



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

FIFTH SECTION

DECISION

Application no. 13545/10
Roger GÄHWILER
against Switzerland

The European Court of Human Rights (Fifth Section), sitting on 9 October 2012 as a Committee composed of:

André Potocki, *President*,

Mark Villiger,

Paul Lemmens, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having regard to the above application lodged on 2 March 2010,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Roger Gähwiler, is a Swiss national, who was born in 1968 and lives in Pfäffikon. He was represented before the Court by his father, Mr Rolf Gähwiler.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

In 2007 a Liechtenstein citizen filed an action against the applicant before the *Höfe* District Court (*Bezirksgericht*) claiming CHF 40,000 and further costs arising out of a loan agreement. The court granted the applicant legal aid (*unentgeltliche Rechtspflege*). He was represented by his father who is not a lawyer.

On 31 August 2009 the District Court ordered the applicant to pay the claimant CHF 40,000 plus interest and costs.

On 18 September 2009 the applicant appealed against this decision to the Cantonal Court (*Kantonsgericht*) of the Canton Schwyz.

On 6 October 2009, the applicant, again represented by his father, requested legal aid according to sections 74 § 1 and 77 of the Code of Civil Procedure (see below “B. Relevant domestic law”) for the appeal.

On 3 November 2009 the Cantonal Court rejected the legal aid request and fixed a time-limit for the applicant to pay CHF 4,000 as an advance on court costs. Firstly, the court observed that the applicant’s submissions in his petition for appeal were essentially limited to the assertion of forgery of documents, a prohibition of assignment of the claim in question and the amount owed. It further observed that the applicant for the first time furnished a copy of a handwritten confirmation of receipt whereas he had failed to provide any evidence for the alleged prohibition of assignment before the District Court. The Cantonal Court thus held that the appeal lacked sufficient prospects of success. The applicant’s submissions in his petition for appeal were hardly suitable to cast doubt on the authoritativeness of the loan agreement thoroughly evaluated by the District Court. Secondly, the Cantonal Court found that the applicant had failed to establish sufficient proof of his financial incapacity to pay the legal fees. The applicant had submitted that he was working in his father’s business (a fast food stall) for more than 50 hours per week, but received a financial support of CHF 1,000 per month only. This had been confirmed by the applicant’s father with reference to the amount of income declared vis-à-vis the tax authorities and justified by the company’s difficult financial situation.

On 27 November 2009 the applicant’s father submitted a complaint against the Cantonal Court’s decision to refuse legal aid to the Federal Court (*Bundesgericht*).

On 1 December 2009 the Federal Court informed the applicant’s father that he could not act as a representative of his son before this court and drew his attention to the requirements for the statement of reasons of a complaint.

On 3 December 2009 the applicant himself filed a complaint against the Cantonal Court’s order rejecting the legal aid request with the Federal Court. He requested legal aid for the proceedings before the Federal Court as well. The applicant submitted that he had not been granted legal aid by the Cantonal Court despite his poor financial status.

On 12 February 2010 the Federal Court rejected the complaint. It held that the applicant had failed to sufficiently deal with the Cantonal Court’s considerations and that he had not at all addressed the court’s observations as to his appeal’s lack of prospect of success but had merely repeatedly submitted that he had no income nor any assets despite the fact that he worked 50 hours a week. Thus, the applicant had failed to comply with the

statutory requirements for stating the reasons for his complaint. Furthermore, the court rejected the legal aid request as the complaint had no prospects of success.

On 25 February 2010 the Cantonal Court extended the time-limit for paying the advance on court costs until 8 March 2010.

On 11 March 2010 the Cantonal Court noted that the applicant had failed to pay the advance on court costs and therefore rejected the appeal.

B. Relevant domestic law

As regards the Cantonal level, assistance with court costs is regulated by sections 74 *et seq.* of the Code of Civil Procedure (*Zivilprozessordnung*) of the Canton Schwyz.

According to section 74 of the Code of Civil Procedure, any party who does not have sufficient financial resources to cover the costs of litigation will be granted assistance with the costs – upon filing a corresponding application – , provided that the intended legal action or proceedings have sufficient prospects of success.

According to section 75 of the Code of Civil Procedure, the grant of financial assistance, *inter alia*, releases the party concerned from the duty to pay the advance on court costs.

In addition, according to section 77 of the Code of Civil Procedure, the court can appoint a counsel free of charge if the aforementioned requirements for granting financial assistance are met.

As regards the Federal level, legal aid for proceedings before the Federal Court is regulated by the Federal Court Act – *Bundesgerichtsgesetz*). According to article 64 § 1 of the Federal Court Act, the court exempts a party who does not have sufficient financial means from the requirement to pay an advance on court fees provided that the intended legal proceedings do not lack sufficient prospects of success. According to article 64 § 2 of the Federal Court Act, the court may appoint a lawyer who is to be remunerated by the court.

COMPLAINT

Without invoking any article of the Convention, the applicant complained about the refusal of assistance with legal costs for appeal proceedings in a civil action. He claimed that the refusal to grant him legal aid was tantamount to a denial of access to the appellate court.

THE LAW

A. Exhaustion of domestic remedies

The Court observes at the outset that the Federal Court rejected the applicant's complaint against the Cantonal Court's denial of legal aid for failure to comply with the requirements for the statement of reasons for a complaint. This raises an issue as to the exhaustion of domestic legal remedies. The Court observes, however, that this question is closely linked to the refusal of legal aid.

In any event, even assuming that the applicant could be said to have satisfied the requirement of exhaustion of domestic remedies, the Court finds that his application must be declared inadmissible for being manifestly ill-founded for the reasons set out below.

B. Alleged violation of Article 6 § 1 of the Convention

The applicant complained that the Cantonal Court had refused his application for legal aid for appeal proceedings and that subsequently the Federal Court had refused to admit his complaint against this decision for adjudication as well as to grant him legal aid for the proceedings before it. His complaint falls to be examined under Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of his civil rights and obligations (...), everyone is entitled to a (...) hearing (...) by [a] (...) tribunal (...).”

1. Principles deriving from the Court's case-law

The Court reiterates that, as it has held on many occasions, the right of access to court is part of the guarantees of Article 6 § 1 of the Convention (see, among other authorities, *Kreuz v. Poland*, no. 28249/95, § 52, ECHR 2001-VI).

It further reiterates that, where a Contracting State sets up an appeal system, it is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in Article 6 as well (see *Del Sol v. France*, no. 46800/99, § 21, ECHR 2002-II; *Essaadi v. France*, no. 49384/99, § 31, 26 February 2002).

Nonetheless, the Court emphasizes that the right of access to court is not absolute but may be subject to limitations permitted by implication as the right of access by its very nature calls for regulation by the State. Thus, while the Contracting States enjoy a certain margin of appreciation in this respect, it rests with the Court to ultimately decide on the observance of the Convention's requirements by the Contracting States in the exercise of their

power of appreciation (see, among other authorities, *Essaadi*, cited above; *Kreuz*, cited above, § 53, and *Pedro Ramos v. Switzerland*, no. 10111/06, § 33, 14 October 2010). In doing so, the Court examines whether a restriction placed on access to a court pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (see *Kreuz*, cited above, § 55; and *Pedro Ramos*, cited above, § 37).

In that context, the Court recalls that its task is not to substitute itself for the competent domestic authorities in determining the most appropriate means of regulating access to court, nor to assess the facts which led those courts to adopt one decision rather than another (see *Kreuz*, cited above, § 56; and *Pedro Ramos*, § 38).

The Court further reiterates that there is no obligation under the Convention to make legal aid available for all disputes in civil proceedings, as there is a clear distinction between the wording of Article 6 § 3 (c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which makes no reference to legal assistance (see, among other authorities, *Del Sol*, cited above, § 20; *Essaadi*, cited above, § 30; and *Pedro Ramos*, cited above, § 41). However, in discharging the obligation to provide parties to civil proceedings with legal aid, when it is provided by domestic law, the State must display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6. It is also essential for the legal aid system to offer individuals substantial guarantees to protect those having recourse to it from arbitrariness (see, among other authorities, *Staroszczyk v. Poland*, no. 59519/00, § 129, 22 March 2007).

The Court recalls that a legal aid scheme cannot work without a system which allows for selecting suitable applicants for legal aid. The requirement of reasonable prospects of success cannot as such be deemed arbitrary (see, among other authorities, *Del Sol*, cited above, §§ 20-23; and *Pedro Ramos*, cited above, § 41).

Furthermore, the Court has previously noted – in respect to the legal aid scheme set up by the French legislature for proceedings before the French Court of Cassation – that the lack of an arguable ground of appeal was undoubtedly intended to meet the legitimate concern that public money should only be made available to applicants for legal aid whose appeals have a reasonable prospect of success (*Del Sol*, cited above, § 23).

2. Application of the above principles to the present case

The Court notes at the outset that the applicant requested legal aid according to sections 74 § 1 and 77 of the Code of Civil Procedure; *i.e.*, he not only requested to be released from the duty to pay an advance on the court costs but also requested the court to appoint a lawyer free of charge.

The Court considers it important to have due regard to the quality of a legal aid scheme within a State (*Del Sol*, cited above, § 25; *Pedro Ramos*, cited above, § 49). In this regard, the Court has previously observed that the Swiss regulations on legal aid in proceedings before the Federal Court – and their application by the courts – complied with the Convention (*Pedro Ramos*, cited above, § 33). The Court put special emphasis on the fact that the decision on the request for legal aid for proceedings before the Swiss Federal Court was taken by that court itself, *i.e.*, by a judicial body (*Pedro Ramos*, cited above, § 50). The same is true for the present case where the decision not to grant legal aid was taken by the president of the court for the chamber.

The Court further notes that in *Pedro Ramos* the applicant had been granted legal aid on the Cantonal level but not the Federal level whereas the present case concerns the refusal of legal aid on the Cantonal level. This does not, however, change the overall assessment of the Court in *Pedro Ramos* that the Swiss legislature has put in place a legal aid scheme that provides for sufficient safeguards against the arbitrary denial of financial support in court proceedings. In addition, as the applicant in *Pedro Ramos*, the applicant in the present case was granted legal aid for the proceedings before the lower court.

It is true that in *Pedro Ramos* the Court could verify that the Swiss Federal Court had duly considered the prospects of success of the intended legal proceedings as it had been provided with the Federal Court's internal report on this case (see *Pedro Ramos*, cited above, § 51). Nonetheless, in the present case the Cantonal Court has duly albeit shortly reasoned its decision not to grant legal aid.

The Court observes in this regard that the Cantonal Court based its decision not to grant the applicant legal aid on two grounds: the lack of sufficient prospects of success of the appeal and the applicant's failure to establish his financial incapacity. Either one of these two aspects would have sufficed to refuse the applicant legal aid. There is nothing to indicate that the Cantonal Court did not duly assess the prospects of success of the appeal or to suggest that its finding was arbitrary in any way.

The Court further observes that under the Swiss legal aid scheme a party whose request for legal aid is refused by a cantonal court may file a complaint to the Federal Court. Thereby, the Swiss legislature provided an additional safeguard against an arbitrary refusal of legal aid.

The Court notes again in this regard that the Federal Court rejected the applicant's complaint against the Cantonal Court's decision to refuse him legal aid for failure to duly address the reasons for his complaint. In the light of the fact, however, that the applicant did not at all address the Cantonal Court's assessment of his appeal's prospects of success in his statement of complaint to the Federal Court, there is nothing that suggests

that the requirements for a complaint to the Federal Court were applied in an unreasonably strict manner.

Against this background, the Court considers that the applicant's right of access to court has not been violated by the refusal of legal aid.

The Court, thus, finds that the applicant's application is manifestly ill-founded in accordance with Article 35 § 3 (a) of the Convention and must hence be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Deputy Registrar

André Potocki
President