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

COURT (CHAMBER)

CASE OF ANKERL v. SWITZERLAND

(Application no. 17748/91)

JUDGMENT

STRASBOURG

23 October 1996

In the case of Ankerl v. Switzerland[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr I. FOIGHEL,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr L. WILDHABER,
Mr B. REPIK,
Mr P. KURIS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 22 May and 24 September 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 10 July and 28 August 1995 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 17748/91) against Switzerland lodged with the Commission under Article 25 (art. 25) by a Swiss national, Mr Guy Ankerl, on 10 December 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 32, 45, 47 and 48 (art. 32, art. 45, art. 47, art. 48). The

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[1] The case is numbered 61/1995/567/653. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3(d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings. The President gave him leave to present his own case to the Court (Rule 30).

3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 13 July 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh, Mr S.K. Martens, Mr J.M. Morenilla, Sir John Freeland and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr I. Foighel and Mr B. Repik, substitute judges, replaced Mr Martens, who had resigned, and Mr Walsh, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the registry received the applicant's and the Government's memorials on 22 and 24 November 1995 respectively. On 14 December 1995 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

5. On 27 February 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. On 6 March 1996 the Registrar asked the applicant and the Government to supply certain documents by 5 April 1996. The applicant replied in a letter of 18 March that with one exception, of which he enclosed a copy, he was not able to produce them. The Government informed the Registrar on 3 April 1996 that it was "not possible to accede to [the] request", but they nevertheless sent him a number of documents on 9 and 13 May 1996.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 May 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr P. BOILLAT, Head of the European Law and International Affairs Section, Federal Office of Justice, *Agent*,

Mr A.D. SCHMIDT, former judge in the Canton of Geneva,

Mr F. SCHÜRMANN, Deputy Head of the European Law and International Affairs Section, Federal Office of Justice, *Counsel*;

(b) for the Commission

Mr F. MARTÍNEZ, *Delegate*;

(c) the applicant.

The Court heard addresses by Mr Martínez, the applicant himself, Mr Schürmann and Mr Boillat.

8. On 28 May 1996 the President of the Chamber received a letter from Mr Ankerl in which the latter protested against the fact that the documents filed out of time by the Government had nonetheless been placed in the case file. On the President's instructions, the Registrar sent a copy of Mr Ankerl's letter to the Government and to the Commission. On 24 September 1996 the Court removed the documents in question from the file (Rule 37 para. 1).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. In 1978 Mr Guy Ankerl and his wife moved into a flat on the second floor of no. 3, rue Saint-Léger, Geneva. He subleased the flat from a property-management company, Régie Immobilière SA ("Régie Immobilière"), itself the tenant of a property company, SI Chrysanthemum SA ("Chrysanthemum"), the owner of the building.

A. Background

10. In the autumn of 1985 Mr Ruffieux became Chrysanthemum's main shareholder.

11. On 14 November 1986 the property-management company Régie Naef SA ("Naef"), which managed the building in which the flat in issue was located, informed the applicant that renovation and building work was going to be carried out on the block.

12. In a letter of 8 May 1987 Naef gave Régie Immobilière - which was in liquidation - notice to quit the flat with effect from 29 February 1988, the date of expiry of the lease, and requested them to terminate the subtenancy agreement with Mr Ankerl.

13. It would appear that Régie Immobilière asked Naef to collect the rent direct from Mr Ankerl. On 14 July 1987 Naef allegedly sent Mr Ankerl receipts relating to the payment of rent from April to July of that year and -

what is denied by the applicant - specified that in collecting the sums in question they were not recognising the existence of any direct legal relationship between Mr Ankerl and Chrysanthemum.

14. In a registered letter of 21 July 1987 Régie Immobilière informed Mr Ankerl that they were terminating the subtenancy agreement with effect from its expiry. The applicant then applied to the Rents and Leases Conciliation Board for an extension of the agreement. No settlement having been reached, he applied to the Rents and Leases Tribunal but subsequently withdrew the application.

15. From February 1988 onwards the management of the block was taken over by the GPR Degenève SA agency ("GPR Degenève"). The latter notified the applicant of their bank account number. In an unanswered letter of 29 February 1988 Mr Ankerl confirmed to the agency that he would in future pay the rent into that account. He maintains that he did so each month from March 1988 to August 1991, taking care to write "rent" on the payment advice slips, without meeting any objection.

16. On 22 April 1988 the applicant and his wife had an interview - the terms of which are disputed – with Mr Linder, the director of GPR Degenève (see paragraph 18 below).

B. Proceedings in the Canton of Geneva Court of First Instance

17. On 15 November 1988 Chrysanthemum brought an action for possession in the Canton of Geneva Court of First Instance, alleging that the applicant was occupying the premises unlawfully since his subtenancy agreement had been terminated.

Mr Ankerl argued that the court had no jurisdiction ratione materiae, maintaining that he had an orally agreed lease from the plaintiff.

The court thus had to determine whether the conduct of the protagonists amounted to an agreement to enter into a lease after the termination of the subtenancy.

18. The court held a hearing on 19 May 1989. It heard Mr Linder (GPR Degenève), Mr Veuillet (Naef) and Mrs Ankerl; Mr Ruffieux (Chrysanthemum) and the applicant also gave evidence. Only the first two were heard as witnesses on oath.

The transcript of the testimony reads as follows:

> "...
>
> 1. Mr Jean-Gabriel Linder ...
>
> When I resumed [the management of the building in March 1988], Mr Ankerl was occupying the premises but he had no written or oral lease or even a tacit one.

It is true that I had an interview with Mr Ankerl on my own initiative ... I wanted to know what Mr Ankerl's position was. I made it clear to him that in my view he did not have a lease.

Mr Ankerl said that he very much wished to remain in the flat on sentimental grounds, having, so he said, written a book there. He may have told me that he had earlier supposedly been granted an oral lease, but I cannot state that with certainty. At all events, Mr Ankerl did not ask me to have a lease drawn up for him.

At the end of the interview Mr Ankerl suggested to me that he pay a higher rent in order to be able to stay in the flat. I suppose that implies that he was asking to be given a lease.

I told the defendant that I would pass on his request to the landlord. I told him clearly, both at the beginning and at the end of the interview, that I could not take a decision myself.

I consequently informed the landlord of the conversation I have just described. He told me that he did not wish to proceed in the matter and he did not give me the reasons.

I did not myself communicate the shareholder's position to Mr Ankerl but, on the other hand, I did send the file to our lawyer, who must have informed him of the shareholder's position.

My office staff must, it would seem, have communicated our account number to Mr Ankerl when we took over from Naef.

...

I heard about an agreement that had earlier been made between Naef and Mr Ankerl to the effect that Mr Ankerl should pay the rent direct to Naef.

2. Mr Dominique Veuillet ...

I have worked for Naef since 1 March 1983.

...

We knew that Mr Ankerl was in de facto occupation of the premises ...

... In 1986 or 1987 Mr Ankerl came to see me and told me that his position vis-à-vis Régie Immobilière was a rather special one. I cannot remember now the exact reasons. The defendant asked that we should draw up a lease in his name.

At the same time Régie Immobilière had asked us to collect the rent direct from Mr Ankerl ... I myself handed the file over to another property-management company on 31 December 1987, and at that time, as far as we were concerned, Mr Ankerl's position remained as we had described in our letter of 14 July 1987 ...

It is true that on 14 November 1986 we had informed Mr Ankerl about the proposed works in the building. That was because we could not ignore his presence in the building.

...

3. Mrs Méryl Ankerl ...

I was present at the interview with Mr Linder in April 1988. Mr Linder asked us what our intentions were regarding this flat and we told him that we wanted to stay in it. He then explained to us that the building was going to be made higher and asked whether the works would not inconvenience us. We replied that the works might perhaps inconvenience us but that we would put up with it since we wanted to stay. Mr Linder added that at all events the process would be a long one, because the architect's plans had not been approved by the Public Works Department. He also told us that during the building work we could occupy another flat in the block and that after the work was completed we could occupy a newly built flat at the top of the house. Or else we could move back into our second-floor flat.

When we left, Mr Linder told us that he would keep us informed. When we came out we were really reassured and optimistic.

Mr Linder never asked us to look for a flat elsewhere and he did not indicate that we had to leave within a given time.

I cannot remember if Mr Linder said that he was going to consult the landlord. I myself had the impression that he had some freedom of action.

Mr Ruffieux: I have myself been the director of the plaintiffs since October 1985. I have never set eyes on Mr Ankerl until today. I once replied to a letter he had sent me asking for an interview and I told him that his case was being dealt with by Naef's legal department.

... It is true that I told Mr Linder that I refused to give Mr Ankerl a lease. We had never accepted that Mr Ankerl had a tenancy and I did not wish us to agree to it. I knew from the beginning that Mr Ankerl was occupying the premises. He is up to date with the rent.

I would not have been opposed to a settlement at the outset but relations with Mr Ankerl have become difficult. I have already allowed Mr Ankerl four years.

Mr Ankerl: When I concluded the lease with Régie Immobilière, I did not realise that it was a subtenancy. I had consulted a lawyer before signing it.

Mr Ruffieux says today that it is not easy to get on with me, but he said before that he wanted us out because he wanted to renovate his building."

19. On 12 October 1989 the court held that there was no lease agreement between the parties and ordered Mr Ankerl to move all property and persons from the flat and restore it to the plaintiffs in good condition. The judgment reads as follows:

"...

Mr Veuillet, an employee of [Naef], told the Court that the tenant, Régie Immobilière, had asked Naef to collect the rent direct from Mr Ankerl.

This arrangement was accepted, the payments being received as an indemnity for unlawful occupation, as appears from a letter of 14 July 1987 ...

On 20 January 1988 the new management, the GPR Degenève SA agency, wrote to Régie Immobilière SA, asking that in future the company should pay the indemnity for Mr Ankerl's unlawful occupation to their own office.

Mr Linder, an employee of the new management, told the Court that he had had an interview with Mr Ankerl and had made it clear to him that in his view Mr Ankerl did not have a lease.

Mr Ankerl, he said, implicitly requested that a lease should be drawn up, to which Mr Linder said he had replied that it was not for him to decide.

Mr Ruffieux, the director and shareholder of the plaintiffs, told the Court that he had never agreed, and did not wish to agree, to enter into a lease with the defendant.

However, ... Mr Ankerl had been supplied personally with GPR Degenève's account number and wrote to that company on 29 February 1988 to inform them that in future he would pay the rent into their account ...

That letter does not appear to have been answered, except that, three months later, the lawyer instructed by the landlord wrote to enquire when Mr Ankerl would be leaving.

The defendant's wife - who was present at her husband's interview with Mr Linder – recalled from that interview that the property-management company had been contemplating offering them another flat in the building for the duration of the works, and that when they had left Mr Linder, the couple had had every reason to be reassured, seeing that they were not being asked to leave the premises.

...

In law the only issue which it is necessary to resolve is whether the defendant, since his sublease was terminated, has been given a lease by the landlord.

A lease may be entered into orally, although it is to be noted that property-management companies customarily draw up a written agreement.

In the instant case no lease has been signed since the termination of the sublease.

None of the documents produced discloses any agreement by the plaintiffs to enter into a lease.

It remains to be determined whether, by not immediately or clearly replying to the defendant's letter of 29 February 1988 or by allowing an employee of the property-management company to tell the defendant that he was going to refer back to the

landlord, the plaintiffs may – under the doctrine of good faith – have agreed to enter into a lease.

The Court reaches the conclusion that, in the circumstances of this case, no lease was entered into orally (the existence of an oral agreement has not been proved) or even implied by the clear conduct of the parties.

While it is true that the defendant wishes to remain in the flat, it is not even apparent from the evidence that he has clearly asked for a lease to be drawn up.

Despite the unambiguous letters from the plaintiffs, the defendant did not take the trouble to reply in writing.

He therefore could not truly suppose – in good faith – that the plaintiffs were implicitly granting him a lease.

He had all the less reason to assume a tacit agreement of this kind as, since the termination of the head lease, and accordingly of the sublease, proceedings had been pending for an extension of the lease, during which the landlord had clearly denied being contractually bound to the defendant or wishing to be.

Consequently, there is no lease between the parties.

... it must be held that the defendant is on the premises unlawfully.

Article 641 para. 2 [of the Civil Code] applies in this case ..."

C. Proceedings in the Canton of Geneva Court of Justice

20. In a judgment of 7 June 1990 the Canton of Geneva Court of Justice dismissed an appeal by Mr Ankerl on the following grounds:

"The Court cannot but agree with the court below that there was no contractual relationship between the landlord, Chrysanthemum SA, and Guy Ankerl. It is bold to argue that the existence of a lease is evidenced by the conduct of the landlord or of the landlord's representatives, who, on the contrary, always emphasised their determination not to enter into a lease with Guy Ankerl for flat at no. 3, rue Saint-Léger, second floor. The fact of having handed over rent receipts accompanied by the letter of 14 July 1987 or of not having replied to the appellant's letter of 29 February 1988 cannot be construed as meaning that a lease was in existence. It follows, in the absence of any lease, that the Court of First Instance had jurisdiction ratione materiae.

... According to this Court's case-law, a landlord is entitled to raise his ownership against a subtenant and to rely on Article 641 para. 2 [of the Civil Code], in the absence of any legal relationship between the parties ...

The sublease is a lease between the tenant and the subtenant ...

Having been given notice for 28 February 1988, Guy Ankerl, from that date, no longer has any right to remain on the premises.

..."

D. Proceedings in the Federal Court

21. The applicant lodged a public-law appeal with the Federal Court against the Court of Justice's judgment. In his pleading he relied, in particular, on Articles 6 and 14 of the Convention (art. 6, art. 14) and argued:

"... the fact that [the cantonal courts] allowed the representative of a party to be heard as a witness on oath created a flagrant inequality vis-à-vis the other party, who by the force of circumstance was not able to call witnesses to whom the oath could be administered. The equality of arms guaranteed both in the Federal Constitution and in the European Convention on Human Rights was not ensured. Such inequality is all the more flagrant where the court dealing with the case has not taken the slightest account in its decision of statements made by a witness, even if heard purely for information purposes. This was a gross breach of the law, which expressly provides, even if it precludes taking the oath, that a spouse may testify and therefore implies that the court dealing with the case will consider that evidence."

22. The First Civil Division of the Federal Court delivered its judgment on 3 October 1990. It declared inadmissible - in particular - the complaint based on a violation of Articles 6 and 14 of the Convention (art. 6, art. 14), as follows:

"... On a public-law appeal, the Federal Court will consider only the complaints adequately pleaded ... the notice of appeal must contain, inter alia, a succinct statement of the constitutional rights or legal principles violated, specifying in what the breach consists (section 90 (1) (b) of the Federal Judicature Act).

... In many respects, the present appeal does not comply with this requirement that reasons must be given.

This is true ... of the ground based on a breach of Articles 6 and 14 (art. 6, art. 14) [of the] European Convention on Human Rights, of which the appellant makes a bald assertion without providing any explanation."

23. Dismissing the remainder of the appeal, the First Civil Division said:

"The appellant also submitted that the Court of Justice had made an arbitrary assessment of the evidence taken by the court below.

...

... If the appellant's argument, which is not very clear, has been understood correctly, the cantonal appellate court inadmissibly took into account the interview that Mr Linder had with the appellant in April 1988 in the presence of the appellant's

wife, in that it completely ignored her statements and only took Mr Linder's statement into consideration.

In this connection it must be pointed out that the appellant's wife was heard only for information purposes and without taking the oath, in accordance with Article 226 [of the] Civil Proceedings Act [of the Canton of Geneva]. According to commentators on Geneva's Civil Proceedings Act, however, hearing a witness for information purposes is of purely informative import and has no probative value ... There was therefore nothing arbitrary in the instant case in not taking account of the explanations provided by Mrs Ankerl. The appellant did not, moreover, show in what way the cantonal appellate court had unsustainably interpreted the statements made by the sworn witness Jean-Gabriel Linder. Contrary to what he appeared to be arguing, the court below did not infer from those statements that the witness had indicated to the appellant that he would have to leave the flat. It merely found that Mr Linder `confirmed that he would pass on to the landlord Guy Ankerl's wish to enter into a new lease'. The appellant did not attack that finding.

...

The present appeal is manifestly ill-founded, and it must accordingly be dismissed in so far as it is admissible."

E. The applicant's departure

24. Mr and Mrs Ankerl left the flat in issue on 16 October 1991.

II. RELEVANT DOMESTIC LAW

A. Cantonal law

25. The relevant provisions of the Canton of Geneva Civil Proceedings Act of 10 April 1987, which came into force on 1 August 1987, are the following:

Article 196

"Unless otherwise laid down by law, the court shall freely assess the results of measures taken to obtain evidence."

Article 222 para. 1

"Anyone of sound mind who has been lawfully summoned shall be required to appear as a witness to give evidence on oath."

Article 225

"1. The following cannot be heard as witnesses:

(a) lineal relatives of one of the parties;

(b) brothers and sisters;

(c) uncles and nephews;

(d) relatives of the same degree by marriage;

(e) spouses, even if divorced.

2. The parties may, however, have these persons heard as witnesses, with the exception of descendants, in proceedings for withdrawal of parental authority, in matters concerning personal status and in cases concerning judicial separation, divorce and measures to preserve marital union."

Article 226

"The persons referred to in Article 225 para. 1 may be heard as witnesses in other cases without distinction, but without taking the oath and solely for information purposes.

..."

B. Federal law

26. Section 90 of the Federal Judicature Act of 16 December 1943 provides:

"1. In addition to identifying the order or decision being appealed against, the notice of appeal must contain:

(a) the appellant's submissions; and

(b) a statement of the main facts and a succinct statement of the constitutional rights or legal principles violated, specifying in what the breach consists.

2. ..."

PROCEEDINGS BEFORE THE COMMISSION

27. The applicant applied to the Commission on 10 December 1990. Relying on Articles 6 para. 1 and 14 of the Convention (art. 6-1, art. 14), he alleged that by hearing a witness for the opposing side on oath and not his wife, Mrs Méryl Ankerl, the Canton of Geneva Court of First Instance had disregarded the principle of equality of arms.

28. The Commission declared the application (no. 17748/91) admissible on 5 July 1994. In its report of 24 May 1995 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 6 para. 1 (art. 6-1) (seven votes to six) and that it was unnecessary to determine whether there had been a violation of Article 14 taken together with Article 6 para. 1 (art. 14+6-1) (unanimously).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

29. In his memorial the applicant requested the Court to

> "quash the Swiss Federal Court's judgment ..., which breaches Switzerland's obligation to comply with Article 6 of the Convention (art. 6)".

30. The Government invited the Court,

> "as their primary submission, to hold that it has no jurisdiction to take cognisance of the merits of the case on account of the failure to exhaust domestic remedies and, in the alternative, to hold that the Swiss authorities have not infringed the ... Convention ... by reason of the facts which gave rise to the application brought by Mr Guy Ankerl against Switzerland".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

31. As before the Commission, the Government raised a preliminary objection that domestic remedies had not been exhausted.

In the first place, by Article 26 of the Convention (art. 26) it was necessary to submit to the national courts, in accordance with the formal requirements of domestic law, the complaints subsequently intended to be made before the Convention institutions. That condition had not, the Government said, been satisfied in the instant case since the Federal Court had held that Mr Ankerl's ground of appeal based on Articles 6 and 14 of the Convention (art. 6, art. 14) was inadmissible as the reasons in support of it were insufficient to satisfy the requirements of section 90 of the Federal

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-V), but a copy of the Commission's report is obtainable from the registry.

Judicature Act. It was not for the Court to rule on the issue of compliance with such requirements, which was a matter solely of domestic law.

In the second place, Mr Ankerl was now arguing that a provision of the Canton of Geneva Civil Proceedings Act relating to the hearing of witnesses was incompatible with the Convention. The application to the Federal Court, however, had been concerned with a separate complaint, being exclusively for an interpretation of the provision in issue.

32. The applicant rejected that argument and referred to the relevant extracts of his pleading before the Federal Court.

33. In its decision on the admissibility of the application the Commission noted that in the Federal Court Mr Ankerl had complained of a breach of the principle of equality of arms and had expressly relied on Articles 6 and 14 of the Convention (art. 6, art. 14).

34. The Court reiterates that the purpose of Article 26 (art. 26) is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Thus the complaint to be submitted to the Commission must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see, among other authorities, the Remli v. France judgment of 23 April 1996, Reports of Judgments and Decisions 1996-II, p. 571, para. 33). Article 26 (art. 26) must, however, be applied with some degree of flexibility and without excessive formalism (see, for example, the de Geouffre de la Pradelle v. France judgment of 16 December 1992, Series A no. 253-B, p. 40, para. 26, and the Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, p. 17, para. 30). In its recent judgment in the case of Akdivar and Others v. Turkey the Court emphasised that "the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up" (judgment of 16 September 1996, Reports 1996-IV, p. 1211, para. 69).

In the instant case it is sufficient for the Court to find that in his submissions to the Federal Court Mr Ankerl expressly relied on the relevant provisions of the Convention and, at least in substance, set out the complaint now made at Strasbourg (see paragraph 21 above). He therefore gave the Federal Court an adequate opportunity to remedy by its own means the situation complained of. The objection must accordingly be dismissed.

II. THE MERITS

A. Alleged violation of Article 6 para. 1 of the Convention (art. 6-1)

35. The applicant complained of a breach of the principle of equality of arms between the parties before the Canton of Geneva Court of First Instance. This, he said, had resulted in a violation of the right to a fair hearing guaranteed in Article 6 para. 1 of the Convention (art. 6-1), which provides:

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

Mr Ankerl argued that he had maintained in the Court of First Instance that the conduct of GPR Degenève, which managed the building owned by the plaintiffs, showed that it had agreed to enter into a lease. He relied, in particular, on an interview that he, accompanied by his wife, had had with the director of the agency, Mr Linder, on 22 April 1988, which had, the applicant said, made that contractual relationship manifest. At the hearing on 19 May 1989 - whose purpose had been to establish what had been said during that interview - the court heard on oath, of the three people who had been present on 22 April 1988, only Mr Linder. Mrs Ankerl had been heard only for information purposes because as she was the wife of one of the parties, she was not in law allowed to take the oath. The "financial loyalty" binding Mr Linder to the plaintiff company that owned the building was, however, no less strong than matrimonial loyalty in a society in which family ties had weakened. By nonetheless attaching an exclusive "probative value" to Mr Linder's testimony, the court had clearly put the applicant at a disadvantage, infringed the principle of equality of arms and consequently breached his right to a fair hearing.

Mr Ankerl added that the evidence given by his wife, which had moreover been very accurate, had been reproduced only summarily in the transcript of the testimony; it had dealt with the consequences of the proposed renovations in the building and therefore with the contractual relationship between the tenant and the landlord. Furthermore, the letter of 14 July 1987 that was referred to in the reasons given in the Court of First Instance's judgment was a forgery which the court had blindly accepted as a fact without the defendant's having had an opportunity to examine it.

36. The Government replied that the facts of the case were different from those that had led the Court to find a breach of Article 6 para. 1 (art. 6-1) in the Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993 (Series A no. 274). In the Netherlands courts the onus had been on the applicant company to establish that there had been an oral agreement between it and a bank concerning the extension of certain credit facilities. Two people had attended the meeting at which the agreement had

allegedly been concluded: the representative of the applicant company and the representative of the bank. Only the latter had been allowed to give evidence as a witness; the judge had refused to call the company's representative as a witness on the ground that he was identified with the Dombo Beheer B.V. company. Having noted that during the negotiations the two protagonists had acted on an equal footing, each of them being empowered to negotiate on behalf of his party, the Court had concluded that the company had been placed at a substantial disadvantage vis-à-vis its opponent. In the instant case, on the other hand, Mr Linder had been only the director of the company appointed as agent to manage the plaintiff company's building; he did not belong to the plaintiff company, was not empowered to enter into a lease without its specific agreement and was not a party to the court proceedings. There had therefore been nothing to prevent the Court of First Instance hearing him as a witness. If a third party had been present at the interview in issue, Mr Ankerl could similarly have had that person give evidence under oath.

In the Government's submission, the truth of the matter was that Mr Ankerl had had no witness to be examined because by law, as in many countries, his wife could not be heard as a witness. The issue of complying with the principle of equality of arms only arose in situations that were comparable; the principle was not contravened solely because one of the parties was able to call a witness while the other was not able to do so.

At all events, the issue of compliance with the principle of equality of arms had to be looked at in the context of the fairness of the hearing as a whole. Thus, in the instant case, the Court of First Instance had looked at other evidence besides Mr Linder's testimony, to which, freely assessing the results of the measures taken to obtain evidence as required by cantonal law, it had moreover not attached paramount importance. The applicant had lost his case therefore not because his wife's statements - which the court had in any case taken into account - had not been taken on oath but because they had conflicted with irrefutable evidence. In short, there had been no breach of Article 6 para. 1 (art. 6-1).

37. The Commission reached the same conclusion. Several factors led it to distinguish the instant case from the Dombo Beheer B.V. case, namely: it was a feature of many legal systems that parties in civil proceedings and persons closely related to them could not be heard as witnesses under oath; the Court of First Instance had based its judgment on other evidence besides Mr Linder's testimony; and Mrs Ankerl's statement had been vague and inconclusive.

38. The Court's task is to ascertain whether the proceedings in their entirety were "fair" within the meaning of Article 6 para. 1 (art. 6-1). It reiterates in this connection that the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies also to litigation in which private interests are opposed; in such instances "equality of arms"

implies that each party must be afforded a reasonable opportunity to present his case - including his evidence -under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see the Dombo Beheer B.V. judgment previously cited, p. 19, paras. 32-33). A difference of treatment in respect of the hearing of the parties' witnesses may therefore be such as to infringe the principle in question.

In the present case, however, although Mrs Ankerl was not able to give evidence on oath, she was heard by the Court of First Instance (see paragraph 18 above). In the exercise of its power freely to assess the evidence the court was entitled not to regard Mrs Ankerl's statements as decisive in regard to the conclusion of an unwritten agreement to enter into a lease; the Government pointed out, without being contradicted, that under cantonal law the court freely assesses the results of the "measures taken to obtain evidence" (see paragraph 25 above). Furthermore, it does not appear from the judgment that the court attached any particular weight to Mr Linder's testimony on account of his having given evidence on oath (see paragraph 19 above). Lastly, the court relied on evidence other than just the statements in issue.

The Court therefore does not see how the fact of Mrs Ankerl's giving evidence on oath could have influenced the outcome of the proceedings. Accordingly, the circumstances of the case, unlike those of the Dombo Beheer B.V. case, lead it to find that the difference of treatment in respect of the hearing of the parties' witnesses by the Court of First Instance did not place the applicant at a substantial disadvantage vis-à-vis his opponent.

In conclusion, there has not been a breach of Article 6 para. 1 (art. 6-1).

B. Alleged violation of Article 14 of the Convention taken together with Article 6 para. 1 (art. 14+6-1)

39. The applicant also complained, under Article 14 of the Convention taken together with Article 6 para. 1 (art. 14+6-1), of unequal treatment before the Court of First Instance in respect of the hearing of witnesses.

40. The Government made no submissions on this point.

41. The Court has already determined the question of compliance with the principle of equality of arms under Article 6 para. 1 taken alone (art. 6-1). Like the Commission, it considers that no separate issue arises under Articles 14 and 6 para. 1 taken together (art. 14+6-1).

It is accordingly unnecessary to examine the complaint.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government's preliminary objection;

2. Holds that there has been no breach of Article 6 para. 1 of the Convention (art. 6-1);

3. Holds that it is unnecessary to examine the complaint based on Article 14 of the Convention taken together with Article 6 para. 1 (art. 14+6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 October 1996.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar