention.

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

2. Insofar as the applicant complained under Article 8 with regard to "private life" and Article 10 of the Convention that the domestic courts failed to protect his personality rights, the applicant has not exhausted domestic remedies, as he had failed to pursue the damages claim in substance. It follows that this part of the application is also inadmissible pursuant to Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Deputy Registrar

Boštjan M. Zupančič
President