AS TO THE ADMISSIBILITY OF

Application No. 20241/92
by H. W. K.
against Switzerland

The European Commission of Human Rights (First Chamber) sitting in private on 29 November 1995, the following members being present:

MM. C.L. ROZAKIS, President
S. TRECHSEL
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 22 June 1992 by H. W. K. against Switzerland and registered on 30 June 1992 under file No. 20241/92;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 14 December 1994 and the observations in reply submitted by the applicant on 27 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, a Swiss citizen born in 1931, is a lawyer residing at Zumikon in Switzerland. Before the Commission he is represented by Messrs B. Badertscher and T. Poledna, lawyers practising in Zurich.

Particular circumstances of the case

I.

Based on information provided by T., a former accountant of the applicant, the Zurich tax authorities instituted tax and tax penalty proceedings against the applicant, first in 1985, and, after these proceedings had been terminated for lack of evidence, again in 1988.

On 22 December 1988 the Finance Directorate (Finanzdirektion) of the Canton of Zurich imposed cantonal taxes (Staatssteuern) and tax penalties (Strafsteuern) on the applicant in respect of the tax assessment period between 1978 and 1981. The taxes and the tax penalties due each amounted to 54,032.20 SFr.

In its decision the Finance Directorate found in particular that after 1975 the applicant had only insufficiently supervised his accountant. His negligence (Fahrlässigkeit) in this respect amounted to culpability (Verschulden) within the meaning of the Tax Act (Steuergesetz) of the Canton of Zurich, and tax penalties were, therefore, due (eine Strafsteuer ist daher zu erheben). As the culpability was not insignificant, the tax penalties were set at the same amount as the taxes due.

II.

On the basis of the decision of the Finance Directorate of 22 December 1988 (see above I.) the Zumikon Municipal Tax Office (Gemeindesteueramt) imposed on 30 December 1988 municipal taxes (Gemeindesteuern) and tax penalties on the applicant, each amounting to 50,827.55 SFr.

III.

Against the decisions of the Finance Directorate of 22 December 1988 (see above I.) and of the Zumikon Municipal Tax Office of 30 December 1988 (see above II.) the applicant filed an appeal (Rekurs) with the Administrative Court of Appeal (Verwaltungsgericht) of the Canton of Zurich in which he requested an oral hearing.

In his appeal the applicant also complained that he could not be accused either of negligence (Fahrlässigkeit) or of culpability (Verschulden). In particular, it did not suffice if the tax authorities stated that he had insufficiently supervised his accountant. The applicant concluded that "there was no legal basis (=culpability) for imposing tax penalties" ("die Rechtsgrundlage <=Verschulden> liegt also für die Erhebung einer Strafsteuer nicht vor").

On 27 April 1989 the Finance Directorate filed its submissions with the Administrative Court on the applicant's appeal. The submissions contained inter alia a list of undeclared fees of the applicant which the accountant T. had given to the tax authorities. A stamp was issued on the submissions stating that they were transmitted to the applicant for information; the text continues: "a 2nd round of submissions has not been ordered. Any further requests would be dismissed" ("Ein 2. Schriftenwechsel ist nicht angeordnet worden. Allfällige weitere Eingaben würden aus dem Recht gewiesen"). The stamp is signed by the Court Secretary acting for the President of the Administrative Court.

On 3 October 1989 the Administrative Court (Verwaltungsgericht) partly upheld, partly dismissed and partly rejected the appeal. Thus, the Court quashed the imposition of cantonal taxes and tax penalties for the year 1978 by reason of prescription (Verjährung), and reduced the cantonal taxes for the years 1979 to 25,967.80 SFr and the tax penalties to 12,983.90 SFr. The Court declared inadmissible the appeal concerning the municipal taxes and tax penalties as the matter had first to be decided by the Finance Directorate.

In its decision the Court explained why it had considered it unnecessary to communicate the Finance Directorate's submissions for further observations to the applicant or to order an oral hearing:

<Translation>

"The reply to the appeal by the Finance Directorate contains no new submissions, in respect of which the tax subject should have been heard in the light of Section 4 para. 1 of the Swiss Constitution. Moreover, he had sufficient opportunity duly to put forward his point of view in respect of the facts and the law - and both orally and in writing. His subsidiary request to fix an oral hearing will not therefore be granted."

<German>

"Die Rekursantwort der Finanzdirektion enthält keine neuen Vorbringen, zu denen der Pflichtige im Lichte von Art. 4 Abs. 1 BV hätte angehört werden müssen. Er hat überdies hinreichend Gelegenheit gehabt, seinen Standpunkt in tatsächlicher und rechtlicher Hinsicht gehörig - sowohl mündlich als auch schriftlich - zu vertreten. Seinem Eventualantrag auf Anordnung einer mündlichen Verhandlung ist daher nicht stattzugeben."

The Court further found that the applicant who was an experienced lawyer should have duly supervised the accountant T. By not doing so he had not demonstrated the necessary care. It was irrelevant in this respect whether T. had acted culpably. As a result, the applicant had negligently caused the insufficient tax assessments of the years 1979 until 1981.

IV.

The applicant's appeal concerning the imposition of municipal taxes and tax penalties (above II.) which had been declared inadmissible by the Administrative Court (above III.) was transferred to the Finance Directorate. On 30 October 1989 the latter partly upheld and partly dismissed the appeal. Thus, the municipal taxes were reduced to 23,933.65 SFr and the tax penalties to 11,966.80 SFr.

V.

Against the decision of the Finance Directorate of 30 October 1989 concerning the applicant's municipal taxes and tax penalties (above IV.) the applicant filed an appeal with the Administrative Court of the Canton of Zurich. Therein he complained inter alia that there was no legal basis for the punishment of his conduct. Thus, according to the Zurich tax law, tax evasion required culpability, and the offence had to be committed with intention (vorsätzlich). By relying on the applicant's negligence when imposing tax penalties, the tax authorities had breached the principle of "nulla poena sine lege".

On 27 March 1990 the Administrative Court partly upheld the appeal. The Court quashed the imposition of municipal taxes and tax penalties for the year 1979 by reason of prescription, and, as a result, reduced the municipal taxes and tax penalties due to 14,347.55 SFr, and 7,173.75 SFr, respectively.

In respect of the applicant's complaint that there was no legal basis for punishing him for negligent tax evasion, and his affirmation that he was not guilty, the Court found that these issues had already been dealt with in substance by the Administrative Court in its decision of 3 October 1989 which concerned cantonal taxes (above III.); that this decision was binding on the municipal authorities; and that the Court could not reconsider these issues in the present case.

VI.

The applicant filed public law appeals (staatsrechtliche Beschwerden) against the decisions of the Administrative Court of 3 October 1989 (above III.) and of 27 March 1990 (above V.).

In respect of the decision of 3 October 1989 the applicant complained inter alia that the Administrative Court, by refusing an oral hearing, had deprived him of the possibility of commenting on the new submissions filed by the Finance Directorate.

In respect of the decision of 27 March 1990, the applicant complained that he was entitled to an examination of all relevant conditions for punishment (Strafbarkeitsgründe). The applicant referred to case-law of another Swiss court according to which the imposition of a fine required culpability. The imposition of tax penalties in his case without any examination of these conditions of punishment breached the principle "nulla poena sine culpa".

On 16 December 1991 the Federal Court (Bundesgericht) joined the public law appeals and dismissed them, the decision being served on the applicant on 23 December 1991.

The Federal Court first dealt with the applicant's complaint that the Administrative Court, in its decision of 3 October 1989, had considered it unnecessary, in respect of the cantonal taxes and tax penalties, to order an oral hearing or to communicate the Finance Directorate's submissions for further observations to the applicant, finding that they contained no new observations.

The Court referred in this respect to the necessity of first exhausting cantonal remedies, in particular by requesting the reopening of the cantonal proceedings. The decision continues, with reference to Section 108 para. 1 of the Tax Act of the Canton of Zurich (see below, Relevant domestic law):

<Translation>

> "the reopening of definite tax decisions ... is admissible, if the deciding authority (here the Administrative Court) disregarded important facts or means of evidence which it knew or should have known, or if it breached essential procedural principles in any other manner. ... A reopening of proceedings in advance will only then not be required, if the disputed question has already been decided in the contested decision ..."

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> "die Revision von rechtskräftigen Steuerentscheiden ... ist zulässig, wenn die urteilende Behörde (vorliegend das Verwaltungsgericht) erhebliche Tatsachen oder Beweismittel, die ihr bekannt waren oder hätten bekannt sein müssen, ausser acht gelassen oder wenn sie in anderer Weise wesentliche Verfahrensgrundsätze verletzt hat. ... Eine Revision ist vorgängig nur dann nicht erforderlich, wenn die streitige Frage bereits im angefochtenen Entscheid behandelt worden ist ..."

The Court then applied these principles to the applicant's complaints:

<Translation>

> "In the contested decision the Administrative Court decides at the outset solely that the appeal statement in reply by the Finance Directorate did not contain any new submissions, for which reason the person concerned in view of Article 4 para. 1 of the Federal Constitution did not have to be heard and for which reason also the request for an oral hearing did not have to be granted. The point at issue (in the present case), namely why there were no new submissions, had not however been dealt with, or explained, by the Administrative Court.
>
> Thus, the applicant's submissions in this respect amount to

the reproach that the Administrative Court breached essential principles of procedure. This complaint should therefore have been raised in reopening proceedings ... before filing the public law appeal; however, no request for reopening was submitted. In respect of this issue therefore there is no last instance decision, and this complaint cannot therefore be entertained.

The applicant also implicitly accuses the Administrative Court of disregarding the facts of the case-file by stating that the contested decision incorrectly assumed that the appeal statement in reply of the Finance Directorate did not contain any new submissions. In this respect he should also immediately have filed a complaint by requesting reopening of the proceedings..."

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"Im angefochtenen Entscheid wird durch das Verwaltungsgericht einleitend einzig festgestellt, dass die Rekursantwort der Finanzdirektion keine neuen Vorbringen enthalte, weshalb der Pflichtige im Licht von Art. 4 Abs. 1 BV nicht angehört und dem Begehren um eine mündliche Verhandlung daher nicht stattgegeben werden müsse. Die (im vorliegenden Verfahren) strittige Frage, weshalb keine neuen Vorbringen gegeben seien, wurde indessen durch das Verwaltungsgericht nicht behandelt oder näher begründet.

Was der Beschwerdeführer zu diesem Punkt vorträgt, läuft somit auf den Vorwurf der Verletzung wesentlicher Verfahrensgrundsätze durch das Verwaltungsgericht hinaus. Diese Rüge hätte demnach vor Ergreifung der staatsrechtlichen Beschwerde im Verfahren der Revision ... vorgetragen werden müssen; ein entsprechendes Revisionsgesuch ist indessen nicht eingereicht worden. Insofern liegt daher mit Bezug auf diesen Punkt kein letztinstanzlicher Entscheid ... vor, wehsalb auf diese Rüge nicht einzutreten ist.

Insoweit der Beschwerdeführer dem Verwaltungsgericht ausserdem sinngemäss Aktenwidrigkeit vorwirft, indem er geltend macht, im angefochtenen Entscheid sei zu Unrecht davon ausgegangen worden, dass die Rekursantwort der Finanzdirektion keine neuen Vorbringen enthalte, so hätte er dies ebenfalls vorweg mittels Revision ... rügen müssen ..."

In respect of the cantonal taxes the Federal Court further found that negligence was indeed a form of culpability. As a result, it upheld the Administrative Court's conclusion that the applicant's negligent conduct was punishable.

The Court then dealt with the applicant's complaint that municipal tax penalties had been imposed on him without the conditions for punishment having been examined. The Court found that this complaint was new and therefore inadmissible. Thus, before the Administrative Court the applicant had invoked the principle of "nulla poena sine lege" whereas in his public law appeal before the Federal Court he had relied on the principle "nulla poena sine culpa".

In respect of the applicant's complaint that in the municipal tax proceedings he had not had an oral hearing, the Court found no issue as on 27 March 1990 the Administrative Court had quashed the imposition of municipal taxes and tax penalties for the year 1979 by reason of prescription.

Relevant domestic law

According to Section 108 para. 1 of the Tax Act (Steuergesetz) of the Canton of Zurich, proceedings may be reopened (Revision), "if the deciding body disregards important facts or means of evidence which

it knew or should have known or in any other manner breached essential principles of procedure" ("went die entscheidende Behörde erhebliche Tatsachen oder Beweismittel, die ihr bekannt waren oder hätten bekannt sein müssen, ausser acht gelassen oder in anderer Weise wesentliche Verfahrensgrundsätze verletzt hat").

COMPLAINTS

1. The applicant complains that the Administrative Court in its decision of 3 October 1989 relied on the submissions of the Finance Directorate of 27 April 1989 without the applicant having had the opportunity to comment thereupon. The applicant refers here to the list of fees which the accountant T. handed over to the tax authorities. The applicant submits that the Administrative Court breached Article 6 para. 1 of the Convention by refusing him an oral hearing and not granting him any other possibility to reply to these submissions.

2. The applicant complains under Article 6 para. 2 of the Convention that the authorities did not consider, in respect of the municipal taxes and tax penalties, whether he was culpable (Verschulden), for which reason he should not have been punished.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 June 1992 and registered on 30 June 1992.

On 31 August 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 14 December 1994, after an extension of the time-limit fixed for that purpose. The applicant replied on 27 February 1995, also after an extension of the time-limit.

THE LAW

1. The applicant raises various complaints under Article 6 paras. 1 and 2 (Art. 6-1, 6-2) of the Convention about the proceedings in which he was involved, and their outcome. These provisions state, insofar as relevant:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ..."
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

In the Commission's opinion, the proceedings at issue concerned inter alia the imposition of tax penalties and, therefore, "the determination of ... (a) criminal charge" against the applicant within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 (Art. 6) of the Convention is, therefore, applicable in the present case.

2. The applicant complains that the Administrative Court in its decision of 3 October 1989 relied on the submissions of the Finance Directorate of 27 April 1989 without giving him the opportunity to comment thereupon. The applicant submits that the Administrative Court breached Article 6 para. 1 (Art. 6-1) of the Convention by refusing him an oral hearing and not granting him any other possibility to reply to these submissions.

The Government submit that the applicant has not complied with

the requirement as to the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention. The applicant could have filed a request with the Administrative Court of the Canton of Zurich for reopening the proceedings according to Section 108 para. 1 of the Zurich Tax Act. In such a request, he could have complained about the lack of an oral hearing; and that he could not comment on the submissions of the Finance Directorate of 27 April 1989. Had the applicant done so and if he had been unsuccessful, the Federal Court could have dealt with these points in his public law appeal.

In the Government's view, it cannot be said that the Administrative Court had already effectively dealt with the issue in its decision of 3 October 1989 and that therefore a request for reopening the proceedings would not have offered prospects of success. Rather, the Administrative Court merely stated that the Finance Directorate's submissions of 27 April 1989 contained no new elements. It was only in his subsequent public law appeal to the Federal Court that the applicant complained in detail of the Finance Directorate's submissions. Had the applicant raised these issues directly before the Administrative Court, the latter would have had the opportunity to reopen the proceedings. In fact, the applicant could still have filed a request for reopening the proceedings even after the Administrative Court's decision of 3 October 1989.

The Government submit that these issues of domestic law had been clarified by the Federal Court. In this respect, reference is made to the Commission's case-law according to which, when examining the requirements under Article 26 (Art. 26) of the Convention, regard must be had to the interpretation and application by the national authorities of domestic law (see No. 9022/80, W. v. Switzerland, dec. 13.7.83, D.R. 33 p. 21).

The applicant submits that in respect of these complaints he has complied with the requirements under Article 26 (Art. 26) of the Convention. Thus, according to Swiss doctrine the request for reopening proceedings according to Section 108 of the Zurich Tax Act is not an effective remedy which must be exhausted before filing a public law appeal with the Federal Court; rather, proceedings cannot be reopened as long as a public law appeal to the Federal Court is possible. Indeed, the Federal Court misunderstood the consequences of such a request for reopening.

The applicant further submits that even if the request for reopening proceedings was an effective remedy, it would have proved useless where, as in the present case, the Administrative Court deliberately refused to consider a fact. Thus, in its decision of 3 October 1989 the Administrative Court considered in detail whether an oral hearing should be held. The Court concluded that this was not necessary as the Finance Directorate's reply to the appeal did not contain any new submissions and that, moreover, the applicant had had sufficient opportunity duly to put forward orally and in writing his point of view in respect of both the facts and the law.

In the applicant's view, the Federal Court in its decision of 16 December 1991 arbitrarily refused to admit his public law appeal. The Court incorrectly stated that the Administrative Court had not dealt with the applicant's complaints and that he should therefore have asked for the reopening of these proceedings. In any event, the request for the reopening of the proceedings would again have been dealt with by the same Administrative Court, and it was unlikely that that Court would contradict its own previous decision.

The Commission recalls that there is no exhaustion of domestic remedies where a domestic appeal is not admitted because of a procedural mistake (see No. 6878/75, dec. 6.10.76, D.R. 6 p. 79).

In the present case, the Federal Court in its decision of

16 December 1991 declared the applicant's complaints inadmissible as he had failed previously to file a request for reopening the proceedings before the Administrative Court.

It is true that according to the Commission's case-law requests for the reopening of proceedings do not as a rule constitute an effective remedy within the meaning of Article 26 (Art. 26) of the Convention (see No. 8850/80, dec. 7.10.80, D.R. 22 p. 232).

The situation may nevertheless be different if it is established under domestic law that a request for the reopening of proceedings in fact constitutes an effective remedy. Thus, the Commission has found that the request for reopening proceedings according to Section 108 para. 1 of the Zurich Tax Act may constitute an effective remedy to complain about the unfairness of proceedings (see No. 19117/91, dec. 12.1.94, D.R. 76-A p. 74).

In the present case the Commission sees no reason to doubt that a request for reopening the proceedings according to Section 108 para. 1 of the Tax Act of the Canton of Zurich would have been an effective remedy. Thus, the Federal Court in its decision of 16 December 1991 stated that, had the applicant filed such a request, the Administrative Court could have examined inter alia the applicant's allegations that essential procedural principles had been breached.

It is true that such a request for reopening the proceedings would only have offered prospects of success if the Administrative Court had not already previously dealt with the complaints at issue. In the present case, the applicant was in particular complaining that the Finance Directorate's reply contained new submissions, in particular as regards the list of fees which the accountant T. had handed over to the tax authorities, in respect of which he could not reply.

The applicant contends that in its decision of 3 October 1989 the Administrative Court indeed had dealt with these complaints when it stated that the reply concerned no new submissions in respect of which the applicant should have been heard, and that he had had sufficient opportunity duly to put forward his point of view in respect of the facts and the law, both orally and in writing.

In the Commission's opinion, however, it cannot be said that the Administrative Court had thereby effectively dealt with the applicant's complaint in particular as regards the list of fees which the accountant T. had handed over to the tax authorities. The Commission finds a confirmation herefor in the Federal Court's decision of 16 December 1991 which equally found that the point at issue had not previously been dealt with by the Administrative Court.

As a result, the applicant could have filed a request for reopening the proceedings which would have been an effective remedy. The applicant failed to do so, and the Federal Court did not therefore admit the applicant's public law appeal in view of a procedural mistake (see No. 6878/75, loc. cit.).

It follows that the applicant has not complied with the requirement as to the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

The application must in this respect, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant further complains under Article 6 para. 2 (Art. 6-2) of the Convention that the authorities did not consider, in respect of the municipal taxes and tax penalties, whether he was culpable, for which reason he should not have been punished.

The Commission need not examine whether or not the applicant has in this respect complied with the requirements under Article 26 (Art. 26) of the Convention as to the exhaustion of domestic remedies, as this part of the application is in any event inadmissible for the following reasons:

With regard to the judicial decisions of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its established case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

The Commission has examined this complaint under Article 6 paras. 1 and 2 (Art. 6-1, 6-2) of the Convention.

It notes that in its decision of 22 December 1988 the Finance Directorate of the Canton of Zurich found that after 1975 the applicant had only insufficiently supervised his accountant T., and that his negligence in this respect amounted to culpability. These findings also provided the basis for the calculation of the tax penalties imposed by the Zumikon Municipal Tax Office on 30 December 1988.

It cannot therefore be said that the domestic authorities did not establish the applicant's guilt.

It follows that the remainder of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)