



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

COURT (CHAMBER)

CASE OF DARBY v. SWEDEN

(Application no. 11581/85)

JUDGMENT

STRASBOURG

23 October 1990

In the Darby case*,

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 the Rules of Court**, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr L.-E. PETTITI,

Mr C. RUSSO,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Mrs E. PALM,

Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 May 1990 and on 24 September 1990,

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

PROCEDURE

1. The case was brought before the Court on 13 July 1989 by the European Commission of Human Rights ("the Commission") and on 8 September 1989 by the Government of the Kingdom of Sweden ("the Government"), within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 11581/85) against Sweden lodged with the Commission under Article 25 (art. 25) by Dr Peter Darby, a Finnish citizen, on 20 November 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose 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

* The case is numbered 17/1989/177/233. 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.

** The amendments to the Rules of Court which entered into force on 1 April 1989 are applicable to this case.

Articles 9 and 14 of the Convention, Article 14 being taken together with Article 9 (art. 14+9) and with Article 1 of Protocol No. 1 (art. 14+P1-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mrs E. Palm, the elected judge of Swedish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 25 August 1989 the President of the Court drew by lot, in the presence of the Registrar, the names of the other five members namely, Mr L.-E. Pettiti, Mr C. Russo, Mr A. Spielmann, Mr N. Valticos and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). He also granted a request from the applicant for legal aid (Rule 4 of the Addendum to the Rules of Court). Thereafter, in accordance with the President's Order, the Registrar received the applicant's and the Government's memorials on 28 February and 6 March 1990 respectively; in a letter of 6 April 1990 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 16 January 1990 that the oral proceedings should open on 22 May 1990 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr H. CORELL, Ambassador,

Under-Secretary for Legal and Consular Affairs, *Agent,*

Mrs C. WESTERLING, Legal Adviser,

Ministry of Finance,

Mr C.-H. EHRENCRONA, Legal Adviser,

Ministry for Foreign Affairs,

Advisers;

- for the Commission

Mr J. A. FROWEIN,

Delegate;

- for the applicant

Mr C. PALME, advokat,

Counsel.

The Court heard addresses by Mr Corell for the Government, by Mr Frowein for the Commission and by Mr Palme for the applicant, as well as their replies to its questions. The applicant also made a short statement.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. General background

7. The applicant, Dr Peter Darby, is a Finnish citizen of British origin, born in 1926. In 1977 he was employed as a doctor by the Swedish State Railways in Gävle, Sweden. He rented a flat in the town, but spent the weekends with his family on the island of Lemland in the neutral and demilitarised Finnish archipelago of Åland at the southern end of the Gulf of Bothnia. From the end of 1981 he worked as a doctor in the public health service in another Swedish town, Norrtälje. Since August 1986 he has been working in Åland.

8. During the period when the applicant was working in Sweden his income from the above-mentioned posts was, in accordance with the convention between Sweden and Finland for the avoidance of double taxation (see paragraph 18 below), liable to Swedish tax. The applicant was allowed deductions for the cost of maintaining two homes as well as for travel expenses to and from Åland. As he was considered not to be permanently resident in Sweden, he was, until 1979, taxed in the so-called Common District (*gemensamma distriktet*) and he paid only a reduced municipal tax (see paragraph 19 below).

9. On 1 January 1979 the law was amended, with the result that the applicant was no longer taxed in the Common District but in the municipality where he stayed, i.e. in Gävle (see paragraph 20 below). The deductions which had previously been allowed were no longer permitted and he now had to pay the full municipal tax, including a special tax to the Lutheran Church of Sweden ("the church tax" - see paragraphs 21-23 below). He was informed by the tax authorities that he could not claim any reduction of the church tax unless he was formally registered as resident in Sweden (see paragraph 22 below).

B. Dr Darby's appeal against the decision to tax him as a resident

10. Dr Darby appealed to the Joint Municipal Tax Court (*mellankommunala skatterätten*) against the decision to treat him for tax purposes as having been resident in Gävle in 1979. He claimed that he should still be taxed in the Common District as he was not living in Sweden. In a judgment of 25 February 1982 the court dismissed the appeal.

11. In the meantime, on 19 February 1982, the applicant had obtained a decision from the National Tax Board (riksskatteverket) to the effect that if he travelled daily from Åland to his work in Sweden he would not be regarded as a resident for the purposes of section 68 of the Municipal Tax Act 1928 (kommunalskattelagen - see paragraph 20 below) and would thus be taxed in the Common District. However, he found daily commuting to Gävle impossible, and in 1982 he accordingly took on less responsible work with lower pay in Norrtälje, to which he could just manage to commute from Lemland. As a result he was again taxed in the Common District and was not liable to the church tax.

12. An appeal by Dr Darby to the Administrative Court of Appeal (kammarrätten) of Sundsvall against the Joint Municipal Tax Court's judgment was dismissed in a judgment of 22 October 1982 and on 15 October 1984 the Supreme Administrative Court (regeringsrätten) refused an application by him for leave to appeal.

C. Dr Darby's complaints regarding the obligation to pay full church tax

13. In addition to the above-mentioned proceedings, the applicant submitted an appeal to the County Administrative Court (länsrätten) of Gävleborg County against the order to pay full church tax on his 1979 income, on the ground that he was neither a member of the Church of Sweden, nor a Swedish citizen nor resident in Sweden. In a judgment of 19 May 1981 the court dismissed the appeal, holding that the Tax (Reduction of Dissenters' Liability) Act (lag 1951:691 om viss lindring i skattskyldigheten för den som icke tillhör svenska kyrkan, "the Dissenters Tax Act" - see paragraph 22 below) did not apply to the applicant.

14. Dr Darby appealed to the Administrative Court of Appeal of Sundsvall, which in a judgment of 22 October 1982 confirmed the judgment of the lower court. His application for leave to appeal was refused by the Supreme Administrative Court on 9 October 1984.

15. The applicant also lodged a complaint with the Parliamentary Ombudsman (justitieombudsmannen) concerning his obligation to pay tax for the religious activities of the Swedish Church. In his decision of 16 April 1982 the Ombudsman noted that the requirement in the Dissenters Tax Act that a person be formally registered as resident in Sweden (mantalsskriven, as defined in the Ordinance on the keeping of population records, folkbokföringsförordningen) in order to be able to apply for exemption from the church tax had been questioned on several occasions by various bodies, including Parliament. Although the problem raised by the applicant was a limited one, the Ombudsman concluded that it showed up an inconsistency in the tax legislation for which there was no objective justification and that it was understandable if this inconsistency caused

irritation. In a letter of the same day to the Government, he proposed that the registration requirement should be abolished. As a result of this proposal the Dissenters Tax Act was subsequently amended accordingly (see paragraph 23 below).

D. The church tax paid by the applicant

16. Dr Darby paid church tax in the amount of 1,336 Swedish kronor for the tax year 1979, 1,717 kronor for 1980 and 1,325 kronor for 1981. If he had been allowed the reduction provided for in the Dissenters Tax Act, he would have had to pay 401, 515 and 397 kronor, respectively (see paragraph 22 below).

II. RELEVANT DOMESTIC LAW

A. Taxation in general

17. The provisions regarding municipal income taxation in general are included in the Municipal Tax Act 1928, which has been amended on numerous occasions over the years. The references below to this Act and to other enactments are all to the version in force during the relevant period (1979-1981), unless otherwise stated.

18. Liability to pay tax in Sweden was regulated in section 53, subsection 1, of the Municipal Tax Act: residents of Sweden were taxed on their world-wide income whereas non-residents had a more limited liability, covering, inter alia, income derived from employment in the Swedish public service.

Under Article 19 of the convention with Finland for the avoidance of double taxation (published in svensk författningssamling ("SFS" - the official journal), 1977:812), the right to tax income derived from public service vested in the State which paid the remuneration (with certain exceptions not relevant here).

19. Regarding the place of taxation in Sweden, section 59, subsections 1 and 3, of the Municipal Tax Act provided that income earned by a resident from employment was to be taxed in the municipality where he was formally registered as a resident (mantalsskriven).

According to the Tax (Common Municipal Purposes) Act (lag om skatt för gemensamt kommunal ändamål), income earned by a non-resident from employment in, inter alia, the Swedish public service was to be taxed in Stockholm in the so-called Common District. The tax rate (10 per cent) applicable in this district was lower than the ordinary municipal tax rate. The tax levied was not destined for any specific municipality but was used for levelling out the burden of taxation between different municipalities or

other administrative authorities. It did not include any tax payable to the Church of Sweden.

20. As a result of an amendment to section 68 of the Municipal Tax Act and subsection 1 of the instructions relating to section 66 of the same Act (SFS 1978:925), certain non-residents were considered, with effect from 1 January 1979, to have sufficient connection with Sweden to be liable to pay the full municipal tax. The Government Bill (1978/79:58) containing these amendments did not mention the problems which might result for non-residents in relation to the Dissenters Tax Act.

Henceforth, a non-resident with certain types of income, such as that derived from employment in the public service, and with a temporary abode in Sweden was no longer taxed in the Common District but in the municipality where he had first lived. This meant that he had to pay municipal tax at the same rate as a resident and also church tax.

B. The church tax

21. The church tax is collected together with the ordinary municipal tax. The rate is determined by the local parish council. This system has a long tradition and is based on the fact that the Lutheran Church of Sweden is the established church. Under the transitional provisions of the 1974 Constitution (*regeringsformen*), its parishes have a status similar to that of the municipalities - including the right of taxation.

22. The Dissenters Tax Act was enacted in 1951 at the same time as the Freedom of Religion Act (*lag 1951:680 om religionsfrihet*) in order to secure better respect for freedom of religion (see Government Bill 1951:175, p. 75). Section 1 of the Dissenters Tax Act, made the following provision for a reduction in the church tax:

"Church tax which is referred to in the 1961 Act on parish administration (*lag 1961:436 om församlingsstyrelse*) and is imposed either by decision of a parish council or otherwise in accordance with the principles that apply to the imposition of municipal tax, shall be levied on a person who was not a member of the Church of Sweden at the beginning of the tax year and who is formally registered as resident (*mantalsskriven*) in this country for the tax year at only 30 per cent of the amount assessed."

The registration requirement meant that the Dissenters Tax Act did not apply to persons who had only a temporary abode in Sweden. According to the *travaux préparatoires* of the Act, the reasons for this were that the case for reduction could not be argued with the same force in regard to persons who were not resident in Sweden as it could in regard to those who were, and that the procedure would be more complicated if the reduction applied to non-residents (Government Bill 1951:175, p.144).

The 30 per cent of the church tax that remained after the reduction was supposed to cover the costs borne by the parishes of certain administrative

functions such as the keeping of population records and the maintenance of churchyards and other public burial-grounds.

23. With effect from 1 January 1987, section 1 of the Dissenters Tax Act was amended in order to take into account the criticism made by the Parliamentary Ombudsman (see paragraph 15 above), so that the taxpayer no longer has to be registered as resident in Sweden in order to benefit from the reduction of the church tax (Government Bill 1986/87:45, p. 15).

C. Membership of the Swedish Church

24. Under the Freedom of Religion Act, as worded before 15 November 1979, membership of the Swedish Church was reserved to Swedish citizens and foreigners living in Sweden. In 1979 an amendment (SFS 1979:929) opened membership also to other groups of persons. In order to leave the Church, it is sufficient for the person concerned to notify his resignation to the church authorities of his parish. Special rules apply to minors.

PROCEEDINGS BEFORE THE COMMISSION

25. In his application of 20 November 1984 to the Commission (no. 11581/85), Dr Darby alleged violations of Article 6 para. 1 and Article 9 (art. 6-1, art. 9) of the Convention. He contended that he had been discriminated against by the Swedish authorities while working in Sweden because he was a Finnish citizen domiciled in the archipelago of Åland; and he also challenged the interpretation of the Dissenters Tax Act to the effect that he had to pay the full church tax and claimed that this obligation infringed his civil rights.

26. On 11 April 1988 the Commission declared admissible the complaint that he had been obliged to pay church tax and declared the remainder of the application inadmissible.

In its report of 9 May 1989 (made under Article 31) (art. 31), the Commission expressed the opinion that:

(a) there had been a violation of Article 9 (art. 9) (by ten votes to three) and also of Article 14 of the Convention taken together with Article 9 (art. 14+9) by nine votes to four);

(b) it was not necessary to examine whether there had been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1) (by eleven votes to two).

The full text of the Commission's opinion and of the dissenting opinions contained in the report is reproduced as an annex to the present judgment*.

AS TO THE LAW

27. Dr Darby complained of the fact that between 1979 and 1981 he had had to pay 3,065 Swedish kronor (see paragraph 16 above) as a special tax to the Church of Sweden to finance its religious activities. In his opinion, this amounted to a breach of Article 9 (art. 9) of the Convention and also of Article 14 of the Convention taken together either with Article 9 (art. 14+9) or with Article 1 of Protocol No. 1 (art. 14+P1-1).

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL NO. 1 (art. 14+P1-1)

28. Considering that the applicant's grievances relate mainly to allegedly discriminatory effects of the Swedish tax legislation, the Court finds it more natural to examine the case under Article 14 of the Convention taken together with Article 1 of Protocol No. 1 (art. 14+P1-1), which concerns the peaceful enjoyment of possessions.

29. Article 14 (art. 14) of the Convention reads:

"The enjoyment of the rights and freedoms set forth in this Convention" - and in Protocol No. 1 (Article 5 thereof) (P1-5) - "shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Under Article 1 of Protocol No. 1 (P1-1):

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Dr Darby claimed that the refusal to grant him an exemption from the impugned part of the church tax on the ground merely that he was not

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 187 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

formally registered as a resident in Sweden amounted to a discrimination in comparison with other non-members of the Church who were so registered.

This view was shared by two dissenting members of the Commission, whereas the Government maintained that it would be out of proportion to regard this distinction in treatment as constituting prohibited discrimination.

30. Article 1 of Protocol No. 1, second paragraph (P1-1-2), establishes that the duty to pay tax falls within its field of application. Accordingly, Article 14 (art. 14) is also applicable (see, *mutatis mutandis*, the Inze judgment of 28 October 1987, Series A no. 126, pp. 17-18, paras. 36-40).

31. Article 14 (art. 14) protects individuals placed in similar situations from discrimination in their enjoyment of their rights under the Convention and its Protocols. However, a difference in the treatment of one of these individuals will only be discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, amongst other authorities, the above-mentioned Inze judgment, *ibidem*, p. 18, para. 41).

32. It appears first that Dr Darby can claim to have been, as regards his right to an exemption under the Dissenters Tax Act, in a situation similar to that of other non-members of the Church who were formally registered as residents in Sweden.

33. As regards the aim of this difference in the treatment of residents and non-residents, it is worth noting the following. According to the Government Bill (1951:175) which gave rise to the Dissenters Tax Act, the reason why the right to exemption was reserved for persons formally registered as residents was that the case for reduction could not be argued with the same force in regard to persons who were not so registered as it could in regard to those who were, and that the procedure would be more complicated if the reduction was to apply to non-residents (see paragraph 22 above). The Government Bill (1978/79:58) containing the tax-law amendments that brought about this complaint did not mention the special situation which the amendments would create for non-residents under the Dissenters Tax Act (see paragraph 20 above). In fact, the Government stated at the hearing before the Court that they did not argue that the distinction in treatment had a legitimate aim.

34. In view of the above, the measure complained of cannot be seen as having had any legitimate aim under the Convention. Accordingly, there has been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1 (art. 14+P1-1).

II. ALLEGED VIOLATION OF ARTICLE 9 (art. 9) OF THE CONVENTION, TAKEN EITHER ALONE OR TOGETHER WITH ARTICLE 14 (art. 14+9)

35. Having regard to the circumstances of the case and to the conclusion in the preceding paragraph, the Court does not find it necessary to examine also the applicant's complaint of a violation of his freedom of religion, as guaranteed by Article 9 (art. 9), or of discrimination contrary to Article 14 (art. 14) in his enjoyment of this right.

III. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

36. According to Article 50 (art. 50):

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant claimed compensation for pecuniary and non-pecuniary damage and reimbursement of his costs and expenses. The Government contested part of the claims; the Delegate of the Commission refrained from making any comments.

A. Pecuniary damage

37. As regards pecuniary damage, the applicant claimed repayment of the excess tax he had paid between 1979 and 1981, that is 3,065 Swedish kronor (see paragraph 16 above), plus interest calculated in accordance with the Swedish Interest Act (räntelagen) from the year in which the taxes were levied until the date of reimbursement. While accepting this claim in principle, the Government maintained that the Swedish Interest Act was not applicable. However, they left it to the Court to determine whether the amount claimed should be increased on an equitable basis.

38. The Court awards Dr Darby 8,000 kronor under this head, comprising the amount of tax unduly paid in 1979-1981 (3,065 kronor) and interest assessed in the light of the interest rates in Sweden at the time.

B. Non-pecuniary damage

39. The applicant also sought 50,000 kronor as compensation for non-pecuniary damage. He submitted that:

(a) he had suffered from having to contribute directly to the religious activities of a foreign church;

(b) he had had to challenge, without the assistance of a lawyer, his obligation to pay church tax in several court proceedings in Sweden, and the ensuing work had caused him stress and considerable loss of time although he had not actually incurred any costs;

(c) he had also experienced stress as a result of the measures he took to adjust his life in accordance with the National Tax Board's advance ruling (see paragraph 11 above).

In the Government's view, the state of affairs complained of was not of such significance as to justify compensation in the amount claimed.

40. As the Government pointed out, the applicant's claims under item (c) must be considered irrelevant in relation to the violation found, as the obligation to pay the church tax cannot be said to have required the taking of such measures. For the rest, the Court agrees with the Government that the main aim of Dr Darby's domestic proceedings was to be taxed in the so-called Common District, where, besides being exempt from the church tax, he would have enjoyed a generally more favourable tax treatment (see paragraph 19 above).

In sum, the present judgment provides sufficient just satisfaction for any mental suffering.

C. Costs and expenses

41. The applicant claimed 11,575 kronor for his costs in the proceedings before the Commission, in which he appeared without legal counsel. As to the proceedings before the Court, he sought 18,278 kronor for his lawyer's expenses, 129,500 kronor for his lawyer's fee and 14,000 kronor for his own attendance at the hearing.

The Government considered the lawyer's fee to be somewhat high and left to the Court the question of compensating Dr Darby for his own attendance. They accepted the other items.

42. Making an equitable assessment and taking into account the sums paid in legal aid by the Council of Europe, the Court awards the applicant 90,000 kronor under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1 (art. 14+P1-1);
2. Holds that it is not necessary to examine the case under Article 9 (art. 9) of the Convention taken either alone or together with the said Article 14 (art. 14+9);

3. Holds that Sweden is to pay the applicant 8,000 (eight thousand) Swedish kronor for pecuniary damage and 90,000 (ninety thousand) kronor for costs and expenses;
4. Rejects the remainder of the claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 October 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar