



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

FOURTH SECTION

CASE OF ZIEGLER v. SWITZERLAND

(Application no. 33499/96)

JUDGMENT

STRASBOURG

21 February 2002

FINAL

21/05/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ziegler v. Switzerland,

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

Mr G. RESS, *President*,

Mr A. PASTOR RIDRUEJO,

Mr L. WILDHABER,

Mr L. CAFLISCH,

Mr J. MAKARCZYK,

Mr J. HEDIGAN,

Mrs S. BOTOCHAROVA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 7 June 2001 and on 30 January 2002,

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

PROCEDURE

1. The case originated in an application (no. 33499/96) 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 two Swiss nationals, Mr Jost Ziegler and Mr Martin Ziegler (“the applicants”), on 9 October 1996.

2. The applicants were represented before the Court by Mr P. Züger, a lawyer practising in Lachen. 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 applicants complained under Article 6 § 1 of the Convention that in the proceedings before the Federal Court they could not reply to the submissions of the Cantonal Court and of the opposing party and that they could not consult the case-file.

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 Fourth 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 7 June 2001 the Chamber declared the application partly admissible.

7. On 20 June 2001 the President invited the parties to submit memorials in the case (Rule 59 § 3). The applicants were further invited to submit their claim for just satisfaction under Article 41 of the Convention (Rule 60 § 1). The applicants filed their reply on 10 September 2001. The Government replied on 31 October 2001. After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within former Section IV.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants are Swiss citizens born in 1950 and 1957, respectively. The first applicant lives in Siebnen, the second in Lachen in Switzerland.

A. Proceedings before the courts of the Canton of Schwyz

10. In 1994 the applicants announced their intention to construct a subterranean garage in Lachen. The neighbours complained, arguing that certain prescribed boundary distances between the real properties had not been observed. Their objection was dismissed by the March District Court (*Bezirksgericht*) on 19 July 1994. The court awarded the applicants, as defendants, 8,000 Swiss francs (CHF) for procedural expenses (*Prozessentschädigung*), as the plaintiffs, their neighbours, could themselves have verified that the distances in question had been respected. The court costs of CHF 1,149.20 were imposed on the plaintiffs.

11. The neighbours filed an appeal (*Berufung*) which the Cantonal Court (*Kantonsgericht*) of the Canton of Schwyz dismissed on 4 July 1995. In the operative part of its decision, the court took formal note of the applicants' commitment that no changes would be made within fifty centimetres from the border separating the real properties. The court also ordered the applicants to pay the plaintiffs CHF 4,000 as procedural expenses for the first-instance proceedings and CHF 4,000 for the appeal court proceedings, and imposed on the applicants the first-instance court costs as well as appeal court costs amounting to CHF 3,450.50. The court found that the applicants' plans had been incomplete and even incorrect and the terms employed had been vague, thus prompting the plaintiffs to uphold their objection. The uncertainty brought about by the applicants' conduct contrary to good faith had actually provoked the procedures before the two instances.

B. Proceedings before the Federal Court

12. On 9 October 1995 the applicants filed a public law appeal (*staatsrechtliche Beschwerde*) with the Federal Court (*Bundesgericht*), complaining, first, about the imposition of costs, which in their view was disproportionate as the Cantonal Court had dismissed the plaintiffs' claims. There had been no obligation to submit plans, and neither the first nor the second instance had considered it necessary to ask for further plans. It was unclear to what extent the terms used had been imprecise, and indeed, the objections raised by the plaintiffs had *a priori* been completely unfounded. On the whole it appeared disproportionate that, for a matter of a value of CHF 10,000, the applicants were now asked to pay CHF 12,000 for completely unnecessary proceedings. Second, the applicants complained that the Cantonal Court had in its judgment incorrectly taken note of their commitment which in fact had not been requested by the parties in the proceedings.

13. The Federal Court transmitted the applicants' public law appeal for observations to both the Cantonal Court and the plaintiffs.

14. The Cantonal Court sent its reply, running to seven pages, together with the case-file, to the Federal Court on 16 November 1995, requesting the latter to dismiss the applicants' public law appeal. In its submissions it explained why the applicants' plans had been vague and that precise early information would have been necessary. The court continued that it was "quite typical for the (applicants') mentality" (*geradezu typisch für die Mentalität*) that they had submitted sketches of plans only after objections had been filed, since they knew that there were tensions with their neighbours and that the latter would object. Other remarks of the applicants were misplaced (*deplaziert*). The Cantonal Court furthermore submitted that it had been competent to formulate conditions in its judgment, in particular as to changes in the border area between the properties.

15. The plaintiffs filed their observations of five pages on 4 December 1995. Therein, they commented on the judgment of the Cantonal Court, and they requested the Federal Court to dismiss the applicants' public law appeal.

16. The Federal Court transmitted the various observations to the applicants' lawyer who, on 11 December 1995, replied:

"In the above-mentioned case I thank you for serving the observations. I should like to ask you to let me have the case-file for consultation (which in the cantonal proceedings could not be fully undertaken, as the case-file presented by the Cantonal Court was incomplete).

In its written 'reply' (of 7 pages), the lower court adds to its decision numerous new grounds as well as amendments to its reasoning. They are hardly objective and aim at twisting the facts in a manner not to be expected from a court. Pursuant to S. 4 § 1 of

the Swiss Federal Constitution and Article 6 § 1 of the Convention, the applicants request the opportunity to comment on the 'reply'."

17. By letter of 13 December 1995 the Federal Court replied:

"You are objecting against inadmissible statements in the observations of the Cantonal Court and you request transmittal of the case-file.

At the present stage of the proceedings, the parties can no longer exercise any rights. Therefore, and as we need the case-file for our decision, we cannot comply with your request for consultation. Inadmissible statements of the Cantonal Court will be disregarded *ex officio*."

18. On 7 February 1996 the Federal Court dismissed the applicants' public law appeal, the decision being served on 9 April 1996. The judgment noted at the outset that both the Cantonal Court and the opposing party had requested dismissal of the applicants' public law appeal. In its judgment the Federal Court then declared inadmissible as being insufficiently substantiated the complaint that the Cantonal Court had incorrectly taken formal note of the applicants' commitment that they would not make changes within 50 centimetres from the border line separating the two properties. In respect of the complaints about the imposition of costs, the Federal Court noted that the applicants, by expressing the wish to construct the garage, had in fact unintentionally obliged their neighbours to institute proceedings and to defend their property rights, compliance with which had at the outset not sufficiently transpired from the plans. The Cantonal Court was entitled to combine the dismissal of the neighbours' objection with a clause that no changes could be made in the border area between the properties. On the whole, a person wishing to construct became responsible for provoking litigation if he did not from the beginning establish clearly that other persons' rights would not be affected.

II. RELEVANT DOMESTIC LAW

19. Section 93 of the Federal Judiciary Act (*Organisationsgesetz*) envisages the following procedure after a public law appeal has been filed:

"Exchange of Statements

1. If the court orders an exchange of statements, it transmits the appeal to both the authority from which the contested decision or act emanated and to the opposing party as well as any other persons involved. They are given an adequate time-limit to submit the case-file and to file their replies.

2. If the reasons for the decision transpire only from the authority's observations, the appellant may be granted a time-limit to complement his appeal statement.

3. Only exceptionally will there be a further exchange of statements."

THE LAW

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

20. The applicants complained that in the proceedings before the Federal Court they could not reply to the submissions of the Cantonal Court and of the opposing party and that they could not consult the case-file. They 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 ...”

21. The Government were of the opinion that Article 6 § 1 was not applicable and that in any event there had been no violation of the Convention.

A. Applicability of Article 6 § 1

22. The applicants submitted that Article 6 § 1 of the Convention was applicable to the present proceedings. Since the main dispute in issue involved civil rights, it was not easy to understand why the high costs and expenses should be excluded from the scope of the Convention guarantees by splitting the case into the different rights involved.

23. The Government replied that Article 6 § 1 of the Convention was inapplicable in the present case, since it concerned costs and expenses arising from other proceedings. Reference was made in particular to the Report of the European Commission of Human Rights in the case of *Robins v. the United Kingdom* (Report of 4 July 1996, *Reports of Judgments and Decisions* 1997-V, pp. 1814-1816), where it was found that decisions on procedural costs were a subsidiary issue to the merits of a case and did not involve a determination of “civil rights and obligations” within the meaning of Article 6 § 1. While the Court itself did not adhere to this view in its subsequent judgment (*ibid.*, p. 1809, §§ 28-29), the Government submitted that that case differed from the present one in that there was a clear link in that case between the substance of the proceedings, concerning their length, and the costs.

24. The Court recalls its judgment in the case of *Robins v. the United Kingdom*, where it found:

“the legal costs which formed the subject matter of the proceedings in question were incurred during the resolution of a dispute between the neighbours which undoubtedly involved ‘the determination of ... civil rights and obligations’ ... (T)he Court considers that the costs proceedings, even though separately decided, must be seen as a continuation of the substantive litigation and accordingly as part of a ‘determination of ... civil rights and obligations’ ... It follows that Article 6 § 1 is applicable” (*ibid.*, § 29).

25. In the Court's opinion, these considerations apply equally to the present case. It notes, moreover, that the applicants' public law appeal of 9 October 1995 raised an issue as to the merits of the case, at least inasmuch as the costs of the parties were concerned, and indeed, the imposition of court costs was linked to the merits of the case.

26. It follows that Article 6 § 1 of the Convention is applicable.

B. Compliance with Article 6 § 1

1. The parties' submissions

27. The applicants contended that the Federal Court's express refusal to admit observations in reply to the tendentious and largely incorrect statements by the lower court constituted a breach of the principle of the equality of arms. The lower court was able to pronounce itself twice: in its judgment, and later in its observations to the Federal Court. The applicants were only allowed one set of submissions. As such, there was no real difference between the present case and that of *Nideröst-Huber v. Switzerland* (see the judgment of 18 February 1997, *Reports* 1997-I, p. 101 et seq.). In the applicants' submissions, the powers of examination of the Federal Court were irrelevant here.

28. In the applicants' view, the observations which they wished to submit in reply to the Federal Court would have served mainly to refute new and, in particular, biased statements by the lower court. In addition, the Federal Court did not even keep its assurance not to take these statements into account, in fact it even expressly adopted them in part. Granting the right to reply would not have unnecessarily prolonged the proceedings before the Federal Court.

29. The applicants also pointed out that after they had filed their request on 11 December 1995, four months elapsed until the decision was served. Thus, there would have been sufficient time for the Federal Court to part with the case-file for a few days to enable them to consult it.

30. The Government replied that, even assuming that Article 6 § 1 of the Convention was applicable, it did not breach the principle of the equality of arms if the applicants were unable to reply to the observations filed by the Cantonal Court, since that court was not the opposing party in these proceedings. Moreover, both the observations of the lower court and of the opposing party were transmitted to the applicants which, in the Government's opinion, was the major difference to the situation in the *Nideröst-Huber v. Switzerland* case, where that applicant was not at all informed of the observations (*ibid.*). A further difference lay in the fact that in that case the Federal Court was confronted with the substance of the case, whereas the present case concerned only costs and expenses.

31. The Government pointed out that in the present case the Federal Court's jurisdiction was limited to examining whether the decision of the lower court was arbitrary, and that the applicants could not have raised any new submissions as to the facts or the law before that court. A right to reply was furthermore unnecessary since the statements of the lower court could not influence the Federal Court's decision, which would rely exclusively on the contested decision of the lower court. Indeed, in its letter of 13 December 1995, the Federal Court assured the applicants that it would disregard inadmissible statements, and it kept its promise: in its judgment of 7 February 1996, it did not rely on any new arguments to which the applicants had not been able to reply. In any event, national courts were entitled, in the interests of the good administration of justice, to regulate the exchange of observations, and in every procedure the moment would come where observations, regardless from which party, could no longer contribute any new elements to the debate.

32. Finally, insofar as the applicants complained that they were not shown the case-file before the Federal Court, the Government recalled, on the one hand, that the applicants had the possibility of consulting the case-file at the seat of the Federal Court itself. On the other hand, the Government listed all the documents which were in the possession of the applicants, and submitted that the applicants had not made clear which further document they wished to consult.

2. The Court's assessment

33. The Court recalls that the concept of fair trial 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).

34. In the present case, the Cantonal Court of the Canton of Schwyz and the opposing party, the plaintiffs, each submitted observations on the applicants' public law appeal to the Federal Court. Both the observations of the Cantonal Court, which ran to seven pages, and those of the opposing party, running to five pages, requested the Federal Court to dismiss the applicants' public law appeal. The applicants, who received a copy of these submissions, were refused leave to reply thereto.

35. In the Court's view, the present case resembles the situations in the *Nideröst-Huber* and the *F.R. v. Switzerland* cases. In the *Nideröst-Huber* case, the applicant was not informed by the Federal Court of the observations of the lower court. In the *F.R.* case, the Federal Insurance Court duly transmitted the observations of the lower court to the applicant who replied to them though the Federal Insurance Court refused to consider the reply. In both cases the Court found a violation of Article 6 § 1 of the

Convention (see the Nideröst-Huber judgment cited above, p. 109, §§ 27, 32; *F.R. v. Switzerland*, no. 37292/97, § 41, ECHR 2001-...).

36. In the present case the Government have contended that a right to reply was unnecessary since the statements of the lower court could not influence the decision of the Federal Court, the latter in its judgment not having relied on any new arguments to which the applicants had not been able to reply.

37. However, the Court sees no indication that the Federal Court declined to consider the submissions of the lower court and of the opposing party. In fact, in its judgment of 7 February 1996, the Federal Court expressly referred to the requests of the lower court and of the opposing party to dismiss the applicants' public law appeal. In its letter of 13 December 1995 to the applicants, the Federal Court merely stated that it would disregard inadmissible statements *within* the lower court's submissions insofar as the applicants had complained that these statements were inadmissible as being "hardly objective" and "aiming at twisting the facts".

38. In the Court's opinion, the effect which the observations actually had on the judgment of the Federal Court is of little consequence. The observations of the lower instance 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. The observations of the opposing party equally contained a reasoned opinion on the merits of the applicants' public law appeal. In such cases, therefore, the parties to a dispute should be given the possibility to state their views as to 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. 107, §§ 27, 29; *F.R. v. Switzerland* cited above, §§ 37, 39).

39. 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 applicants be given the opportunity to comment on the observations submitted by the Cantonal Court of the Canton of Schwyz and of the opposing party. However, the applicants were not afforded this possibility. That finding denotes a breach of Article 6 § 1 of the Convention.

40. Insofar as the applicants complain that they could not consult the case-file before the Federal Court, the Court considers that they had the possibility of consulting it at the seat of the Federal Court.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicants claimed compensation for non-pecuniary damage amounting to CHF 2,000 on the ground that the Cantonal Court had seriously insulted them in its observations of 16 November 1995 to the Federal Court. The Government asked the Court to rule that the finding of a violation constituted sufficient just satisfaction.

43. The Court considers that the finding of a breach of Article 6 § 1 of the Convention affords sufficient just satisfaction for any non-pecuniary damage.

B. Costs and expenses

44. The applicants also requested a total of CHF 34,892.50 for costs and expenses, namely CHF 29,350.50 which he had incurred through the cantonal proceedings and the proceedings before the Federal Court, and CHF 5,542 as costs for their lawyer.

45. The Government agreed to reimburse CHF 4,000 in respect of the costs for the applicants' lawyer, while asking the Court to refuse the remainder of the claim.

46. 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).

47. In the Court's opinion, the costs relating to the cantonal proceedings and to those before the Federal Court could not have been incurred in order to prevent or rectify a violation affecting the proceedings in those very courts. It accordingly accepts the Government's submission that it should refuse this part of the claim.

48. In respect of the legal costs incurred by the applicants, the Court, having regard to the fact that only part of their application was declared admissible, finds the sum of CHF 4,500 reasonable and awards it to the applicants.

C. Default interest

49. 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 applicants;
3. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, CHF 4,500 (four thousand five hundred Swiss francs) 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 applicants' claims for just satisfaction.

Done in English, and notified in writing on 21 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President