

In the case of Thomann 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. Ryssdal, President,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr C. Russo,
Mr J. De Meyer,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr J. Makarczyk,
Mr P. Jambrek,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 25 January and 21 May 1996,

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

Notes by the Registrar

1. The case is numbered 33/1995/539/624. 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.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 April 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 17602/91) lodged with the Commission under Article 25 (art. 25) by a Swiss national, Mr Martin Thomann, on 5 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 object of the request 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 and designated the lawyer who would represent him (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. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr C. Russo, Mr J. De Meyer, Mr M.A. Lopes Rocha, Mr J. Makarczyk and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Swiss Government ("the Government"), the applicant's lawyer 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 Registrar received the Government's and the applicant's memorials on 2 November 1995. On 24 November 1995 and 4 January 1996 the Commission produced various documents, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 January 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 F. Schürmann, European Law and
International Affairs Section,
Federal Office of Justice, Adviser;

(b) for the Commission

Mr M.P. Pellonpää, Delegate;

(c) for the applicant

Ms B. Pauen, avocate, Counsel.

The Court heard addresses by Mr Pellonpää, Ms Pauen and Mr Boillat.

AS TO THE FACTS

I. Particular circumstances of the case

6. Mr Martin Thomann, a Swiss national who was born in 1949, lives in Zurich.

A. The in absentia proceedings

7. On 13 December 1988 the prosecutor's office of the Canton of Basel-Stadt brought a prosecution (Anklageerhebung) against the applicant on charges of aggravated fraud and attempted aggravated fraud, having had previous convictions for the same offence (wiederholter und fortgesetzter vollendeter und versuchter, teils gewerbsmäßiger Betrug), negligent bankruptcy (leichtsinziger Konkurs) and failure to keep accounts (Unterlassung der Buchführung).

8. The cantonal Criminal Court (Strafgericht) set down the case for trial from 10 to 17 May 1989. However, it was not possible to serve the summons to appear (Vorladung zur Verhandlung) on the applicant, because he had quit his home without leaving an address. An arrest warrant was accordingly issued, indicating that the trial could take place at any time, even if the applicant was not present.

9. The court, composed of Judges Metzener, Becht-Gutmann and Memminger, sat from 10 to 17 May 1989 in the applicant's absence. He was arrested on 16 May 1989 and on 17 May attended court for the delivery of the judgment, whereby he was sentenced to two and a half years' imprisonment and fined five hundred Swiss francs for fraud and attempted fraud both in the exercise of an occupation (gewerbsmäßiger Betrug), negligent bankruptcy and failure to keep accounts.

B. The application for a retrial

10. The applicant immediately sought a retrial (see paragraph 24 below). The Criminal Court allowed his request and decided accordingly not to provide a written statement of reasons for its judgment given in absentia (Kontumazurteil). It then commenced proceedings under the ordinary procedure and set down a new trial for 30 October 1989.

11. On discovering that the composition of the Criminal Court would be identical to that of the court that had convicted him in absentia, on 29 June 1989 Mr Thomann lodged an application (Ausstandsbegehren wegen Befangenheit) challenging its three members. On 22 August the challenge was dismissed by the same three judges.

On an appeal (Beschwerde) by the applicant, the Court of Appeal (Apellationsgericht) of the canton set aside that decision on 5 October 1989 and directed that the Criminal Court rule on the applicant's challenge without the judges concerned being present. The court, composed of Judges Kunz, Stephenson and Stamm, dismissed the challenge on 25 October.

12. Relying on Article 58 of the Federal Constitution and Article 6 para. 1 of the Convention (art. 6-1), the applicant lodged a new appeal (Beschwerde) with the cantonal Court of Appeal, which dismissed it on 14 November 1989.

The Court of Appeal took the view that the decision to allow a retrial under Article 267 para. 2 of the Code of Criminal Procedure (see paragraph 24 below) was not an avenue of appeal in the strict sense, but a decision to rehear the case (Restitution), whose sole effect was to set aside a judgment given in absentia and to open a trial under the ordinary procedure (gewöhnliches Verfahren), which would result in a new judgment replacing the earlier one. In the absence of statutory provisions on that point, the practice was for the judge who had given the first judgment to hear the application for a retrial and to sit in the new trial under the ordinary procedure. The explanation of this practice was that the retrial did not entail the exercise of functions that were different from those exercised by the first judge or any criticism of his decision. Its sole purpose was to supplement the facts on which the first judgment had been based. In those circumstances, it could hardly be contended that there was a risk of a lack of impartiality on the part of such a judge when he retried the case.

The Court of Appeal considered in addition that judges giving judgment in absentia were perfectly well aware that their decisions were open to an application for a retrial. In the case in question the judgment appealed had been given by a panel of three judges - a circumstance which in itself reduced the risk of breaches of the duty of impartiality - who had, moreover, agreed to set aside their own decision, thus showing their opinion that Mr Thomann should not suffer as a result of his absence from the first trial.

13. On 2 May 1990 the Federal Court dismissed the applicant's public-law appeal (staatsrechtliche Beschwerde).

The Federal Court referred to its relevant case-law and observed, inter alia, that the members of a panel of three judges did

not lose their impartiality merely because they had already given judgment in absentia in the same case, provided that the outcome of the case appeared to remain open and did not give the impression of being predetermined (Anschein der Vorbestimmtheit). To establish whether this was in fact the case, it was necessary to have regard to the factual and the procedural circumstances of the two trials.

Given the importance of the presence of the defendant in person before a criminal court, it could never be ruled out that a case heard in the absence of the accused might have reached a different conclusion if he had been present at the trial. Thus the cantonal Codes of Criminal Procedure which allowed trial in absentia all empowered a person convicted in such proceedings to seek the reopening of the trial under the ordinary procedure. In contrast to an appeal, the purpose of this remedy was not to conduct a review (Überprüfung) of the first judgment. It took the case back to the trial stage so that it could be entirely reheard at a new trial resulting in a new judgment.

Admittedly the judges had to deal with the same issues, namely the accused's guilt and the appropriate sentence. However, as the ordinary procedure made it possible to carry out certain steps, such as examination and cross-examination, which the accused's absence had precluded, the case was wholly reconsidered. Its outcome was therefore open, as the court might very well arrive at a different conclusion from its earlier decision. The contrary view expressed by Mr Thomann on this point was based solely on his subjective impressions which, according to the case-law, could not be taken into account. The decisions that he invoked were irrelevant because they concerned an issue unrelated to the case before the court, namely the concurrent exercise of different functions, in particular that of trial judge and investigating judge.

Moreover, acceptance of the applicant's argument would invite abuse because in the cantons where an application for a retrial was not subject to objective conditions, it would be sufficient for an accused to fail to appear for trial where he wished to have a judge of whom he did not approve removed. He would therefore be placed at an advantage in relation to an accused who did appear. It would also cause delays in the proceedings, which would be aggravated by the fact that on each occasion new judges would have to study the case.

C. The retrial under the ordinary procedure

14. The retrial took place from 26 September to 3 October 1990 in Basel-Stadt Criminal Court, composed of Judges Metzener, Becht-Gutmann and Memminger; the court took evidence from the applicant, who was assisted by an officially appointed lawyer, and from several witnesses. On 3 October Mr Thomann was sentenced to two years and three months' imprisonment and fined five hundred Swiss francs for fraud and attempted fraud in the exercise of an occupation, negligent bankruptcy and failure to keep accounts.

15. On 11 July 1991 the cantonal Court of Appeal acquitted Mr Thomann on certain counts relating to the fraud charge and reduced his prison sentence to two years' imprisonment.

On 9 December 1992 the Federal Court dismissed the applicant's public-law appeal against that judgment.

II. The relevant cantonal law

A. Ordinary procedure

16. An accused who appears for trial is first questioned as to his personal circumstances and then allowed to make a short statement on the indictment. The President of the Court then examines him in detail on the charges brought against him (Article 178 of the Basel-Stadt Code

of Criminal Procedure (Strafprozeßordnung)).

17. The accused may be confronted with witnesses (Article 179) and call other witnesses (Article 181). After the prosecuting authority has made its submissions and any victim that may be participating in the proceedings has made a statement, the accused may put the defence case; he always has the last word, after the prosecutor has had an opportunity to reply (Articles 185 and 186).

18. With the exception of the prosecuting authority, the parties to criminal proceedings who have an interest in doing so may appeal against the first-instance decision, in which case the Court of Appeal rehears the whole case (second sentence of Article 236).

B. Procedure in proceedings conducted in absentia

19. In so far as possible, the preliminary investigation of a suspect who is absent must be conducted with the same degree of thoroughness as if he were present. In particular, witnesses with relevant testimony must be heard (Article 260).

20. A person who is absent who has not been heard on the charges brought against him may be committed for trial (öffentliche Anklage) only if he has not been heard through his own fault and if, despite his absence, it appears that the trial will result in a safe verdict (Article 261 para. 1).

21. Where a person who is absent is committed for trial or a person who is summoned to appear fails to do so without a valid excuse, the President of the criminal court (Strafgerichtspräsident) orders that the trial is to proceed in absentia (Kontumazialverhandlung). This is indicated in the documents relating to the search and inquiry measures taken to find the person concerned (Article 262 para. 1).

22. If the accused cannot be brought to the hearing, the relevant documents of the investigation file are given to the members of the court or are read out during the trial. The court gives judgment on the basis of the file, after having heard the parties who are present (Article 263 para. 1). The President may, of his own motion or at the request of a party, order that evidence be taken from witnesses, experts or any other persons (Article 263 para. 2).

23. If there is insufficient evidence to secure the accused's conviction, the proceedings are stayed (Article 264 para. 1). On the other hand, where the court convicts the accused, it must in its judgment given in absentia (Kontumazurteil) determine the measures that are to be taken as soon as the accused is arrested. The judgment must, in so far as possible, be executed immediately (Article 264 para. 2).

24. A person convicted in absentia is formally notified thereof as soon as he is brought before the relevant court or appears of his own free will (Article 267 para. 1). He can apply for a retrial (Revision des Verfahrens) in the ten days following notification (Article 267 para. 2). The application will only succeed if he shows that he did not receive the summons or that, through no fault of his own, he was prevented from appearing (Article 267 para. 3). If the application is allowed, the case is retried under the ordinary procedure and a new judgment is given (Article 267 para. 4); otherwise, or when no application for a retrial is made, the judgment given in absentia becomes final (Article 267 para. 5).

PROCEEDINGS BEFORE THE COMMISSION

25. In his application (no. 17602/91) lodged with the Commission on 5 December 1990, Mr Thomann complained that he had been convicted on 3 October 1990 by a court that was not impartial for the purposes of Article 6 para. 1 of the Convention (art. 6-1).

26. The Commission declared the application admissible on 5 September 1994. In its report of 2 March 1995 (Article 31) (art. 31), it expressed the opinion, by twenty votes to four, that there had been no violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-III), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

27. The applicant complained of a breach of Article 6 para. 1 of the Convention (art. 6-1), which, in so far as is relevant to the present case, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ..."

Relying, *inter alia*, on the judgments of *De Cubber v. Belgium* of 26 October 1984 (Series A no. 86) and *Padovani v. Italy* of 26 February 1993 (Series A no. 257-B), he contended that the criminal court that had tried him on 3 October 1990 could not be regarded as impartial because it had been composed of judges who had already convicted him in absentia on 17 May 1989. Even before he appeared before them at the retrial, they had therefore already formed their opinion as to his guilt. This had been all the more prejudicial to him as the facts of the case were largely uncontested, it being essentially the assessment of their gravity that was in dispute. The retrial had thus been conducted without due regard to the importance to be attached to the impartiality of a tribunal and to appearances in this field, and, taken as a whole, had therefore been merely a purely formal repetition of the earlier proceedings.

28. The Government maintained that in giving judgment in absentia the judges had known perfectly well that the grounds for their decision had been incomplete. Accordingly, by allowing the applicant's application for a retrial (see paragraph 10 above) and by taking evidence from him and from several witnesses during the retrial proceedings, they had afforded Mr Thomann, as soon as he had reappeared, an entirely new trial, with the result that they had even reduced the sentence initially imposed (see paragraph 14 above). That proved that they had indeed remained impartial.

In addition if the criminal court for the retrial had had to be composed differently, the applicant would have been placed at an advantage in relation to defendants who complied with their summons to appear. He would have had the benefit of an additional procedure besides the other appeals lodged by him in the cantonal Court of Appeal and the Federal Court (see paragraph 15 above). Moreover, the applicant had been assisted by a lawyer throughout the proceedings that followed his application for a retrial being allowed (see paragraph 10 above).

29. The Commission subscribed in substance to the Government's view.

30. The Court recalls that, when the impartiality of a tribunal for

the purposes of Article 6 para. 1 (art. 6-1) is being determined, regard must be had not only to the personal conviction and behaviour of a particular judge in a given case - the subjective approach - but also to whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect (see, among other authorities, the *Bulut v. Austria* judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, p. 356, para. 31).

31. As regards the subjective aspect of such impartiality, the Court notes that there was nothing to indicate in the present case any prejudice or bias on the part of Judges Metzener, Becht-Gutmann and Memminger and that moreover the applicant did not level any criticism at them in this respect. It cannot but presume their personal impartiality (see the *Bulut* judgment cited above, p. 356, para. 32).

There thus remains the objective test.

32. In this connection the Court observes that the instant case does not concern the successive exercise of different judicial functions, but judges who sat twice in the same capacity.

33. In its judgments in the cases of *Ringeisen v. Austria* and *Diennet v. France*, the Court held that "it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority". The Court observed that "no ground for legitimate suspicion can be discerned in the fact that" judges who "had taken part in the first decision" also participate in the second (see the judgments of respectively 16 July 1971, Series A no. 13, p. 40, para. 97, and 26 September 1995, Series A no. 325-A, p. 17, para. 38).

34. The applicant argued that this case-law concerned the situation of judges to whom a case was remitted after a decision had been set aside or quashed by a higher court. In such circumstances they no longer had a "wide margin of appreciation", which made it less shocking that they should retry the case. In the present case, on the other hand, the members of the Criminal Court had retained complete freedom of decision in the retrial. In addition, they had all three already convicted Mr Thomann in absentia, whereas in the *Ringeisen* and *Diennet* cases, only some of the members of the court to which the case had been remitted had taken part in the first examination of the case.

35. The Court does not find these arguments persuasive.

As the Federal Court explained (see paragraph 13 above), judges who retry in the defendant's presence a case that they have first had to try in absentia on the basis of the evidence that they had available to them at the time are in no way bound by their first decision. They undertake a fresh consideration of the whole case; all the issues raised by the case remain open and this time are examined in adversarial proceedings with the benefit of the more comprehensive information that may be obtained from the appearance of the defendant in person. That is in fact what happened in the present case.

Such a situation is not sufficient to cast doubt on the impartiality of the judges in question.

36. Furthermore, if a court had to alter its composition each time that it accepted an application for a retrial from a person who had been convicted in his absence, such persons would be placed at an advantage in relation to defendants who appeared at the opening of their trial, because this would enable the former to obtain a second hearing of their case by different judges at the same level of jurisdiction. In addition, it would contribute to slowing down the work of the courts as it would force a larger number of judges to

examine the same file, and that would scarcely be compatible with conducting proceedings within a "reasonable time".

37. In conclusion, there has been no violation of Article 6 para. 1 of the Convention (art. 6-1).

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 June 1996.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar