



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

SECOND SECTION

CASE OF WETTSTEIN v. SWITZERLAND

(Application no. 33958/96)

JUDGMENT

STRASBOURG

21 December 2000

FINAL

21/03/2001

In the case of Wettstein v. Switzerland,

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

Mr C.L. ROZAKIS, *President*,

Mr A.B. BAKA,

Mr L. WILDHABER,

Mr G. BONELLO,

Mr P. LORENZEN,

Mr M. FISCHBACH,

Mr A. KOVLER, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 23 March and 7 December 2000,

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

PROCEDURE

1. The case originated in an application (no. 33958/96) against the Swiss Confederation lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Swiss national, Mr Heinz Peter Wettstein (“the applicant”), on 7 November 1996.

2. Before the Court, the applicant was represented by Mr A. Staffelbach, a lawyer practising in Zürich. The Swiss Government (“the Government”) were represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice.

3. The applicant complained under Article 6 § 1 of the Convention of the lack of impartiality of two judges in building proceedings who in separate proceedings had acted as lawyers, or through an office partner, against the applicant.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 23 March 2000 the Court declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

7. The Court having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the Government, but not the applicant, filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, born in 1930, is a businessman living in Pfäffikon (Switzerland).

A. Background

9. The applicant is the owner of two properties, of 115 sq. m. and 51 sq. m. respectively, in the municipality of Kloten. Half of the second property is tied up with a joint ownership of part of a path. In the 1950s an area zoning plan was prepared, although no general settlement regarding the applicant's properties was achieved. The applicant also unsuccessfully requested the Kloten municipality on a number of occasions to take over the two properties and to compensate him accordingly.

10. The applicant was also involved in other building proceedings in the Kloten municipality in which the opposing party, a cantonal insurance pension office, was represented by a lawyer, Mr W.

11. The applicant was furthermore involved in building proceedings against the Küsnacht municipality in which that municipality was represented by a lawyer, Mrs R. These proceedings were conducted before the Administrative Court of the Canton of Zürich and in last resort before the Federal Court, its decision having been given on 24 October 1995.

12. Mrs R. and Mr W. are practising lawyers (*Rechtsanwälte*) who at that time shared office premises in Zürich together with Mr L. Lawyers R. and L. also acted as part-time administrative court judges at the Administrative Court of the Canton of Zürich.

B. Proceedings instituted by the applicant

13. In the proceedings concerning the applicant's properties in Kloten (see paragraph 9 above), the applicant filed on 15 February 1995 an action with the Administrative Court of the Canton of Zürich, requesting an order that the Kloten municipality take over the two properties, including the joint ownership, for the sum of 368,200 Swiss francs.

14. In the applicant's case, the bench of the Administrative Court was then composed of five judges, namely the Vice-President, three administrative court judges and one substitute judge. Among the administrative court judges were R. and L., who were part-time judges.

15. On 15 December 1995 the court rejected the applicant's action. The Court found that it was not competent to deal with the matter which appertained to the jurisdiction of the Assessment Commission (*Schätzungskommission*). However, the court declined to transmit the case to the Assessment Commission as the applicant had forfeited his right to claim compensation. Thus, if he had disagreed with the area zoning plan, in particular with the settlement of accounts of 1957, he should have requested the institution of assessment proceedings at the relevant time. The Court found that the claim for compensation would in any event be unfounded as it had to be directed against other proprietors in the area covered by the zoning plan, rather than the municipality.

16. The applicant filed a public-law appeal with the Federal Court in which he complained, on the one hand, about the outcome of the proceedings, on the other, that judge R. had shortly before acted in separate appeal proceedings, instituted by the applicant, as the legal representative of the opposing party, namely the Küsnacht municipality. Moreover, judge R. shared office premises with judge L., and also with W. who, in separate proceedings instituted by the applicant, had represented the opposing party.

17. The public-law appeal was dismissed by the Federal Court on 29 April 1996, the decision being served on 9 May 1996. In its decision, the court dealt with the applicant's complaint that certain judges of the Administrative Court had not been impartial as follows:

“The interrelations mentioned may raise certain doubts in view of Article 58 § 1 of the Federal Constitution which requires the impartiality of judges. However, the applicant does not claim that R. or another member of the Administrative Court was in fact biased when giving the contested decision. The Federal Court has already previously held that the fact that legal representatives in the Canton of Zürich also acted as part-time administrative court judges could under certain circumstances result in an interrelation of interests. The Court found, however, that it could be expected from a part-time judge that he could distinguish between his official function and his private professional activities. A part-time judge was not, therefore, obliged to stand down merely because he had represented legal interests in other proceedings which were opposed to those of the applicant ... In view of these principles it can equally not be assumed in the present case that the Administrative Court was composed of judges who could be regarded as biased when giving the contested decision.”

18. The Federal Court furthermore did not consider it arbitrary that the Administrative Court had found that the applicant's claims were forfeited as he had failed duly to raise them.

19. On 20 August 1996 the Federal Court dismissed the applicant's request to reopen the proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Administrative Court of the Canton of Zürich

20. The Administrative Court of the Canton of Zürich consists of both full-time and part-time judges, the latter also acting as practising lawyers on a part-time basis.

21. Section 34 of the Administrative Judiciary Procedure Act (*Verwaltungsrechtspflegegesetz*) of the Canton of Zürich of 1959 concerns “incompatibility” (*Unvereinbarkeit*) and stated in the version in force at the relevant time:

“1. The office of a full-time judge of the Administrative Court is incompatible with any other full-time professional activity [*hauptberufliche Tätigkeit*]. Full-time judges may not be members of the Federal Assembly nor members or registrars of a municipal or district council. They are not allowed legally to represent third persons before courts and administrative bodies. An authorisation of the cantonal parliament is required if they wish to belong to the administration or management of a commercial company or cooperative acting for commercial purposes.

2. Part-time judges may not be employed full-time by an administrative authority or a court, and may not be members or registrars of a municipal or district council.”

22. The Administrative Judiciary Procedure Act was revised in 1997 and section 34 now states:

“1. The office of a full-time member of the Administrative Court is incompatible both with any other full-time professional activity and with the professional representation of third persons before courts or administrative authorities.

2. The office of a part-time member of the Administrative Court is incompatible with the professional representation of third persons before the Administrative Court ...”

B. Situation in Switzerland

23. In Switzerland no particular magistrate's training is required to enter the judicial profession. This explains, *inter alia*, the comparatively high number of practising lawyers (legal representatives) acting as part-time or substitute judges.

1. Federal level

24. The Federal Court consists of thirty full-time and fifteen part-time judges, and the Federal Insurance Court consists of nine full-time and nine part-time judges. Part-time judges may exercise the profession of practising lawyer. According to section 22 of the Federal Judiciary Act

(*Organisationsgesetz*), judges shall stand down if, in a particular case, they have participated in another capacity, *inter alia* as legal adviser or as practising lawyer. The First Public Law Division of the Federal Court furthermore avoids appointing as part-time judges persons resident in the canton in which the case originates.

25. In various federal appeals commissions (*Rekurskommissionen*) provision is made for full-time and part-time judges. Whatever other functions the latter exercise, these functions may not compromise the accomplishment of their tasks or the independence and reputation of the appeals commission.

2. Situation in the cantons

26. In various cantons, no particular regulations exist as to part-time judges acting as practising lawyers, for example for certain judges of the Cantons of Appenzell Inner Rhodes, Graubünden and Valais. Other cantons have specific legislation on the matter.

27. For instance, certain cantonal courts are composed exclusively of full-time judges who exercise no other legal profession, for instance the Cantonal and Administrative Courts of the Cantons of Berne and of Lucerne; the Administrative Court of the Cantons of Fribourg and Ticino; the Cantonal Court of the Canton of Thurgau; and the Cantonal Court and the Court of Appeal of the Canton of Schaffhausen. In the Canton of Graubünden, as from 2001, eight of the eleven presidents of the first-instance courts will act as full-time judges.

28. In some cantons, certain part-time judges are prohibited from acting as practising lawyers, for instance in the Canton of Basle Rural (part-time judges of the Court of Appeal in criminal cases) and in the Canton of Aargau (part-time judges of the Cantonal Court and the specialised administrative courts and the presidents of the district courts). In the Canton of Berne a new law has been proposed which, as from 2001, intends to prohibit part-time judges from acting as practising lawyers, although this function will continue to be possible for substitute judges. In the Canton of St Gall, part-time district court judges may not act as practising lawyers in the district in question.

29. In various cantons part-time judges of a court may not appear before that court as practising lawyers, for instance in the Cantons of Schwyz, Obwalden, Zug, Aargau (in respect of the Administrative Tribunal), Basle Urban (in respect of the regular judge at the Court of Appeal in administrative matters), St Gall (in respect of part-time judges who are otherwise employed for more than 40% of their time), Graubünden (in respect of judges of the administrative courts and their respective divisions and, as from 2001, in respect of district and regional court presidents and their deputies). The Canton of Basle Rural is currently revising its relevant legal norms along these lines.

30. Certain cantonal courts envisage the possibility for substitute judges to act as practising lawyers, for instance in the Cantons of Aargau (labour courts), Berne (Cantonal and Administrative Court), Basle Urban, Geneva, Fribourg (Administrative Court), Ticino, Solothurn and Schaffhausen (Court of Appeal and Cantonal Court).

C. Case-law of the Federal Court

31. The Federal Court has pronounced on various occasions on the question of the impartiality of lawyers acting as judges, in particular the danger of a link of dependency between the judge and one of the parties. For instance, a lawyer may not act as judge in a case where he or she is representing one of the parties to the case, or where in separate pending proceedings he or she is representing the opposing party. On the other hand, as a rule no issue will arise where the lawyer once represented a party and the mandate has been completed. The mere fact that the lawyer generally advises in building matters does not imply that as a judge he will necessarily favour a plaintiff who is involved in the construction of a house (see judgment of 15 May 1992, *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 94, 1993, 87; and the judgment of 20 December 1990, *Arrêts du Tribunal fédéral suisse* (ATF), vol. 116 Ia, p. 485).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

32. The applicant complained of the lack of impartiality of the two administrative court judges R. and L. These judges had themselves, or through their office partner W., acted against the applicant in other proceedings. The applicant relied on Article 6 § 1 of the Convention which provides, in its relevant parts:

“1. In the determination of his civil rights and obligations ... , everyone is entitled to a ... hearing ... by an independent and impartial tribunal ...”

33. The Government submitted that the proceedings complied with Article 6 § 1 of the Convention.

A. The parties' submissions

1. The applicant

34. The applicant submitted that in some areas of administration in Switzerland there were particularly close links between practising lawyers and the judiciary. In view of the problems which have arisen, the Canton of Zürich has revised its legislation which now excludes for part-time judges the professional representation of third parties. As a result of these changes, the office in which lawyers R., L. and W. worked no longer exists.

35. The applicant referred to everyday legal practice where a conflict of interests experienced by an individual lawyer in a partnership consisting of several lawyers implied that not only this lawyer but all other staff were equally excluded from taking on the same work. The applicant referred to the strict standards applying to lawyers, for instance that a lawyer may not act for two opposing parties and may not accept a request from a third party to represent him or her against a previous client. These standards also applied to courts with a mixed composition. In the present case, it was not therefore important which of the three lawyers were affected by the conflict of interests.

36. The applicant contended that the lawyers should not have been allowed to act as judges. There was always a danger of at least a potential conflict of interests for administrative court judges: either they considered the possibility of obtaining future work from the public authorities concerned and did not want to annoy them by voting against them; or they did not want to lose their goodwill when taking future decisions on granting planning permission, on which they were dependent for their private clients who wanted to carry out construction projects. The interrelated interests of a total of two out of five judges in the instant case amounted to an appearance of lack of impartiality.

2. The Government

37. The Government submitted, with reference to the Federal Court's case-law, that in the present case there was no link of dependency between judge R. and the party opposing the applicant in the administrative court proceedings. R. had represented another municipality – Küsnacht and not Kloten – and in proceedings concerning a matter completely unrelated to the present case. R.'s representation of the Küsnacht municipality had been terminated when the Administrative Tribunal gave its decision. One could not therefore say that judge R. in any way appeared to favour the Kloten municipality. Lawyer W., on the other hand, acted in a completely different case and did not represent Kloten. The applicant had not submitted that the three lawyers R., L. and W. undertook a concerted action in order to favour

Kloten. Indeed, it could be expected from a part-time judge that he distinguished between his different professional activities.

38. In the Government's opinion, Article 6 of the Convention did not exclude "mixed" courts where, as for instance in the *Sramek v. Austria* case, practising lawyers acted as judges (see the judgment of 22 October 1984, Series A no. 84, p. 19, § 40). In the present case, there were no grounds to doubt the impartiality of judges R. and L. on subjective grounds. As regards the objective grounds, appearances could be of a certain importance for the accused person, although they could not be decisive. What was decisive was whether the fear of lack of impartiality could be objectively justified. Doubts alone could not suffice. The Government pointed out that judge R. never represented the Kloten municipality as a lawyer before the Administrative Court. In the light of the *Sramek* case, her impartiality would not even be called in question if she had represented Kloten in other proceedings.

39. The Government contended that there was no link *ratione loci, materiae* or *personae* between the different proceedings in which R. and L. were involved as judges, on the one hand, and W. as a lawyer, on the other. In any event, W. had not represented the Kloten municipality.

40. The Government emphasised that the part-time judiciary was of central importance for the cantons. Most courts were composed of part-time judges who had additional professional activities, among them that of practising lawyer. Those cantons which did not have part-time judges had often made provisions for substitute judges who acted as practising lawyers.

B. The Court's assessment

41. The Court recalls at the outset that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see the *Minelli v. Switzerland* judgment of 25 March 1983, Series A no. 62, p. 17, § 35). Accordingly, in the present case there is no reason to doubt that legislation and practice on the part-time judiciary in general can be framed so as to be compatible with Article 6. What is at stake is solely the manner in which the proceedings were conducted in the applicant's case.

42. According to the Court's constant case-law, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – as well as to whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect – the objective approach (see the *Thomann v. Switzerland* judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 815, § 30).

43. 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 R. and L.

44. There thus remains the objective test. Here, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see the *Castillo Algar v. Spain* judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45). This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see the *Ferrantelli and Santangelo v. Italy* judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58).

45. Turning to the present case, the Court notes that judge R. acted against the applicant in separate building proceedings as the legal representative of the Küsnacht municipality. Judges R. and L. both shared office premises with lawyer W. who had previously acted as legal representative in other building proceedings in the Kloten municipality. This situation arose in the Canton of Zürich where, as with the courts of many other cantons, the Administrative Court is composed of both full-time and part-time judges. The latter may practise as legal representatives. The Administrative Judiciary Procedure Act in force at the relevant time contained no provisions as to the incompatibility of such legal representation with judicial activities. Section 34(2) of the Act currently in force provides that part-time judges may not act as legal representatives before the Administrative Court.

46. It is true that there was no material link between the applicant's case before the Administrative Court and the separate proceedings in which R. and W. acted as legal representatives. Furthermore, R. and W. had been acting as trained lawyers who were called upon to represent the interests of constantly varying parties.

47. Nevertheless, the Court notes that, when on 15 February 1995 the applicant instituted the present proceedings before the Administrative Court with R. as a judge on the bench, the parallel proceedings in which R. acted as legal representative for the Küsnacht municipality against the applicant were pending before the Federal Court, which gave its decision eight months later on 24 October 1995 (see paragraph 11 above). Less than two months after these proceedings had been terminated the Administrative Court gave its judgment on 15 December 1995. There was, therefore, an overlapping in time of the two proceedings with R. in the two functions of judge, on the one hand, and of legal representative of the opposing party, on the other. As a result, in the proceedings before the Administrative Court, the applicant could have had reason for concern that judge R. would continue to see in him the opposing party. In the Court's opinion this situation could have raised legitimate fears in the applicant that judge R. was not approaching his case with the requisite impartiality.

48. The fact that W., an office colleague of judges R. and L., had in other proceedings represented the party opposing the applicant, while only of minor relevance, could be seen as further confirming the applicant's fear that judge R. was opposed to his case.

49. In the Court's view, these circumstances serve objectively to justify the applicant's apprehension that judge R. of the Administrative Court of the Canton of Zürich lacked the necessary impartiality.

50. Consequently, in the present case there has been a violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

52. The applicant claimed 368,200 Swiss francs (CHF) for pecuniary damage resulting from the fact that the Kloten municipality had used his property without compensation during forty-two years. The Government saw no connection between the pecuniary damage alleged and the conduct of the Swiss authorities.

53. The Court notes that the applicant is in fact requesting damages of the same amount as in the action which he introduced before the Administrative Court of the Canton of Zürich on 15 February 1995 (see paragraph 13 above). However, the Court cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 of the Convention would have been (see the *Incal v. Turkey* judgment of 9 June 1998, *Reports* 1998-IV, p. 1575, § 82). In the present case it perceives no causal link between the breach of Article 6 § 1 of the Convention and the alleged pecuniary damage. There is, therefore, no ground for an award under this head.

B. Costs and expenses

54. Under this head the applicant claimed a total of CHF 65,120.05, namely CHF 29,486.50 for lawyer's costs in the domestic proceedings; CHF 20,133.55 for lawyer's costs in the Strasbourg proceedings; and CHF 15,500 for procedural costs incurred in the domestic proceedings.

55. The Government contended that only the public-law appeal proceedings before the Federal Court could have served to redress the alleged violation of Article 6 § 1 of the Convention, although these proceedings also concerned other complaints raised by the applicant. In respect of the Strasbourg proceedings the Government submitted that only one of the applicant's complaints had been declared admissible and that this particular complaint concerned only a minor part of the observations submitted by the applicant during the admissibility proceedings. The Government considered as adequate the sum of CHF 2,000 for the lawyer's costs in the domestic proceedings; CHF 3,000 for the lawyer's costs in the Strasbourg proceedings; and CHF 3,000 for the procedural costs incurred in the domestic proceedings; namely a total of CHF 8,000.

56. The Court, in accordance with its case-law, will consider whether the costs and expenses claimed were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

57. The Court finds the applicant's claims excessive. Making an assessment on an equitable basis, the Court awards him CHF 2,000 for the lawyer's costs in the domestic proceedings; CHF 4,000 for the lawyer's costs in the Strasbourg proceedings; and CHF 3,000 for the procedural costs incurred in the domestic proceedings; namely the total sum of CHF 9,000.

C. Default interest

58. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, CHF 9,000 (nine thousand Swiss francs) in respect of legal costs;
 - (b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 21 December 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President