



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

SECOND SECTION

CASE OF F.R. v. SWITZERLAND

(Application no. 37292/97)

JUDGMENT

STRASBOURG

28 June 2001

FINAL

28/09/2001

This judgment will become final in the circumstances set out in Article 44
§ 2 of the Convention.

In the case of F.R. 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,

Mrs M. TSATSA-NIKOLOVSKA,

Mr A. KOVLER, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 11 July 2000 and on 7 June 2001,

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

PROCEDURE

1. The case originated in an application (no. 37292/97) against Switzerland 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 F.R. (“the applicant”), on 31 July 1997.

2. The Swiss Government (“the Government”) were represented by their Deputy Agent, Mr F. Schürmann, Head of the Human Rights and Council of Europe Section of the Federal Office of Justice. The President of the Chamber acceded to the applicant’s request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicant complained under Article 6 § 1 of the Convention of a breach of the equality of arms in that the Federal Insurance Court in its judgment of 10 June 1997 had not considered a statement of his; and that in these proceedings certain witnesses had not been heard and that he himself had not been properly heard.

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 of the Rules of Court.

6. By a decision of 11 July 2000 the Court declared the application admissible.

7. After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, a Swiss citizen born in 1941, is a businessman residing in Gersau in Switzerland.

A. Institution of compensation proceedings

9. The applicant's son founded the R.AG, a construction company, whereby the applicant acted as guarantor (*Bürge*) for a credit. He also assisted his son in various administrative tasks concerning the company.

10. In 1994, the R.AG company went bankrupt. The Compensation Office (*Ausgleichskasse*) of the Canton of Schwyz suffered losses in particular as to contributions of the company to the old age insurance scheme. The Compensation Office regarded the applicant as being the administrative and commercial manager of the company and therefore liable for the sum of 13,925.05 Swiss francs (CHF).

11. The applicant objected, whereupon on 28 January 1995 and 3 January 1996 the Compensation Office introduced a compensation action against the applicant.

12. The action was upheld on 11 December 1996 by the Administrative Court (*Verwaltungsgericht*) of the Canton of Schwyz which nevertheless reduced the amount to CHF 12,462.15.

13. In its decision, the Administrative Court referred, *inter alia*, to the statement of a certain R.H., a former member of the board of the company, according to which the applicant had granted the company an advance payment. The Court then examined whether the applicant had in fact had the position of an executive (*Organ*) of the company and whether in this respect it was necessary to hear the witnesses Ch.R and R.H. The decision referred, *inter alia*, to two letters of the applicant to the Compensation Office, *i.e.*, of 24 December 1993 in which he stated that the company no longer had any assets, and of 27 July 1994 in which he had signed "as a representative". As a result, the Court concluded that the applicant had in fact had the position of an executive of the company, for which reason further evidence was not necessary.

B. Proceedings before the Federal Insurance Court

14. On 31 January 1997 the applicant filed an administrative law appeal with the Federal Insurance Court (*Eidgenössisches Versicherungsgericht*), contesting the action, and requesting the hearing of various witnesses, *inter alia*, Ch.R. and R.H. as well as the March District Court where he had introduced proceedings against a certain R.H.

15. The applicant's appeal was transmitted for observations to the Administrative Court of the Canton of Schwyz, the Compensation Office of the Canton of Schwyz, and the Federal Social Insurance Office (*Bundesamt für Sozialversicherung*).

16. On 28 February 1997, the Administrative Court of the Canton of Schwyz submitted its observations on the applicant's administrative law appeal to the Federal Insurance Court, the statement numbering five pages. The Administrative Court proposed in particular the dismissal of the applicant's appeal.

In its statement the Administrative Court commenced with a "preliminary remark" according to which the applicant had not, in the administrative proceedings, referred to the separate procedure before another court concerning a certain R.H. As a result, the Court had not regarded it necessary to consult that case-file, and it could not be said that the Administrative Court had not sufficiently examined the facts. The Administrative Court further stated that the applicant had implicitly admitted that he was an executive of the R.AG company when filing the letters of 24 December 1993 and 27 July 1994.

17. According to the submissions of the Administrative Court, it further transpired from separate execution proceedings that various foreign currency deals had been transacted by the applicant's family over the R.AG, leading to returns of CHF 65,989.40. However, the R.AG was concerned with constructions, not with foreign currency deals. It could not be said that the applicant had not been in a position to take decisions with binding legal effect. The Administrative Court also considered it unnecessary to hear the witnesses Ch.R. and R.H. Thus, in its decision it had considered that the two witnesses were quarrelling with each other, and the applicant had not shown in what respect the hearing of these witnesses would be useful.

18. The Compensation Office submitted a similar statement, whereas the Federal Social Insurance Office did not file any submissions.

19. On 2 May 1997 the Federal Insurance Court transmitted the statement of the Administrative Court of the Canton of Schwyz to the applicant for information, expressing its regret that it had by mistake not done so earlier on.

20. On 15 May 1997 the applicant submitted a statement on the submissions of the Administrative Court of 28 February 1997. The front page read:

"the observations contain three important new points which were not contained in the decision of the Administrative Court. I could not therefore make any observations thereupon in my administrative law appeal of 31 January 1997. As a result, it must be possible for me now to make such observations which I am herewith submitting."

21. The applicant then pointed out that the Administrative Court had stated that he had never mentioned a further set of proceedings against a certain R.H. This was a new point. He had only found out about R.H. in the decision of the Administrative Court itself, for which reason he could not have commented thereupon in the proceedings before the Administrative Court. The applicant furthermore pointed out that the Administrative Court had made new submissions when stating that in view of his letters of 24 December 1993 and 27 July 1994 he had effectively accepted having the position of an executive of the R.AG company.

22. Finally, the applicant explained that the Administrative Court's submissions were also new to the extent that reference was made to foreign currency deals. This information came from the separate proceedings before another District Court, the March District Court, and not from him. To the extent that the Administrative Court concluded on the basis of this information that the applicant had, in fact, had the position of an executive, he should have been permitted to comment on this point.

23. The Federal Insurance Court dismissed the applicant's administrative law appeal on 10 June 1997.

24. The decision first recalled the procedure before the Federal Insurance Court itself, noting in particular that the applicant had submitted further observations on 15 May 1997 without being requested to do so. The court then noted that according to Section 110 § 4 of the Federal Judiciary Act (*Organisationsgesetz*), observations were only exceptionally exchanged a second time between the parties. The decision continued:

"(Such a second exchange of observations) will be required for reasons of a fair hearing if in the observations new factual statements have been made, the correctness of which does not immediately transpire from the case-file and which are of relevance for the decision. As regards new legal arguments it must be borne in mind that the Federal Insurance Court is called upon *ex officio* to apply the correct law. The mere fact that these observations refer to supporting arguments in addition to those mentioned in the contested decision cannot justify the possibility to reply thereto. It would be different, if the Federal Insurance Court were of the opinion that the contested decision could be upheld, not with the reasons originally given, but with other reasons, now mentioned in the observations ...

In the light of these principles the applicant's request along these lines, namely to have a second exchange of observations, appears unfounded. It is irrelevant in this respect that the observations of the Administrative Court were only submitted belatedly (*nachträglich*). Thus, in those observations no new factual or legal points

were raised: Rather, the circumstances mentioned by the applicant (statement of R.H. about advances paid to the capital of the company; profits from currency deals) disclose that they were already known in the case-file stemming from the proceedings of the Gersau and Lachen execution authorities and thus clearly transpired from the file. Therefore, the applicant could, and ought to, have prepared everything necessary in order to avoid a second exchange of observations ... Furthermore, the new point of the previous court which he has mentioned, regarding his executive position, merely concerns an additional argument which further supports the grounds mentioned in the contested decision. This does not warrant the possibility of a further reply. As a result, the applicant's observations, submitted without being so requested, cannot be legally considered (*aus dem Recht zu weisen*)."

25. Insofar as the applicant complained that certain witnesses had not been heard, the Federal Insurance Court considered, *inter alia*, that the Administrative Court had pertinently mentioned the circumstances under which a company executive became liable for the company's debts. In respect of the witnesses Ch.R. and R.H., the hearing of which had been requested by the applicant, the Court referred to the accurate observations filed by the Administrative Court on 28 February 1997.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. According to Section 128 of the Federal Judiciary Act (*Organisationsgesetz*), the Federal Insurance Court is called upon to examine administrative law appeals against cantonal decisions in last resort concerning matters of social insurance. In principle, the court is free to establish the facts. However, according to Section 105 § 2 of the Act, it considers itself bound by the facts if the lower instance which determined them was a court to the extent that the determination is not manifestly incorrect, incomplete or in breach of essential procedural rules. As a result, there is only a limited possibility to put forward new facts in the proceedings before the Federal Insurance Court (see *Bundesgerichtsentscheide* [BGE] 120 V 485).

27. In the administrative law proceedings before the Federal Insurance Court there is, in principle, only one exchange of statements in which the other parties and instances concerned may file their observations on the administrative law appeal (Section 110 § 4 of the Federal Judiciary Act). According to the practice of the Federal Insurance Court, a second exchange of statements will take place if new facts transpire in the observations the correctness of which cannot be established in the case-file and which observations appear pertinent for the final decision. If new legal considerations are raised for the first time in these observations, a second exchange of statements will take place if the contested decision can no longer be based on the reasons given by the lower court (see BGE 119 V 323; 114 Ia 314; 111 Ia 3; 94 I 662).

THE LAW

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

28. The applicant complained of various breaches of his right to a fair hearing, in particular that there had been a breach of the principle of equality of arms. The applicant relied on Article 6 § 1 of the Convention which states, insofar as relevant:

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

29. The Court has first examined the applicant's complaint of a breach of the equality of arms. He pointed out that in its observations to the Federal Insurance Court, the Administrative Court of the Canton of Schwyz had mentioned various new points. In its judgment of 10 June 1997 the Federal Insurance Court had implicitly relied on these observations, though it had failed to consider his own statement of 15 May 1997 which he had filed with that court.

30. In the applicant's view, the observations submitted by the Administrative Court demonstrated that that court had based its judgment to a significant degree on points mentioned for the first time in the observations. As a result, the applicant could not reply thereto in the proceedings before the Administrative Court. The Federal Insurance Court breached the principle of the equality of arms in that it did not take account of his submissions of 15 May 1997, whereas it did so of the observations of the Administrative Court. In principle, each party had the right to state its case in a manner which did not place it at a disadvantage compared with the other party.

31. The Government contested a breach of Article 6 § 1 of the Convention, contending that the regulation provided for by the Federal Judiciary Act, in particular regarding the restricted jurisdiction of an appeal court, complied with the requirements of Article 6 § 1 of the Convention. It was submitted that, even if the Federal Insurance Court had not formally considered the applicant's reply of 15 May 1997, in fact the applicant was able substantially to put forward his point of view. Thus, the applicant had obtained copies of the observations of the Administrative Court, albeit belatedly in view of an administrative inadvertence, and he had had the possibility to reply thereto. In the Government's opinion, the present case thus differed from the *Nideröst-Huber v. Switzerland* case (judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 107 *et seq.*) where that applicant had not received the observations at all.

32. The Government further referred to the Court's case-law, according to which the domestic court concerned did not have to examine in detail every point raised by the parties (see the *van de Hurk v. the Netherlands* judgment of 19 April 1994, Series A no. 288, p. 20, § 61). As a result, the applicant had no absolute right that the Federal Insurance Court explained the reasons why it dismissed the supplementary observations developed in his reply, *a fortiori* as that court found that the observations of the Administrative Court contained no new elements and were not pertinent for its decision to be given.

33. The Government recalled that the Federal Insurance Court had actually been aware of the applicant's reply of 15 May 1997, and even commented thereupon. It was true that the Federal Insurance Court did not regard it necessary itself to order a second exchange of statements, particularly as such a second exchange had already taken place before the lower court. Nevertheless, the Federal Court gave detailed reasons for its judgment of 10 June 1997. It transpired from the latter that the applicant's observations contained "no new factual or legal points". The court went on to discuss the circumstances mentioned by the applicant, and it explained in conclusion why the elements, which the applicant regarded as new, were not in fact so. Here again, it had to be borne in mind that the Federal Insurance Court's jurisdiction was limited, and that the applicant's possibility to submit new facts was quite limited. In fact, he should have submitted the reasons stated in his reply of 15 May 1997 already before the lower court.

34. According to the Court's case-law, the principle of equality of arms - one of the elements of the broader concept of fair trial - requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among other authorities, the *Ankerl v. Switzerland* judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, pp. 1567-68, § 38).

35. Turning to the circumstances of the present case, the Administrative Court of the Canton of Schwyz submitted observations to the Federal Insurance Court, but the applicant was not permitted to reply thereto. However, the Cantonal Court, which is an independent tribunal, could not be regarded as the opponent of the applicant in these proceedings. Accordingly, no infringement of equality of arms has been established.

36. Nevertheless, the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed (see the *Lobo Machado v. Portugal* and *Vermeulen v. Belgium* judgments of 20 February 1996, *Reports* 1996-I, p. 206, § 31, and p. 234, § 33, respectively).

37. In the present case, the observations submitted by the Administrative Court ran to five pages and expressly called for the applicant's administrative law appeal to be dismissed. In the Court's opinion, the effect

which the observations actually had on the judgment of the Federal Insurance Court is of little consequence. Thus, the observations came from an independent tribunal which, furthermore, had a thorough knowledge of the file, having previously considered the merits of the case, and it is unlikely that the Federal Court would have paid them no heed. In fact, the Federal Court relied on these observations, *inter alia*, when rejecting the applicant's complaint that the witnesses Ch.R. and R.H. had not been heard. It was therefore all the more needful to give the applicant an opportunity to comment on them if he wished to do so (see the Nideröst-Huber v. Switzerland judgment of 18 December 1997, *Reports* 1997-I, p. 108, § 27).

38. It is true that the applicant did in fact submit a reply to the Federal Insurance Court on 15 May 1997 concerning the observations of the lower court. The respondent Government pointed out that the Federal Insurance Court had in fact been aware of this reply and even commented thereupon in its judgment of 10 June 1997. The Court nevertheless notes that the Federal Insurance Court in its judgment explicitly and unequivocally stated that "the applicant's observations, submitted without being so requested, (could) not be legally considered".

39. Indeed, the Federal Insurance Court found it unnecessary to consider the applicant's reply, *inter alia*, as the observations submitted by the lower court contained no new factual or legal points. However, the parties to a dispute should in cases such as the instant one, be given the possibility to state their views as to whether this is the case and whether or not a document calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file (see the Nideröst-Huber judgment cited above, p. 108, § 29).

40. Article 6 § 1 of the Convention is intended above all to secure the interests of the parties and those of the proper administration of justice (see, *mutatis mutandis*, the Acquaviva v. France judgment of 21 November 1995, Series A no. 333-A, p. 17, § 66). In the present case, respect for the right to a fair trial, guaranteed by Article 6 § 1 of the Convention, required that the applicant be given the opportunity to comment on the observations submitted by the Administrative Court of the Canton of Schwyz. However, the applicant was not afforded this possibility.

41. That finding alone constitutes a breach of Article 6 § 1 of the Convention. The Court consequently finds it unnecessary to examine the applicant's further complaint under that provision that he did not have a fair hearing in that in the proceedings before the Administrative Court of the Canton of Schwyz certain witnesses were not heard and that he himself had not been properly heard (see, *mutatis mutandis*, the De Haes and Gijssels v. Belgium judgment of 24 February 1997, *Reports* 1997-I, p. 239, § 59).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. In respect of pecuniary damage, the applicant claimed 9,012.15 Swiss francs (CHF) of the compensation of CHF 12,462.15 which he had to pay to the Compensation Office of the Canton of Schwyz. He further claimed CHF 2,000 for non-pecuniary damage.

44. The Government asked the Court to refuse these claims, arguing that there was no causal link between the alleged violation and the damage claimed.

45. In the Court’s opinion, there is no causal connection between the violation complained of and the pecuniary damage alleged. It is in particular not the Court’s task to speculate as to what the outcome of the case would have been if the proceedings had been compatible with the requirements of Article 6 § 1 of the Convention (see the *Nideröst-Huber* judgment cited above, p. 109, § 37).

46. As regards non-pecuniary damage, the Court considers that it is sufficiently compensated for by the finding of a breach of Article 6 § 1 of the Convention.

B. Costs and expenses

47. The applicant also requested a total of CHF 4,303.95 for costs and expenses, namely CHF 1,200 which he had incurred through the proceedings before the Federal Insurance Court and CHF 3,103.95 as costs for his lawyer.

48. The Government agreed to reimburse the sum of CHF 3,103.95, while asking the Court to refuse the remainder of the claim.

49. The Court observes that, according to its case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, among other authorities, the *Philis v. Greece* (no. 1) judgment of 27 August 1991, Series A no. 209, p. 25, § 74).

50. In the Court’s opinion, the costs relating to the proceedings before the Federal Insurance Court could not have been incurred in order to prevent

or rectify a violation affecting the proceedings in that very court. It accordingly accepts the Government's submission that it should refuse this part of the claim.

51. In respect of the legal costs incurred by the applicant, the Court awards the sum claimed, namely CHF 3,103.95.

C. Default interest

52. 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* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
3. *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, 3,103 (three thousand one hundred and three) Swiss francs and 95 (ninety-five) centimes for costs and expenses;
 - (b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 28 June 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Bonello is annexed to this judgment.

C.L.R.
E.F.

CONCURRING OPINION OF JUDGE BONELLO

So far, after a finding by the Court that a Convention guarantee has been violated, I have consistently voted against the practice of denying the victim of that breach any non-pecuniary compensation by stating that the finding in itself constitutes just satisfaction. This I did for the reasons set down in detail in my partly dissenting opinion in “Aquilina v. Malta” (29 April 1999, 1999-3, p. 247).

My consistency aimed at underscoring a longing to place a sanitary corridor between me and what I consider an undesirable practice.

Now my point has been made, and in the interests of collegiality, judicial certainty and to avoid, where possible, fragmentation in decision-making, in similar cases in the future I will be joining the majority.

Naturally, when, in my view, the circumstances of a specific case introduce some particularly cogent reasons why non-pecuniary compensation ought to be awarded, I will make that opinion manifest.