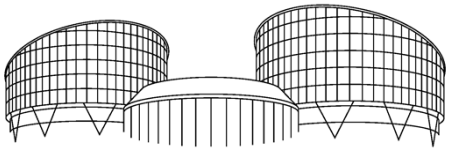

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF D.L. v. GERMANY

(Application no. 18297/13)

JUDGMENT

STRASBOURG

22 November 2018

FINAL

18/03/2019

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

In the case of D.L. v. Germany,

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

Yonko Grozev, *President,*
Angelika Nußberger,
André Potocki,
Síofra O'Leary,
Carlo Ranzoni,
Lətif Hüseynov,
Lado Chanturia, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 23 October 2018,

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

PROCEDURE

1. The case originated in an application (no. 18297/13) 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 D.L. ("the applicant"), on 1 March 2013. The Vice-President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Mr C. Förster, a lawyer practising in Berlin. The German Government ("the Government") were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant complained that the Berlin Tiergarten District Court did not appoint, of its own motion, defence counsel for him in the first-instance criminal proceedings before it. Relying on Article 6 §§ 1 and 3 (c) of the Convention alone and taken in conjunction with Article 14 of the Convention, the applicant alleged a violation of his right to a fair trial, in particular the principle of equality of arms and the right to free legal assistance, as well as discrimination.

4. On 19 September 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and lives in Berlin.

A. Background to the case

6. On 13 March 2010 there was a fight in the applicant's apartment between the applicant, S. (the applicant's flatmate at the time) and S.'s guests. By letter from the police of 18 March 2010, the applicant was notified that preliminary proceedings against him had been initiated and that he was accused of having insulted S. and of having pushed and punched him in the face, resulting in bruising to S.'s skull and jaw problems. The letter also stated that he was given the opportunity to submit written or oral comments and that he was free, at any time, even before being questioned, to consult defence counsel to be chosen by him.

B. The proceedings at issue

7. On 7 March 2011 the Berlin Tiergarten District Court issued a penal order (*Strafbefehl*) against the applicant, finding him guilty of libel and two counts of assault against S. and B., a guest at the event in question, and sentencing him to 80 day-fines of EUR 30 each. The applicant, who had applied for access to, and been given copies of the file prior to the issuance of the penal order, lodged a timely objection against that order and asked to be given access to the file again, which was granted.

8. On 9 May 2011 the District Court admitted S. as private accessory prosecutor (see paragraph 18 below), represented by counsel paid for by S. himself.

9. On 12 May 2011 S.'s lawyer, in the context of the criminal proceedings, lodged civil claims for compensation under Articles 403 et seq. of the Code of Criminal Procedure (see paragraph 19 below) and applied for legal aid to be granted to S. for the pursuit of those claims. The applicant was given the opportunity to submit written comments on this and made use of that opportunity.

10. On 24 May 2011 the Berlin Tiergarten District Court granted legal aid to S. and appointed his lawyer to represent him in the pursuit of the civil claims in the context of the criminal proceedings.

11. The following day the main hearing took place, lasting for some 75 minutes. The District Court orally heard S. as well as B. and M., the latter two having been present at the event in question, as witnesses and also evaluated a medical certificate concerning the injuries sustained by S. It

convicted the applicant of libel and two counts of assault and sentenced him to a fine of 90 day-fines of EUR 15 each. In respect of the civil claims, it also ordered him to pay EUR 430 in damages (EUR 400 in respect of non-pecuniary damage and EUR 30 in respect of pecuniary damage) plus interest to S. S.'s lawyer had been given leave to address only the civil compensation claim. The applicant had made written submissions setting out his position prior to the hearing and was orally heard by the District Court.

12. On 26 May 2011 the applicant lodged an appeal on facts and law.

13. On 4 July 2011 the judge presiding over the competent appeals chamber of the Berlin Regional Court informed the public prosecutor's office of his intention to appoint defence counsel for the applicant. That same day, Mr Förster, the applicant's lawyer in the Convention proceedings, gave notice that he now represented the applicant. In a written submission of 11 July 2011, he stated that he wished to pursue the appeal lodged by the applicant as an appeal on points of law (resulting in the competency of the Berlin Court of Appeal, rather than of the Regional Court). In addition to complaining of a wrongful application of law to the merits of the case, he alleged a procedural error because no defence counsel had been present for the applicant throughout the trial before the District Court. He claimed that representation by defence counsel had been necessary, given that the private accessory prosecutor S. had been represented by counsel who had been present at the main hearing.

14. On 14 March 2012 the Berlin Court of Appeal dismissed the appeal on points of law, save for allowing the applicant to pay the fine in instalments. It found that the conditions for mandatory appointment of defence counsel under Article 140 § 2 of the Code of Criminal Procedure (see paragraph 20 below) were not met. The legislature had deliberately chosen to limit the presumption that an accused cannot defend himself to cases where the competent court had appointed counsel for the victim for the private accessory prosecution in accordance with Articles 397a and 406g §§ 3 and 4 of the Code (see paragraph 20 below). There were legitimate reasons for that distinction, given that counsel was appointed for the private accessory prosecutor for victims of certain grave offences or where the victim was not able to safeguard his interests sufficiently, or could not be expected to do so, including in scenarios which gave rise to particular factual or legal difficulties. In the present case, counsel for S. had been appointed by the court only in respect of the civil claims (see paragraph 10 above), but not for the private accessory prosecution, in respect of which counsel had been hired by S. at his own expense (see paragraph 8 above).

15. Where counsel acted for the (victim and) private accessory prosecutor, without having been appointed by the court, the presumption contained in Article 140 § 2 of the Code did not apply. In such a scenario, the individual circumstances of the case had to be assessed in order to

determine whether defence counsel had to be appointed. Turning to the circumstances of the case, the Court of Appeal concluded that the applicant was capable of effectively defending himself without counsel and had indeed done so. It considered that the applicant had knowledge of the parts of the file relevant for the decision, which did not give rise to factual or legal difficulties, that the nature of the offences and the potential sentence at stake were not significant, and that the factual background and the taking of evidence were easily understandable. Counsel for S. had only acted in respect of the civil claims. The applicant's written submissions, including his timely appeal against the District Court's judgment, showed that he was capable of safeguarding his legal interests on his own.

16. On 30 April 2012 the Court of Appeal dismissed the applicant's request to be heard.

17. On 18 September 2012 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (no. 2 BvR 1377/12), finding that it was inadmissible because he had not applied for the appointment of defence counsel before the District Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Private accessory prosecution (*Nebenklage*), which is regulated in Articles 395 et seq. of the Code of Criminal Procedure, enables the victim of certain criminal offences, under certain conditions, to join the prosecution initiated and led by the public prosecutor and to participate in the trial. Their rights include the right to put questions to witnesses and experts, to make applications for the taking of evidence, the right to comment after the taking of evidence and the right to make a closing speech. In proceedings in a court of first instance, a private accessory prosecutor may exercise his rights without representation by counsel, but may be represented or assisted by counsel. If the conditions of Article 397a § 1 of the Code of Criminal Procedure are met, that is, if the private accessory prosecutor is, in particular, the victim of serious violent or sexual offences, a relative of a person killed by an unlawful act or a child victim of violent or sexual offences, the court appoints counsel for the private accessory prosecutor at public expense without considering the victim's income or asset situation. Where these conditions are not met, the private accessory prosecutor may, upon application, be granted legal aid under the second paragraph of that Article, provided that he lacks sufficient means and cannot safeguard his interests himself or cannot reasonably be expected to do so. The private accessory prosecutor may hire counsel at his own expense.

19. Proceedings in accordance with Articles 403 et seq. of the Code of Criminal Procedure are different from private accessory prosecution and give the victim the possibility of having civil claims deriving from the criminal offence adjudicated within the framework of the criminal trial.

Unlike private accessory prosecution, such proceedings are not aimed at the victim's participation in the criminal proceedings. Representation by counsel is not mandatory for either the victim or the accused. However, counsel may, upon application, be assigned to either by way of legal aid, if they lack sufficient means and if representation by counsel appears necessary or if the opponent is represented by counsel (Article 404 § 5 of the Code of Criminal Procedure in conjunction with Article 121 § 2 of the Code of Civil Procedure).

20. Article 140 § 1 of the Code of Criminal Procedure provides for cases in which the participation of defence counsel is mandatory. Paragraph 2 of the same Article, as applicable at the relevant time, provided that defence counsel shall be appointed, upon application or *ex officio*, where assistance by counsel appeared necessary in view of the seriousness of the offence or the difficulty of the factual or legal situation, or if it was apparent that the accused could not defend himself, notably because counsel was appointed for the victim for the private accessory prosecution in accordance with Articles 397a and 406g §§ 3 and 4 of the Code. There are no formal requirements as to the way in which the applicant lodges such application for legal assistance.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (C) OF THE CONVENTION

21. The applicant complained that the decision of the District Court not to appoint, of its own motion, defence counsel for him for the first-instance proceedings before it, breached his right to a fair trial, in particular the principle of equality of arms and the right to free legal assistance. He relied on Article 6 §§ 1 and 3 (a) and (c) of the Convention alone and taken in conjunction with Article 14 of the Convention. The Court, being the master of the characterisation to be given in law to the facts of the case (see *Wetjen and Others v. Germany*, nos. 68125/14 and 72204/14, § 44, 22 March 2018, with further references), finds it appropriate to examine this complaint solely under Article 6 §§ 1 and 3 (c) of the Convention which, in so far as relevant, reads as follows:

> "1. 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. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ... ”

A. Admissibility

22. The Court notes that this complaint is 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

23. The applicant argued that the Berlin Tiergarten District Court was obliged to appoint, of its own motion, defence counsel for him in the first-instance criminal proceedings, in which he was convicted of libel and two counts of assault, sentenced to a fine, and ordered to pay damages to the victim. The victim was represented by counsel as the private accessory prosecutor and with regard to his civil claims. Thus, the applicant was confronted with two lawyers, the public prosecutor and counsel for the victim. In this scenario, the District Court was obliged to appoint counsel for him *ex officio* and free of charge in order to respect the principle of equality of arms, bearing in mind that he lacked sufficient means to pay for counsel himself. He had neither been informed about the possibility to apply for free legal assistance nor had he been asked about aspects speaking in favour of granting him legal assistance.

24. The Government maintained that the principle of equality of arms did not require that counsel for a party be appointed whenever the opposing party was represented by counsel. The circumstances of the specific case were decisive. In the present case, the applicant had not substantiated in what way he was disadvantaged *vis-à-vis* the public prosecutor or the civil claimant. The applicant had knowledge of the statements and evidence of the prosecution and had the opportunity to present his case. He made use of his right to access the file and submitted comments on multiple occasions, both before and during the main hearing. Counsel for S. spoke exclusively in her role as representative concerning the civil claims at the hearing before the District Court, that is, not in relation to the criminal charge against the applicant.

25. There had been no breach of the applicant's right to free legal assistance. As the accused in criminal proceedings he had the right to the assistance of counsel at every stage of the proceedings and had been informed of this right in the letter from the police of 18 March 2010. By deciding to defend himself, he waived any right to be granted free legal

assistance. In any event, the domestic authorities had established that he was capable of defending himself effectively without the assistance of counsel. He was familiar with the parts of the file relevant for the decision, which did not give rise to factual or legal difficulties, and could safeguard his legal interests, as also evidenced by the timely submission of his appeal.

26. The decision ordering the applicant to pay damages to S. did not violate the principle of equality of arms, because the applicant would have had the right under domestic law to have counsel assigned to him upon application, provided that he lacked sufficient means. He was not assigned counsel because he had not applied for legal aid. He must have been aware of this opportunity, given that S. had applied for legal aid to pursue his civil claims and the applicant had submitted detailed comments on that application. The Government concluded that the proceedings against the applicant, viewed in their entirety, were fair.

2. The Court's assessment

27. The Court notes that the complaint concerns the applicant's right to a fair trial and, in particular, the principle of equality of arms and the right to free legal assistance. It reiterates that the rights set out in Article 6 § 3 (c) of the Convention are elements of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 (see *Mikhaylova v. Russia*, no. 46998/08, § 76, 19 November 2015) and will consider the applicant's complaint under both provisions taken together.

28. The right to free legal assistance under Article 6 § 3 (c) of the Convention is subject to two conditions. Firstly, the applicant must lack sufficient means to pay for legal assistance. Secondly, the "interests of justice" must require that legal aid be granted. The Court takes into consideration several factors to determine whether the interests of justice required that legal aid be granted in the domestic proceedings. This is to be judged by reference to the facts of the case as a whole, having regard, inter alia, to the seriousness of the offence, the severity of the possible sentence, the complexity of the case and the personal situation of the applicant (ibid., §§78-79, with further references). The principle of equality of arms requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent and that he is given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party, with a view to influencing the court's decision (see *Zahirović v. Croatia*, no. 58590/11, § 42, 25 April 2013, with further references). In order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (see *A.V. v. Ukraine*, no. 65032/09, § 58, 29 January 2015).

29. In the present case, the Court observes that the applicant was informed, by letter from the police notifying him about the institution of preliminary proceedings against him, of his right to consult defence counsel at any point in time (see paragraph 6 above). While the applicant alleged that this letter did not contain any references to the possibility of free legal assistance (see paragraph 23 above), which the Government did not contest, it is established that the applicant did comment on S.'s application for legal aid to pursue his civil claims in the context of the criminal proceedings (see paragraph 9 above). The Court considers that the applicant must thus have been aware of the possibility to apply for free legal assistance. The lack of appointment of counsel may therefore also be attributed to his failure to lodge an application to that end, which constitutes an important difference to the case of *Zdravko Stanev v. Bulgaria* (no. 32238/04, §§ 17 and 19, 6 November 2012), in which the applicant had applied for, and had been refused, free legal assistance.

30. The applicant alleged, in a general manner, that he was disadvantaged because he was not represented by counsel despite facing two parties, the public prosecutor and S., the latter being represented by a lawyer. However, it does not follow from either the principle of equality of arms or the right to free legal assistance that free legal assistance has to be provided in each and every case to a party whose opponent is represented by counsel. The applicant did furthermore not argue that he had not been given the opportunity to have knowledge of and comment on the observations filed by either the public prosecutor or S. in the proceedings before the District Court. In fact, it is not in dispute that he was given access to the file and that he made submissions on multiple occasions (see paragraphs 7, 9 and 11 above).

31. The Court of Appeal had determined that the conditions under which it was presumed that an accused could not defend himself had not been met and that, having regard to the circumstances of the present case, the appointment of counsel was not necessary (see paragraphs 14-15 above). To arrive at that conclusion, it examined the applicant's knowledge of the file, the level of factual or legal difficulty of the case, the nature of the offences, the severity of the potential sentence, the complexity of the taking of evidence, the scope of activity of S.'s counsel, and the applicant's capacity to safeguard his legal interests on his own. The Court cannot discern that the Court of Appeal's assessment was flawed or that it fell short of the standards set out in the Court's case-law. It considers that the fact that the domestic courts also dealt with civil claims for damages in the course of criminal proceedings, which was one argument for the finding of a violation of Article 6 § 3 (c) of the Convention in the case of *Zdravko Stanev* (cited above, § 40), is not in itself sufficient to conclude that the interests of justice required that the applicant be appointed counsel *ex officio*.

32. Lastly, the Court cannot ignore that the applicant – prior to being represented by counsel – lodged a timely appeal on facts and law against the District Court's decision (see paragraph 12 above). He could thus have benefited from having the facts of the case established anew before the Regional Court, which would have been competent to examine that appeal, if he had pursued it in the way he had lodged it. However, counsel who had subsequently taken up the applicant's representation gave notice that the appeal was to be pursued only as an appeal on points of law (see paragraph 13 above). Through this procedural choice the applicant waived the right to have the facts established anew during the appeal proceedings before the Regional Court in the presence of his counsel.

33. The foregoing considerations are sufficient to enable the Court to conclude that the proceedings, viewed in their entirety, were not rendered unfair by the fact that the District Court did not, of its own motion, appoint counsel for the applicant for the first-instance proceedings before it. There has accordingly been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

Done in English, and notified in writing on 22 November 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Yonko Grozev
President