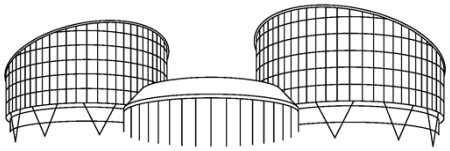

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF FRANZ v. GERMANY

(Application no. 29295/16)

JUDGMENT

Art 6 § 1 (criminal) • Independent and impartial tribunal • Dispute between a notary and the President of the Court of Appeal assigned to the notary senate of that same Court of Appeal • Influence of the President on the composition of the notary senate not negligible • President's involvement in disciplinary and promotion decisions concerning judges of the notary senate • Sufficient review by Federal Court of Justice

STRASBOURG

30 January 2020

FINAL

30/05/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Franz v. Germany,

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

Gabriele Kucsko-Stadlmayer, *President,*
Angelika Nußberger,
Ganna Yudkivska,
André Potocki,
Síofra O'Leary,
Lətif Hüseynov,
Lado Chanturia, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 3 December 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 29295/16) 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") by a German national, Mr Friedrich-Carl Franz ("the applicant"), on 20 May 2016.

2. The German Government ("the Government") were represented by their Agent, Mr H.-J. Behrens of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged under Article 6 § 1 of the Convention that, in proceedings concerning the revocation of the conferral of the office of notary on him, the Court of Appeal had not been an independent and impartial tribunal.

4. On 3 November 2017 notice of the complaint concerning Article 6 § 1 of the Convention was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Written submissions were received from the Federal Chamber of German Civil Law Notaries (*Bundesnotarkammer*), which had been granted leave to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1955 and lives in Lüneburg. In 1986 he was admitted as a lawyer. In 1997 the President of the Celle Court of Appeal conferred the office of notary upon him.

7. On 9 August 2012 the President of the Celle Court of Appeal suspended the applicant from his office as a notary on a preliminary basis. Subsequently, the applicant challenged the preliminary suspension before the Celle Court of Appeal and the Federal Court of Justice without success.

8. On 12 February 2013 the President of the Celle Court of Appeal confirmed the definitive removal of the applicant from his office as a notary. He referred to section 50 (1) point 8 of the Federal Notary Act (see paragraph 20 below). The decision was signed by H., who was the Vice-President of the Celle Court of Appeal at the time, as representative of the President (*in Vertretung*).

9. On 15 March 2013 the applicant filed an application for annulment (*Anfechtungsklage*) of the decision of 12 February 2013 with the Celle Court of Appeal in its capacity as a first-instance court. The application was subsequently assigned to the so-called "notary senate" at that court (see paragraphs 24-26 below). In his submissions, the applicant objected, *inter alia*, to the Celle Court of Appeal having jurisdiction on the basis that it belonged to the ordinary court branch and the challenged decision had been issued by the President of that court. He claimed that the matter would be more suitable for the administrative court branch, which had general jurisdiction over disputes between the administration and a private individual.

10. On 22 May 2013 the notary senate of the Celle Court of Appeal decided in advance on its jurisdiction. It held that the ordinary court had jurisdiction in relation to the application, referring in their reasoning to section 111 of the Federal Notary Act (see paragraphs 24 and 25 below), and that the proceedings would therefore not have to be relinquished to an administrative court.

11. On 19 August 2013 the applicant lodged complaints of bias in respect of the ordinary members of the notary senate, i.e. the presiding judge, the associate judge and the notary judge. On 21 August 2013 he lodged separate complaints of bias in respect of two other judges of the Court of Appeal who were the substitutes of the presiding judge of the notary senate. They were the judges responsible to decide on the complaints of bias against the presiding judge and would have also replaced the presiding judge and each other in the event of bias. On 14 October 2013 the applicant lodged a further complaint of bias in respect of judge K. who was the third substitute of the presiding judge. In each and every one of those complaints of bias, he referred to the close personal and professional ties of the defendant President of the Celle Court of Appeal with the judges deciding his case, as well as to the fact that the defendant President was the disciplinary superior of those judges, which put into question their independence and neutrality.

12. On 8 November 2013 the Court of Appeal, sitting in a composition of judge K, an associate judge and a notary judge, who both had not been

involved earlier, rejected the complaints of bias as inadmissible because the applicant had failed to substantiate the facts in a sufficiently specific manner. The applicant had not given specific reasons relating to the person of the challenged judges, but had only generally referred to structural entanglements relating to all of the judges at the same Court of Appeal as the defendant in the proceedings. After the mandate of the two substitute judges had ended, judge K. was the designated substitute to preside over the panel reaching that decision. Even though judge K. had been one of the judges about whom the complaints of bias were made, the panel found that he was allowed to participate in the panel because the reasons in the complaints were completely ill-suited.

13. On 3 March 2014, after having conducted a hearing on the same day, the Court of Appeal, sitting in a composition of the ordinary members of the notary senate, i.e. the initial presiding judge, associate judge and notary judge, rejected the applicant's legal challenge. The court held that the provision applied in relation to the applicant's removal, section 50 (1) point 8 of the Federal Notary Act (see paragraph 20 below), was, taking account of the case-law clarifying it, sufficiently precise. According to that provision, a notary must be removed from office if his economic circumstances, the manner of his business administration or his conduct regarding deposits jeopardise the interests of users of legal services. The provision did not require fault. It was also not a requirement for a notary to have violated a particular obligation to treat a deposit in a particular way in the past. Rather, it was sufficient that a notary gave the impression of not being trustworthy in this connection. This was, for example, the case if a creditor had to apply for enforcement measures against a notary in relation to an undisputed obligation. Even if an enforcement measure appeared to be invalid, a notary would be obliged to pay and could only challenge the validity of the measures in subsequent reimbursement proceedings. The court concluded, after having listed and examined numerous enforcement measures against the applicant, that he had been the subject of such measures forty-six times in the course of roughly ten years, mostly for minor amounts of up to 3,000 euros (EUR), but on one occasion also for 565,000 German Marks – on the whole that gave sufficient cause to remove him from office.

14. On 23 April 2014 the applicant applied to the Federal Court of Justice for leave to appeal. He alleged in particular a violation of his right to a lawful judge as guaranteed by Article 101 § 1 sentence 2 of the Basic Law (see paragraph 23 below). He did not challenge the existence of the enforcement measures as such, but insisted that he had ultimately paid his debts. In respect of two enforcement measures he challenged their legal basis. He argued that one claim had only been become enforceable after appeal proceedings and the amount of another claim of 268.50 euros had been established incorrectly. With regard to the application of section 50 (1)

point 8 of the Federal Notary Act, he argued that he had not caused a real risk to the interests of his clients. Furthermore, ten-year-old enforcement measures were not a valid basis to conclude that he could not be expected to change his business conduct. Finally, his removal from office was disproportionate.

15. On 24 November 2014 the Federal Court of Justice rejected the application for leave to appeal as ill-founded. It held that the applicant's right to a lawful judge as guaranteed by Article 101 § 1 sentence 2 of the Basic Law (see paragraph 23 below) had not been violated, because assigning disputes between a notary and a President of a Court of Appeal to that Court of Appeal was generally compatible with the constitutional guarantees. Also, the composition of the notary senate did not give rise to doubts regarding its impartiality. The applicant was wrong in claiming that the President, as member of the executive committee (*Präsidium*), could easily replace judges in the notary senate, because those judges were appointed for a period of five years (see paragraphs 28 and 30).

16. It furthermore held that there were no serious doubts regarding the correctness of the judgment (*ernstliche Zweifel an der Richtigkeit des Urteils*). In this context, it found that the applicant had not plausibly challenged the Court of Appeal's finding of facts. It further reiterated its earlier findings of its decision concerning the preliminary suspension of the applicant (see paragraph 7 above). It found that pursuant to section 50 (1) point 8 of the Federal Notary Act (see paragraph 20 below) a notary must be removed from office if his manner of business administration obliged creditors of legally acknowledged claims to apply for enforcement measures against him. The reasons for these measures were immaterial because it was neither necessary that such measures stemmed from financial problems of the notary nor did it require fault. Thus, the very existence of such measures was sufficient. In the past, the applicant had been the subject of forty-six enforcement measures, of which twenty-six had been adopted in the last four years prior to his definitive removal from office. Moreover, relying on written information from the tax authorities, that the Federal Court of Justice had obtained on 13 September 2013, the applicant had also not complied with his tax obligations. Further, the Court of Appeal had not been obliged to verify whether the applicant's conduct had caused a real risk because an abstract risk to the interests of the users of legal services was sufficient. The court concluded that the definite removal from office was proportionate because the applicant had not changed his conduct despite numerous warnings.

17. The applicant subsequently filed a complaint concerning a violation of his right to be heard which the Federal Court of Justice dismissed on 24 August 2015.

18. The applicant then filed a constitutional complaint with the Federal Constitutional Court, in which he again relied on his constitutional right to a

lawful judge. On 17 November 2015, the Federal Constitutional Court refused to adjudicate on the complaint, without providing reasons (1 BvR 2652/15).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Removal of notaries from office

1. Federal Notary Act

19. Under the Federal Notary Act, notaries are appointed as independent holders of a public office to authenticate legal transactions and perform other tasks in the administration of non-contentious justice. Under section 3 of the Federal Notary Act they are appointed for life, to exercise their office as their primary occupation.

20. Disciplinary measures against notaries are taken by the supervising authority – the president of the Court of Appeal of the relevant court district – in respect of specific acts committed in violation of a specific obligation. Disputes arising out of the use of those measures are considered to be disciplinary disputes under the Federal Notary Act. Apart from disciplinary powers, the Federal Notary Act also provides for preventive powers in respect of notaries and their conduct, which do not require the violation of a specific obligation but which, generally speaking, require some sort of risk to third parties to have been established. Disputes arising from such measures are considered to be public law disputes under the Federal Notary Act. In this respect, the relevant parts of section 50 of the Federal Notary Act reads as follows:

> "(1) A notary shall be removed from office:
>
> ...
>
> 8. if his economic circumstances, the manner of his business administration or his conduct of depository transactions jeopardise the interests of users of legal services;
>
> ..."

21. Section 50 (3) of the Federal Notary Act vests the competence for a notary's removal from office in the justice administration of the *Land*. Section 112 of the Act grants the *Länder* the right to confer the duties and powers which are vested in the justice administration of each *Land* on inferior authorities.

2. Law of the Land of Lower Saxony

22. The *Land* of Lower Saxony made use of that possibility in a regulation concerning Responsibilities in the Fields of Jurisdiction and Administration of Justice (*Verordnung zur Regelung von Zuständigkeiten in der Gerichtsbarkeit und der Justizverwaltung*), by conferring its duties and

powers under section 50 of the Federal Notary Act on the president of the Court of Appeal of the relevant court district. The relevant parts of section 30 of that Regulation read as follows:

> "The following duties and powers under the Federal Notary Act are delegated to the presidents of the Courts of Appeal for their respective court district:
>
> ...
>
> 5. removal of notaries from office (section 50 of the Federal Notary Act);
>
> ..."

B. Jurisdiction and composition of the designated court

1. Relevant provisions in the Basic Law

23. The domestic law provides for a right to a "lawful judge" (*Recht auf den gesetzlichen Richter*). This right is understood to entail not only the right to have the jurisdiction of the court called upon to adjudicate in a specific case determined in advance, but also to have confirmed in advance the composition of the panel of judges making up the deciding body of that court. That right therefore required consideration when the provisions concerning jurisdiction and the specific composition of the Celle Court of Appeal were adopted, and generally it requires consideration when those provisions are applied in the circumstances of a specific case. Both questions – the compliance of provisions concerning jurisdiction and composition of a court as well as their application to a specific case – are generally open to judicial review in each and every case. The right is embedded in Article 101 § 1 sentence 2 of the Basic Law, which reads as follows:

> "No one may be removed from the jurisdiction of his lawful judge."

2. Jurisdiction of the Celle Court of Appeal

(a) Federal Notary Act

24. Section 111 of the Federal Notary Act vests jurisdiction for public law disputes under the Act – such as disputes concerning measures taken on the basis of section 50 (1) point 8 of the Act (see paragraph 20 above) – in the Courts of Appeal of the ordinary court branch as a court of first instance. Section 111a sentence 1 of the Act, which governs geographical jurisdiction in case there is more than one Court of Appeal in a *Land*, provides that, in principle, jurisdiction within a *Land* is vested in the Court of Appeal in whose district the challenged decision was taken. However, according to section 111a sentence 3, the Government of the *Land* may, where there is more than one Court of Appeal in that *Land*, by means of a regulation, change the application of jurisdiction in deviation from sentence 1.

(b) Law of the *Land* of Lower Saxony

25. The *Land* of Lower Saxony, which has more than one Court of Appeal, has made use of this possibility by adopting its Regulation on the Jurisdiction of the Lawyer's Disciplinary Court and the Senate for Notarial Matters (*Verordnung über die Zuständigkeit des Anwaltsgerichtshofs und des Senats für Notarsachen*). In section 1 (2) of the Regulation, the *Land* conferred the duties incumbent on the various Courts of Appeal under section 111 of the Federal Notary Act on the Celle Court of Appeal in relation to the districts of all Courts of Appeal within that *Land*.

3. Jurisdiction of the notary senate at the Celle Court of Appeal

26. A Court of Appeal of the ordinary court branch generally consists of civil law and criminal law senates (section 116 of the Courts Constitution Act). In addition, the Federal Notary Act presupposes that the Courts of Appeal establish a "notary senate", which is to adjudicate on disciplinary measures against notaries and public law disputes under the Federal Notary Act, such as disputes on the basis of section 50 of the Federal Notary Act (section 111 (4) of the Federal Notary Act).

4. The composition of the notary senate at the Celle Court of Appeal

27. Section 101 et seq. of the Federal Notary Act require a particular composition of the notary senate:

> "The Court of Appeal shall sit, in disciplinary measures against notaries, in a composition of a presiding judge; an associate judge, who shall be a permanent judge at the Court; and an associate judge, who shall be a notary."

28. Regarding the offices of the professional judges, section 102 of the Federal Notary Act determines that the presiding judge of the notary senate has to, at the least, hold the office of a presiding judge at the Court of Appeal. It also indicates that his or her substitutes and the associate judge, who is a permanent judge at the Court, and his or her substitutes, are to be appointed by the executive committee of the Court of Appeal from amongst all of the permanent members of the Court of Appeal for a duration of five years.

29. The specific presiding and the specific associate judge called upon to decide a specific case at a specific point in time are determined by a plan for the allocation of court business ("the allocation plan"), adopted by the executive committee of the Celle Court of Appeal – which was, at the relevant time, composed of the President as chairman and ten elected judges, under the provisions of the Courts Constitution Act. The relevant sections read as follows:

Section 21a

"(1) An executive committee shall be established at each court.

(2) The executive committee shall be composed of the president or supervising judge acting as chairman and,

1. at courts with at least eighty permanent judicial posts, ten elected judges,

2. at courts with at least forty permanent judicial posts, eight elected judges,

3. at courts with at least twenty permanent judicial posts, six elected judges,

4. at courts with at least eight permanent judicial posts, four elected judges,

5. at the other courts, the judges eligible to stand for election pursuant to section 21b(1)."

Section 21b

"(1) The parties eligible to vote in elections in relation to the executive committee are the judges appointed for life and the judges appointed for a specified term upon whom a judicial office has been conferred at the court, as well as the judges on probation who are working at the court, the judges by commission and the judges on secondment for a term of at least three months who are performing judicial duties at the court. The parties eligible to stand for election to the executive committee are the judges appointed for life and the judges appointed for a specified term upon whom a judicial office has been conferred at the court. Parties who are neither eligible to vote in elections nor eligible to stand for election are judges who have been seconded to another court for more than three months, who have been on leave for more than three months or who have been seconded to an administrative authority.

..."

Section 21e

"(1) The executive committee shall determine the composition of the adjudicating bodies, appoint the investigating judges, regulate representation and allocate court business. It shall make these arrangements for the duration of the year, prior to the beginning of the business year. The president shall determine which judicial duties he shall perform. Each judge may belong to several adjudicating bodies.

(2) The judges who are not members of the executive committee shall be given an opportunity to be heard prior to the allocation of court business.

(3) The arrangements made under subsection (1) may only be changed in the course of the business year if this becomes necessary owing to the excessive or insufficient workload of a judge or adjudicating body or as a result of the transfer or prolonged absence of individual judges. The presiding judges of the adjudicating bodies affected by a change in the allocation of court business shall be given an opportunity to be heard prior to such change.

(4) The executive committee may order that a judge or adjudicating body that has been handling a case continue to be responsible for that case following a change in the allocation of court business.

(5) If a judge is to be assigned to another adjudicating body or if his sphere of competence is to be changed, he shall, except in urgent cases, be given an opportunity to be heard beforehand.

(6) If a judge is to be released, either entirely or partially, in order to perform judicial administration functions, the executive committee shall be heard beforehand.

(7) The executive committee shall decide by a majority vote. Section 21i(2) shall apply *mutatis mutandis*.

(8) The executive committee may rule that judges of the court may be present during the deliberations and votes of the executive committee, either for the entire duration or for a part thereof. Section 171b shall apply *mutatis mutandis*.

(9) The roster allocating court business shall be open for inspection at the registry of the court designated by the president or supervising judge; it need not be published."

30. Regarding the position of the notary in the notary senate (see paragraph 27 above), section 103 of the Federal Notary Act is of crucial significance:

"(1) The associate judges who are notaries shall be appointed by the justice administration of the *Land*. They shall be notaries in the district over which the disciplinary court has jurisdiction. They shall be chosen from a list of proposed candidates, which shall be provided by the executive board of the chamber of notaries to the justice administration of the *Land*. The justice administration of the *Land* shall determine how many associate judges are necessary; it shall first hear from the executive board of the chamber of notaries. The list of proposed candidates drawn up by the executive board of the chamber of notaries must contain at least one and a half times the required number of notaries. Where a Court of Appeal covers several districts of chambers of notaries or parts of such districts, the justice administration of the Land shall apportion the number of associate judges among the districts of the individual chambers of notaries.

...

(5) Associate judges shall be appointed for a period of five years; they may be reappointed after the end of their term of office. Where an associate judge retires from office prematurely, a successor shall be appointed for the remainder of that associate judge's term of office.

..."

31. The specific notary to be called upon to decide a specific case at a specific point in time, is also determined, in accordance with the framework provided for by section 103 of the Federal Notary Act (see paragraph 30 above), by the allocation plan, adopted by the executive committee of the Celle Court of Appeal, in line with the above-described requirements (see paragraph 29 above).

5. Bias complaints

32. A party may challenge the specific composition of the notary senate, as determined by the application of the above-described provisions and the allocation plan (see paragraphs 29 and 31 above) exclusively by way of a complaint of bias. In this connection, Article 54 of the Code of Administrative Court Procedure and Articles 41 to 49 of the Code of Civil Procedure lay down requirements and rules of procedure in order to deal

with such a complaint. On the basis of Article 42 of the Code of Civil Procedure, a judge can be recused if there are grounds justifying doubts as to the judge's impartiality. The court must, as explicitly set out in Article 45 § 1 of the Code of Civil Procedure, rule on a complaint of bias lodged under that heading without the challenged judge being involved in reaching that decision, but instead with his substitute under the rules of the allocation plan. In case the bias complaint is held to be well founded, the judge must be replaced in accordance with the allocation plan. However, if the bias complaint is held to be inadmissible or unfounded, the judge will resume his function in the senate. The case-law of the domestic courts (Federal Administrative Court, decision of 24 January 1973, no. 3 CB 123/71 and decision of 14 November 2012, no. 2 KSt 1/11) does allow for the possibility that Article 45 § 1 of the Code of Civil Procedure should not be applied, and hence allows for a ruling on a complaint of bias to be delivered with the participation of the challenged judge, if the complaint of bias is abusive. The domestic courts have held complaints of bias to be abusive where they were not based on reasons specific to the judge's person or where they had not been substantiated in a manner so as to justify grounds for doubts as to the judge's impartiality.

C. Independence of the judges

1. Relevant provisions of the Basic Law

33. Article 97 of the Basic Law, which stipulates the requirement for a judge's independence, reads as follows:

> "(1) Judges shall be independent and subject only to the law.
>
> (2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of a judicial decision and only for the reasons and in the manner specified by law. The legislature may set thresholds based on age for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary."

2. Supervision of judges in the German Judiciary Act

34. The administrative supervision of professional judges of the Court of Appeal, which lies with the President of that Court of Appeal (section 8 (2) point 1 of the Lower Saxony Judiciary Act – *Niedersächsisches Justizgesetz*), may, under section 26 (2) of the German Judiciary Act (*Deutsches Richtergesetz*), pertain to the manner and timeliness of the execution of official office. It must, however, take sufficient consideration of, and not interfere with, a judge's independence (section 26 (1) of the German Judiciary Act and Article 97 § (1) of the Basic Law). Above all, it must not pertain to his or her decision-making in a specific case. In

particular, it must not be capable of affecting a judge's decision in such a case. This reduces the scope of the administrative oversight by the President of the Court of Appeal over the judges at the Court of Appeal substantially, by excluding not only direct instructions, but also any other form of indirect influence on how a judge conducts his or her decision-making in any particular case (whether ongoing or in the future), thereby ruling out any form of assessment of the correctness of a decision. The matter is open to judicial review: any judge who deems himself subject to a measure not compliant with his independence may challenge that measure in court (section 26 (3) of the German Judiciary Act).

35. The above-described principles are also applicable to notaries (section 104(1) of the Federal Notary Act and section 45(1) and (1a) of the German Judiciary Act).

3. Appraisal and promotion of judges

36. Article 33 § 2 of the Basic Law, under which every German citizen is equally eligible for any public office in line with his aptitude, qualifications and professional achievements, is a provision of central significance for the promotion of judges to higher posts. The provision is generally understood to establish an individual right for a judge to be promoted on the basis of his or her eligibility for a particular public office according to his aptitude, qualifications and professional achievements. Therefore, where there is more than one candidate for a particular post, the promoting authority, which is generally either the Ministry of Justice or the Government of the *Land*, is obliged to base its decision on a comparison of the candidates' aptitude, qualifications and professional achievements. The decision to promote a particular judge is open to judicial review, to be initiated by those who had applied for a certain position but who were not ultimately chosen.

37. In order to allow for a comparison on the basis of the criteria established in Article 33 § 2 of the Basic Law, the presidents of domestic courts prepare appraisal reports. Such reports are prepared on a regular basis for every judge, depending to some extent on the seniority or age of the appraised. Such reports are also prepared if there is specific reason to do so, such as a judge's application for advancement. An appraisal report will generally contain an analysis of the aptitude, qualifications and professional achievements of the person seeking promotion. Such a report, in order to remain compatible with a judge's independence, may not, by any means, exert or put direct or indirect pressure on the adjudicating activity of the appraisee. It would therefore be inadmissible for an appraiser to reproach a judge in an appraisal report for regularly deviating from the case-law of higher courts or for his or her decisions having been quashed by higher courts. The question of whether an appraisal report has caused an interference with a judge's independence, as guaranteed by Article 97 § 1 of

the Basic Law, is open to judicial review, to be initiated by the appraised judge.

D. Appeal proceedings in notarial matters

38. Section 111d of the Federal Notary Act provides that judgments of the Court of Appeal can be appealed, if leave to appeal is granted by either the Court of Appeal or the Federal Court of Justice upon a relevant request. The Federal Court of Justice bases its decision whether to grant leave to appeal solely on the submissions of the applicant. In contrast to appeal proceedings, it does not hear the other party, nor does it hold an oral hearing or take any evidence. In this regard, section 111b (1) of the Federal Notary Act renders the Code of Administrative Court Procedure applicable, which, at Articles 124 and 124a, provides:

> **Section 124**
>
> "...
>
> (2) Leave to appeal on points of fact and law shall only be granted
>
> 1. if serious doubts exist as to the correctness of the judgment;
>
> 2. if the case has special factual or legal difficulties;
>
> 3. if the case is of fundamental significance;
>
> 4. if the judgment derogates from a ruling of either the Court of Appeal, the Federal Administrative Court, the Joint Panel of the Federal Supreme Courts or the Federal Constitutional Court, and is based on this derogation; or
>
> 5. if a procedural shortcoming which is subject to review by the appellate court on points of fact and law is claimed and established, provided that it may have affected the decision."
>
> **Section 124a**
>
> "...
>
> (2) If leave to appeal on points of fact and law is not granted in the judgment of the administrative court, a petition for such leave shall be filed within one month of service of the complete judgment. ..."

39. In a decision dated 25 November 2013 (file no. NotZ (Brfg) 13/13), the Federal Court of Justice found that serious doubts as to the correctness of the judgment pursuant to section 124 (2) point 1 of the Code of Administrative Court Procedure existed when a summary assessment indicated that the applicant's arguments were capable of calling into question the correctness of the finding of facts and law. The incorrect finding of facts and law must have been relevant for the outcome of the proceedings.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

40. The applicant complained that he had not had an independent and impartial tribunal, as required by Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

41. The Government contested that argument.

A. Admissibility

42. The Government were of the opinion that the application was an abuse of the right of individual petition within the meaning of Article 35 § 3 (a) of the Convention, because the applicant's submissions had been incomplete and misleading. They drew the Court's attention to the applicant's allegation that no other disciplinary measure, before the one in question, had been taken against him. However, this allegation was not true, as he had been subject to a disciplinary reprimand in 2011. Moreover, they drew the Court's attention to the applicant's insinuation that he had lodged an appeal on points of law (*Revision*) with the Federal Court of Justice, and not – as had really been the case – an appeal (*Berufung*). They assumed that this was intentional, because an appeal on points of law was much narrower in scope and therefore, unlike a regular appeal was incapable of remedying a prior violation.

43. The applicant, in response to those accusations, alleged to have forgotten to inform the Court of the reprimand – the Government subsequently asserted that this objection was not credible. In respect of using the word "*Revision*" instead of "*Berufung*", the applicant relied on an obvious clerical error. Moreover, he submitted that neither question was of essential relevance for the application.

44. The Court considers that the information in question does not go to the core of the applicant's complaint (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014). In addition, the Court considers that the Government's submissions are also unclear because they focus on the difference between an appeal and an appeal on points of law, although the applicant in compliance with his procedural obligations, lodged an application for leave to appeal, which does not – from what has been submitted to the Court – appear to be as fundamentally different from an application for leave to appeal on points of law as an appeal would be from an appeal on points of law. The Court cannot therefore conclude that the

applicant's conduct constituted an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention.

45. The Government were furthermore of the opinion that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. As far as the applicant had been of the opinion that jurisdiction laid with the administrative court branch, he could have challenged the decision of 22 May 2013 of the Celle Court of Appeal before the Federal Constitutional Court, which he had not done.

46. The applicant claimed to have exhausted domestic remedies. In respect of the question as to which branch of the judiciary had been called upon to rule in the dispute, he submitted that it was not possible to challenge the decision of the Court of Appeal of 22 May 2013 in a separate complaint before any other court, including the Federal Constitutional Court – an assertion which the Government subsequently objected to as incorrect, because a constitutional complaint against a decision concerning the determination of the court branch with jurisdiction was, in principle, admissible. The applicant claimed to have sufficiently brought up the issue before the Federal Court of Justice and the Federal Constitutional Court as part of the main proceedings, rather than as a separate complaint.

47. The Court reiterates that, pursuant to Article 35 § 1 of the Convention, it may only deal with the matter after all domestic remedies have been exhausted. Article 35 § 1 requires that the complaints intended to be made subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, and further, that any procedural means that might prevent a breach of the Convention should have been used. However, Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism and it does not merely require that applications should be made to the appropriate domestic courts or that use should be made of remedies designed to challenge decisions already given.

48. The Court considers that the applicant's objection to the jurisdiction of the Celle Court of Appeal was only one of a number of attempts made by the applicant to achieve a composition of the "tribunal" that he would have considered to be in compliance with Article 6 § 1 of the Convention. In particular, he complained of bias in respect of several judges and of a violation of his constitutional right to a lawful judge before the Federal Court of Justice and the Federal Constitutional Court. The Court considers, even though it has doubts with regard to the applicant's allegation that a constitutional complaint against the decision of 22 May 2013 would not have been possible, that the applicant was not relying on Article 6 § 1 of the Convention to establish the jurisdiction of a certain court branch for a certain matter, although this issue had formed part of his domestic complaint (see paragraph 9 above) but rather that he was relying essentially

on Article 6 § 1 of the Convention to establish an independent and impartial tribunal. Therefore, the complaints of bias, which allow a party to the proceedings to challenge the tribunal's independence and impartiality and regarding which the applicant exhausted domestic remedies, appear to be effective with regard to the guarantee relied on. The Court, accordingly, has no reason to find the application inadmissible for failure to exhaust domestic remedies.

49. The Court notes that the complaint is also not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

50. The applicant was of the opinion that the Celle Court of Appeal had not been an independent and impartial tribunal. That court had been called upon to decide the case, even though the challenged decision stemmed from its President, who had been named as the defendant in the proceedings. The presiding judge of the notary senate and the President had regular contact in the court, in particular during coffee und lunch breaks. They were further both members of the executive committee at the relevant time. Also, the President, as a member of the executive committee, could influence the composition of the notary senate and could decide on whether judges in the notary senate kept that position or not. He could therefore designate "his own judge" and thereby interfere massively with the proceedings, to which he was himself a party.

51. The President was also the supervising authority for the judges of the notary senate. Moreover, the considerable significance of the President in relation to the personal progression of the deciding judges had to be taken into consideration. The President did not generally decide by himself whom to promote and whom not to promote. He did, however, play a significant role in relation to the issue of promotion, since he prepared appraisal reports, which were of key importance in promotion decisions. In this regard, the conflict of interest was obvious. This became all the more obvious when taking into account the fact that the judge, who at the time had presided over the notary senate, had subsequently been promoted to Vice-President of the Celle Court of Appeal.

52. Finally, the independence and impartiality deficit was not, despite the Government's assertions, remedied by the decision of the Federal Court of Justice. That court never conducted a comprehensive examination of the case, referring to both its facts and the law. It had instead only assessed

whether or not to grant leave to appeal, which was an assessment necessarily limited in scope compared to an assessment of full appeal proceedings. This was in particular problematic because the applicant had raised the question of fact whether his conduct had caused a real risk to the interests of the users of his legal services.

(b) The Government

53. The Government were of the opinion that the complaint was without merit. Even assuming that the composition of the Celle Court of Appeal had not been sufficient to maintain the appearance of independence and impartiality, the fact that the Federal Court of Justice had reviewed that court's decision had essentially remedied that deficit (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86, and *Crompton v. the United Kingdom*, no. 42509/05, § 76-79, 27 October 2009).

54. The Government moreover contended that there had been convincing reasons to assign the jurisdiction to the Court of Appeal, as provided for in section 111 of the Federal Notary Act (compare paragraphs 24 and 25 above). The supervision of notaries, including the power to remove them, was entrusted to the presidents of the Courts of Appeal in the region in which the notaries were active. The courts of the ordinary court branch, and in particular the Courts of Appeal, were accordingly familiar with the activities of notaries. The option of concentrating jurisdiction at just one court, as provided for in section 111a sentence 3 of the Federal Notary Act (see paragraphs 24 and 25 above), had been made use of in Lower Saxony – jurisdiction had been concentrated at the Celle Court of Appeal to the effect that the notaries from the two other districts of the Courts of Appeal in Lower Saxony would also have to bring any challenges to disciplinary measures before that court.

55. Moreover, the Government were of the opinion that, given the reasons for vesting jurisdiction in the Celle Court of Appeal, that court had also been a sufficiently independent and impartial tribunal in the circumstances of the case. The tribunal had comprised three judges, who all enjoyed full judicial independence, as guaranteed by the Basic Law as well as its implementation provisions. They were, in particular, not subject to any instructions, directions, indirect exertion or even recommendations by the President of the court. Two of them were professional judges, who held that office for life, were paid well and had been appointed by the Government of the *Land* or the Ministry of Justice of the *Land*, typically from a lower ranking post, and assigned to be a member of the notary senate by the executive committee for a duration of five years. The third judge was a notary, who had been appointed to judicial office on an honorary basis and had also been appointed for five years.

56. The President, being the defendant in the proceedings, had no influence in respect of to whom a particular case was assigned. The question

of to whom a case was, upon introduction, assigned, was determined *in abstracto* in advance in the allocation plan. That plan was adopted at the end of each year for the subsequent year by the executive committee of each court, and at the Celle Court of Appeal that committee comprised – in view of the number of permanent judicial posts at that court at the relevant time – ten judges, elected by the entire body of judges at the Court of Appeal and the President of that court, whose vote carried the same weight as the vote of the other members. Once assigned to be a member of the notary senate in that plan, that membership was even additionally protected as section 102 of the Federal Notary Act guaranteed that judges remain in that role for a period of five years. Hence, the President did not have the power to remove judges from the senate in order to replace them with favoured judges.

57. Independence and impartiality were not called into question by the President's supervisory function and disciplinary powers, which were confined to administrative issues, and by no means related to adjudication. Compliance with this requirement was also open to judicial review.

58. Independence and impartiality were also not called into question by the fact that President was the appraiser for the judges. He was not responsible for promoting the judges at his court, but rather only for preparing their appraisal reports, which were of significance for the Ministry's or the Government's decision on who to promote. However, those appraisal reports had to be drafted in such a way as to guarantee that no undue pressure was put on the judge. They could not pertain to the substance of the appraisee's adjudication. In that connection, the appraisal reports were also generally open to judicial review, which would be conducted by the administrative courts.

59. Finally, the Government considered that there was no appearance of a lack of judicial independence. It was common knowledge that all judges in Germany were granted full judicial independence by law and exercised it in practice. What was more, notaries were considered to be organs of the judiciary who perform sovereign activity, giving them special insight into the functioning of the judiciary. When considering the subjective dimension of independence and impartiality, the applicant's knowledge had to be taken into account. In this connection, it also had to be taken into consideration that the judicial authority, in a long standing tradition, was named after its head, the President of the Court of Appeal. People – and particularly the applicant in his capacity as part of the judiciary – were well aware that in such cases a measure would be taken by the authority, and not by the specific person who carried its name.

2. Comments of the third party

60. The Federal Chamber of German Civil Law Notaries commented that the Governments of the *Länder* could, under the Federal Notary Act, delegate relevant tasks and powers to subordinated administrations, a

possibility of which several *Länder* had availed themselves by conferring the power to remove a notary from office on the presidents of the Courts of Appeal. As, under the Federal Notary Act, the presidents of the Courts of Appeal were also the supervisory authorities for notaries, the underlying reason for conferring the power to remove a notary from office to those presidents, was that they had a particular professional competence. Under section 111 of the Act (see paragraphs 24 and 25 above), the Courts of Appeal had jurisdiction concerning a complaint against a removal from office. Where a *Land* had more than one Court of Appeal, section 111a (see paragraph 25 above) allowed for jurisdiction to be concentrated at just one of these courts. Several *Länder* had made use of that possibility, including the *Land* of Lower Saxony, where the jurisdiction had been concentrated at the Celle Court of Appeal. Independence was effectively protected by legal safeguards such as the prohibition of judicial intervention. The allocation of all notarial matters to courts of ordinary jurisdiction ensured a uniform, qualified and consistent decision-making process.

3. The Court's assessment

(a) General principles

61. The general principles relating to independence and impartiality under Article 6 of the Convention have recently been summarised in *Ramos Nunes de Carvalho e Sá v. Portugal* ([GC], nos. 55391/13 and 2 others, §§ 144-50, 6 November 2018).

(b) Application of these principles to the present case

62. The Court notes that there are different aspects to the applicant's complaint. The first aspect concerns the fact that the President of the Court of Appeal is both the judicial authority, which issued the challenged decision, and the President of the court, which decided the case. The second relates to the fact that judges of the Court of Appeal are under the administrative authority of the President of that court as regards their careers and potential disciplinary proceedings against them (see paragraphs 34 and 36 above).

63. In the present case the Court observes that the applicant did not question the subjective impartiality of the members of the Court of Appeal. It therefore considers it appropriate to examine the complaint solely from the standpoint of the requirement of independence and objective impartiality, and more specifically to determine whether the applicant's doubts can be regarded as objectively justified in the circumstances of the case. It will examine each aspect of the complaint separately.

(i) The dual role of the President of the Court of Appeal

64. Regarding the first aspect of the complaint, the Court observes that it has previously dealt with a similar question in *Ramos Nunes de Carvalho e Sá* (cited above, §§ 153-56) in which it held:

> "153. The Court observes at the outset that the applicant's complaint concerns the highest court in Portugal, which is made up exclusively of professional judges. The judges are independent, have guaranteed tenure and are subject to rules on incompatibility apt to guarantee their independence and impartiality.
>
> 154. The composition of the Judicial Division of the Supreme Court is determined by the Status of Judges Act (section 168 ...), on the basis of objective criteria such as judges' seniority and their membership of a particular division, and the President of the Supreme Court does not sit in this *ad hoc* division. The Government's argument that, in practice, the members of this division are formally appointed by the most senior Vice-President of the Supreme Court must also be taken into account.
>
> 155. It is also noteworthy that the applicant did not allege that the judges of the Judicial Division had been acting on the instructions of the President of the Supreme Court or had otherwise demonstrated bias. Nor did she claim that the President of the Supreme Court could have influenced the judges of the Judicial Division by any other means. In particular, it is not established that those judges were specially appointed with a view to adjudicating her case (see, *mutatis mutandis*, *Pereira da Silva v. Portugal*, no. 77050/11, §§ 59-60, 22 March 2016). No evidence exists in the present case capable of arousing objectively justified fears on the part of the applicant (see *Sacilor-Lormines* [v. France, no. 65411/01, § 74, ECHR 2006-XIII]).
>
> 156. The foregoing considerations suffice for the Court to conclude that the dual role of the President of the Supreme Court is not such as to cast doubt on the independence and objective impartiality of that court in ruling on the applicant's appeals against the CSM's decisions."

65. Turning to the facts of the case before it, the Court observes at the outset that the applicant's complaint concerns a court which ranks among the highest courts in the *Land* of Lower Saxony, yet there are a number of higher courts at the federal level. The judges of the Celle Court of Appeal are independent, and have guaranteed tenure. They are appointed to their post, as either a presiding judge or an associate judge, by the Ministry of Justice or the Government of the *Land* of Lower Saxony on the basis of a thorough comparison of their aptitude, qualifications and professional achievements. Their appointment and their prior appraisal are both, in different ways, open to judicial review (see paragraphs 36 et seq. above). In addition, the Court observes that under domestic law notaries are generally well-qualified lawyers, upon whom the office of public notary has been conferred. As such, notaries generally have professional insight into the judiciary and have particular rights and obligations when exercising their profession.

66. It is true that the presiding judge of the notary senate and the President of the Court of Appeal were colleagues and knew each other. While this fact alone does not raise concern, the Court notes their narrow

relationship as judges working together at the same court. Nevertheless, in the absence of any allegations to the contrary (see paragraph 53 above and paragraph 68 below), the professional conduct of both judges must be presumed. The existence and maintenance of normal professional contact among judicial colleagues working at the same court does not as such prompt objectively justified fears of impartiality.

67. Furthermore, the Court observes that, in order to comply with the "right to a lawful judge" as established in the Basic Law, the applicant's case was assigned to the Celle Court of Appeal's notary senate, in accordance with general provisions, beforehand (see paragraphs 24-26 above). In this regard, the Federal Notary Act, the Courts Constitution Act and certain provisions laid down by the *Land* of Lower Saxony were of particular relevance. Furthermore, the Court takes note of the fact that the specific composition of the court's notary senate was determined by a variety of different provisions, partly through the general requirements for the specific composition of the panel, such as the necessity of a presiding judge, an associate judge and a notary (see paragraph 27 above), and partly through determining, *in concreto*, the responsible judges (see paragraphs 29-31 above). In this regard the Federal Notary Act and the allocation plan, adopted by the executive committee on the basis of the provisions of the Courts Constitution Act in advance of every calendar year, were of particular relevance.

68. The applicant has not claimed that the judges were acting on the instructions of the President of the Court of Appeal or that they otherwise demonstrated bias (see paragraph 63 above). However, from the standpoint of the requirement of independence and objective impartiality (*Ramos Nunes de Carvalho e Sá*, cited above, §§ 154-156), the Court must determine whether the applicant's doubts can be regarded as objectively justified in the circumstances of the case. It will therefore first assess the President's influence on the composition of the notary senate.

69. The Government argued that the President had no influence on who decided a particular case because the executive committee decided the allocation plan in advance. The applicant, to the contrary, relied on the President's membership of the executive committee permitting him to shape the notary senate according to his wishes beforehand.

70. The Court observes in this regard that the President is only one of eleven members of the executive committee, and all votes carry equal weight. The executive committee's and therefore also the President's influence on the composition of the notary senate is further limited by the fact that the duration of membership in the senate is five years (see paragraphs 28 and 30 above). In this connection, it is also noteworthy that the allocation plan, as such, as well as its correct application in any particular case, can be subject to judicial review in essentially any and every

case before a court. Thus, the domestic system provides a high level of safeguards against undue influence.

71. Nevertheless, the executive committee does indeed decide which judges of the Court of Appeal will sit in the notary senate, be it as the presiding judge, the associate judge or the notary judge as well as substitutes for all three categories of judges. The Court considers in this regard that, since the President is a member of the executive committee, he does have an influence on who will deal with disputes under the Federal Notary Act. Against this background, the influence of the President on the composition of the notary senate must be considered limited, but not negligible.

72. In the view of the Court, it cannot therefore be excluded that the dual role of the President could be capable of arousing objectively justified fears on the part of the applicant concerning the independence and objective impartiality of the notary senate.

(ii) The administrative authority of the President

73. In respect of the second aspect of the complaint, the Court observes that it has examined similar issues in *Oleksandr Volkov v. Ukraine* (no. 21722/11, § 130, ECHR 2013) and, subsequently, in *Ramos Nunes de Carvalho e Sá* (cited above, §§ 158-65).

74. In *Oleksandr Volkov*, and subsequently confirmed in *Denisov v. Ukraine* ([GC], no. 76639/11, § 79, 25 September 2018), the Court found as follows:

> "130. The Court observes that the judicial review was performed by judges of the [Higher Administrative Court] who were also under the disciplinary jurisdiction of the [High Council of Justice – "the HCJ"]. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ's independence and impartiality ..., the Court is not persuaded that the judges of the HAC considering the applicant's case, to which the HCJ was a party, were able to demonstrate the 'independence and impartiality' required by Article 6 of the Convention."

75. In *Ramos Nunes de Carvalho e Sá*, the Court found as follows:

> "158. In the Court's view, regard being had to the arguments advanced by the Chamber which examined the case of *Oleksandr Volkov*, these findings should be regarded as a criticism based on the circumstances of the case and applicable in a system with serious structural deficiencies or an appearance of bias within the disciplinary body for the judiciary, as was the case in the specific context of the Ukrainian system at the time, rather than as a general conclusion.
>
> 159. In *Oleksandr Volkov*, in addition to the fact that the judges of the Higher Administrative Court were under the disciplinary jurisdiction of the Ukrainian High Council of Justice, a number of serious issues had been identified. These problems related firstly to structural shortcomings in the procedure before the HCJ, notably the inclusion of the Minister of Justice and of the Prosecutor General as *ex officio* members of that body and the fact that the great majority of its non-judicial members

were appointed directly by the executive and legislative authorities. Secondly, the Court took into account the appearance of bias on the part of some members of the HCJ who had determined the applicant's case. It observed that the members of the Ukrainian HCJ who had carried out the preliminary inquiries in the applicant's case and submitted requests for his dismissal had subsequently taken part in the decisions to remove him from office. Moreover, one of them had been appointed President of the HCJ and had presided over the hearing of the applicant's case. The Court therefore found that the proceedings before the HCJ had been incompatible with the principles of independence and impartiality set forth in Article 6 § 1 of the Convention (see *Oleksandr Volkov*, cited above, § 117). The subsequent determination of the applicant's case by Parliament, the legislative body, had not remedied the structural defects of a lack of 'independence and impartiality' but rather had served to contribute to the politicisation of the procedure and to aggravate the inconsistency of the procedure with the principle of the separation of powers (ibid., § 118). In those circumstances, according to the Court's case-law, it was extremely important for the Ukrainian Higher Administrative Court to afford the guarantees of Article 6 of the Convention in order to be able to remedy any lack of independence and impartiality.

160. By contrast, in the present case, no such serious issues have been established in terms of structural deficiencies or an appearance of bias within the Portuguese CSM.

161. Next, having regard to the facts of the present case, the Court finds it appropriate to examine together the issues of the independence and impartiality of the Judicial Division of the Supreme Court in respect of this aspect of the complaint...

162. The Court emphasises at the outset the importance of the guarantees listed at paragraph 153 above, in particular the principle of independence of the judiciary in Portugal, which is protected both under the Constitution ... and by other provisions of domestic law ... It also takes note of the reasons that prompted the Portuguese legislative authorities to choose the current system whereby jurisdiction over appeals against decisions of the CSM is assigned to the Judicial Division of the Supreme Court, reasons that have been endorsed on several occasions by the Constitutional Court ...

163. Furthermore, it goes without saying that the fact that judges are subject to the law in general, and to the rules of professional discipline and ethics in particular, cannot cast doubt on their impartiality. As noted by the Government and not disputed by the applicant, the judges of the Supreme Court, who are highly qualified and often in the final stages of their careers, are no longer subject to performance appraisals or in search of promotion, and the CSM's disciplinary authority over them is in reality rather theoretical ... The Court also notes the absence of any specific evidence of a lack of impartiality, such as, for instance, the existence of pending disciplinary proceedings against one of the members of the benches that examined the applicant's appeals. In more general terms the Court considers it normal that judges, in the performance of their judicial duties and in various contexts, should have to examine a variety of cases in the knowledge that they may themselves, at some point in their careers, be in a similar position to one of the parties, including the defendant. However, a purely abstract risk of this kind cannot be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her individual situation. Even in the context of disciplinary cases a theoretical risk of this nature, consisting in the fact that judges hearing cases are themselves still subject to a set of disciplinary rules, is not in itself a sufficient basis for finding a breach of the requirements of impartiality.

> 164. Consequently, having regard to all the specific circumstances of the case and to the guarantees aimed at shielding the Judicial Division of the Supreme Court from outside pressures, the Court considers that the applicant's fears cannot be regarded as objectively justified and that the system in place in Portugal for reviewing disciplinary decisions of the CSM does not breach the requirement of independence and impartiality under Article 6 § 1 of the Convention.
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> 165. Accordingly, the Court sees no evidence of a lack of independence and impartiality on the part of the Judicial Division of the Supreme Court, and therefore finds that there has been no violation of that Article."

76. The Court observes that the applicant did not allege that the German domestic system had serious structural deficiencies or an appearance of bias within the disciplinary body for the judiciary. Moreover, the Court accepts that within any judicial system disciplinary powers and promotion decisions must be provided for. In this respect the Court also notes that there is nothing to indicate a lack of impartiality in the specific circumstances of the case, such as pending disciplinary proceedings against one of the judges. The mere fact that one of the judges who participated in the challenged decision-making process was subsequently, according to the applicant, promoted to the role of Vice-President of the Celle Court of Appeal, does not indicate a lack of impartiality, since there is no indication whatsoever that the promotion was a direct and specific consequence of that particular judge's decision in his case.

77. In this connection, it is for the Court to decide whether, in the specific circumstances of the case, an issue arises because certain powers *vis-à-vis* the judges of the notary senate are vested in the President, who was also the defendant in the proceedings. In this regard, the applicant relies, in particular, on the disciplinary and supervisory power of the President over the judges and his influence on the promotion of these judges. According to the Government, neither the President's disciplinary power nor the role he has to play in relation to promotion matters are of such a nature as to justify doubts in respect of the court's independence and impartiality.

78. In the Court's view, the system of supervisory and disciplinary powers is a relevant aspect in assessing the independence and impartiality of judges (see *Oleksandr Volkov*, cited above, § 130). It is therefore necessary to scrutinize the system as a whole with a specific view to the respective guarantees and safeguards. In the present case, under domestic constitutional requirements, all three judges enjoy full judicial independence. When adjudicating cases, judges are not subordinate to the President (see paragraphs 33 et seq. above). In respect of disciplinary measures and promotion decisions, the domestic legal order requires that they must never be capable of influencing a judge's decision in a particular case. A judge therefore cannot be subjected to disciplinary measures or to promotion decisions based on particular decisions delivered in the course of a case. Compliance with those requirements is subject to judicial review, to be initiated on an application by a judge who considers him or herself to

have been affected (see paragraphs 34, 36 and 37). Yet, despite these safeguards and guarantees, it cannot be excluded that the President's involvement in disciplinary and promotion decisions could be capable of arousing objectively justified fears on the part of the applicant.

(iii) Conclusion

79. In view of the foregoing, the Court considers that the independence and impartiality of the notary senate may be open to doubt.

(iv) Subsequent review by the Federal Court of Justice

80. The Court reiterates that a violation of Article 6 § 1 of the Convention cannot be grounded on the alleged lack of independence or impartiality of a tribunal if the decision taken was subject to subsequent control by a judicial body that had full jurisdiction and ensured respect for the guarantees laid down in that provision (see *Vera Fernández-Huidobro v. Spain*, no. 74181/01, § 131, 6 January 2010, and *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, § 97, 15 September 2015).

81. Turning to the present case, the Court accepts that the aim of the judicial review by the Federal Court of Justice was solely to assess whether or not to grant leave to appeal (see paragraph 52 above). Nevertheless, the Court agrees with the Government that these proceedings offered sufficient review, notably to remedy any lack of independence and impartiality of the members of the Celle Court of Appeal.

82. The Court has found in a number of cases, in which the tribunal in question did not have full jurisdiction as such but had examined the relevant issues raised before it, that the judicial review was sufficient (see *Sigma Radio Television Ltd v. Cyprus*, nos. 32181/04 and 35122/05, §§ 156-159, 21 July 2011, with further references). In this context, much depends on the subject matter of the proceedings and the content of the dispute. In specialised areas, for example in the sphere of town and country planning, it was even sufficient that the judicial review was limited to assessing whether the lower instance's findings of fact were perverse or irrational (*Bryan v. the United Kingdom*, 22 November 1995, § 47, Series A no. 335-A). The review will, however, fall short of Convention standards if the reviewing court is precluded from determining or failed to examine central issues in dispute (see, *mutatis mutandis*, *Tsfayo v. the United Kingdom*, no. 60860/00, § 48 , 14 November 2006; contrast: *Tsanova-Gecheva*, cited above, § 102).

83. As to the subject-matter of the proceedings before the Court of Appeal, the Court notes that the relevant disciplinary proceedings demand quite specific knowledge as they concern the removal of a notary from his office (see, *mutatis mutandis*, *Tsanova-Gecheva,* cited above, § 100, in respect of the promotion of a judge).

84. With regard to the content of the dispute, the applicant raised a number of points in his request for leave to appeal (see paragraph 14 above). In this context, the Court observes that the Federal Court of Justice was competent to examine and in fact examined all questions of fact and law, although it did solely examine a request for leave to appeal and did not conduct full appeal proceedings (see, *mutatis mutandis*, *Helle v. Finland*, 19 December 1997, § 45, *Reports of Judgments and Decisions* 1997-VIII). It analysed in particular whether the applicant's arguments were capable of calling into question the correctness of the finding of facts and law (see paragraphs 38 and 39 above). Even though it was a summary analysis without any evidence taking, its jurisdiction was not limited (contrast *Sigma Radio Television Ltd*, cited above, § 159, in which the Court considered the power of review to be sufficient although the reviewing tribunal was not capable of embracing all aspects of the decision under review).

85. When the Federal Court of Justice examined point by point the alleged shortcomings of the Court of Appeal's proceedings, it analysed thoroughly the applicant's right to a lawful judge and the problematic role of the President of the Court of Appeal (see paragraph 15 above).

86. Nonetheless, the dispute centred on the correct interpretation of section 50 (1) point 8 of the Federal Notary Act, i.e. what conduct in financial matters qualified for a removal of a notary. This was not a fundamental question of fact, but a question of law (see *Sigma Radio Television Ltd*, cited above, § 166). Even though the applicant had also challenged the basis for two enforcement measures, it was not necessary to examine or to take evidence in this respect. It is evident from the reasoning of the Federal Court of Justice (see paragraph 16 above) that the underlying reasons for the individual enforcement measures were immaterial. Fault or financial problems were not a prerequisite in order to assess whether a notary's manner of business administration jeopardised the interests of the users of legal services. Moreover, a fresh analysis of each of the enforcement measures was not required because it was sufficient to conclude that the measures as a whole created an abstract risk to the interests of the notary's clients. It was not necessary to establish that there was a tangible risk. In this context, the Court observes that the existence of all forty-six enforcement measures as such was uncontested. With regard to the applicant's argument that the events leading to his removal dated back a long time, the Federal Court of Justice highlighted that the majority of the enforcement measures had taken place during a period of four years prior to the removal decision. Furthermore, it had obtained fresh evidence from the tax authorities in respect of the applicant's compliance with his tax obligations. In respect of the applicant's final argument, the Court notes that the review proceedings included a fresh proportionality assessment.

87. The Court further observes that in the case before it the applicant raised questions of fact only in respect of whether his conduct had caused a

real risk to the interests of his clients (see paragraph 52 above). Thus, he challenged not the findings of fact, but solely the domestic courts' legal conclusions based on his conduct. The Court considers on the basis of the material before it that the Federal Court of Justice was able to review and in fact reviewed all relevant factors, in particular whether the notary senate had applied the law correctly (see, *mutatis mutandis*, *Crompton*, cited above, § 78).

88. The Court therefore concludes that there has been no breach of Article 6 of the Convention in the particular circumstances of this case given that the judicial review proceedings before the Federal Court of Justice offered "sufficiency of review" such as to ensure that the requirements of Article 6 regarding the independence and impartiality of the tribunal were met.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 30 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Gabriele Kucsko-Stadlmayer
President