CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32969/96
by Johann BIFL
against Switzerland

The European Court of Human Rights (Second Section) sitting on 23 February 1999 as a Chamber composed of

Mr C. Rozakis, *President*,
Mr M. Fischbach,
Mr L. Wildhaber
Mr G. Bonello,
Mrs V. Strážnická,
Mr P. Lorenzen,
Mr A.B. Baka, *Judges*,

with Mr E. Fribergh, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 26 July 1996 by Johann Bifl against Switzerland and registered on 16 September 1996 under file no. 32969/96;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 15 April 1997 and the observations in reply submitted by the applicant on 27 January 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a German citizen born in 1961, is a businessman residing in Freiburg in Germany. Before the Court he is represented by Ms C. Triebel, a lawyer practising in Schluchsee in Germany.

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

On 13 May 1993 at approximately 11h00, the applicant was driving on a motorway in Switzerland in the direction of Basle. At one stage, when driving on the left lane, he noted a neutral car behind him which kept coming up towards him and then falling back again. The applicant felt endangered; as he could not move to the right lane, he decided to accelerate, though the car behind him did the same. Eventually, the applicant was able to move to the right lane and then leave the motorway at the next exit. Still the car followed him. It suddenly overtook him and the co-driver held a police-signal out of the window, ordering him to stop.

The applicant stopped and realised that the persons in the car were two policemen. He was accompanied to a motorway stop where he was told that he had exceeded the speed limit of 120 km/h by an average of 43,51 km/h and that he would be fined 500 Swiss Francs (CHF). The applicant was shown a video film of his driving which the policemen had recorded from their car while following him. The applicant pointed out that he had been followed for a longer period of time; originally he had driven at 135 km/h and had been pressed by the car to drive more quickly. The police replied that they had had to follow him for a certain stretch in order to obtain valid readings. The readings concerned a stretch of 1,6 km.

The applicant did not pay the fine and signed the police report.

On 14 June 1993 the Rheinfelden District Office (*Bezirksamt*) issued a penal order (*Strafbefehl*) sentencing the applicant to three days' imprisonment, suspended on probation, and a fine of 500 CHF for having exceeded the speed limit by 43,51 km/h.

Throughout the ensuing proceedings the applicant was represented by a lawyer.

Upon the applicant's objection, the Rheinfelden Public Prosecutor's Office (*Staatsanwaltschaft*) requested the Rheinfelden District Court (*Bezirksgericht*) to punish the applicant with three days' imprisonment and a fine of 800 CHF.

On 30 August 1993 the Court summoned the applicant and police officer B. (the co-driver) to the trial. The invitation was sent to the applicant's previous address in Freiburg in Germany by means of letters rogatory (*Rechtshilfeersuchen*), though the invitation could not be served as the applicant had meanwhile moved to Berlin.

At the hearing on 1 December 1993 the applicant was absent, and considered not to have provided an excuse herefor. At the hearing police officer B. was heard, explaining *inter alia* the video-system used, his experience in such matters, and that the applicant had driven at 135 km/h. The police officer submitted twelve photos which were taken from the video film. The photos register *inter alia* the speed of the applicant’s car. On eleven photos there is a distance of approximately 100 m between the applicant and the police car, often with ample free space on the right lane on the motorway; and on the twelfth and last picture the police car had come closer to the applicant’s car in order to film the applicant’s number plate.

At the hearing, hand written minutes of police officer B. were submitted according to which the applicant had overtaken the police car at a speed of just below 120 km/h. The minutes also noted: "he has allegedly been chased by the police" *("er sei durch Pol. gejagt worden*"). This statement was apparently not included in the subsequent typed minutes of the hearing.

The summons to the applicant for a new hearing on 9 March 1994 could not be served on him either.

On 23 March 1994 the District Court President issued a warrant of arrest against the applicant in order "to secure his presence at the trial" ("*Sicherung der Hauptverhandlung*"). The applicant was arrested on 15 April 1994 when entering Switzerland. He then withdrew his objection against the penal order of 14 June 1993. As a result, the District Court struck the case off its list.

The applicant filed an appeal which was upheld by the Court of Appeal (*Obergericht*) of the Canton of Aargau on 10 August 1994 which found, *inter alia*, that the applicant had not been absent at the hearing of 1 December 1993 by his own fault.

Proceedings were resumed before the Rheinfelden District Court which fixed a new trial for 14 December 1994. As the applicant only received the invitation on 13 December, a new hearing was fixed for 8 March 1995. The applicant challenged the President of the District Court, whereupon the Deputy President presided.

At the hearing, the applicant unsuccessfully requested to question the second police officer (the driver) and to be shown the entire video film.

On 8 March 1995 the District Court sentenced the applicant to three days' imprisonment, suspended on probation, and a fine of 800 CHF. In its decision the Court found that the video film clearly demonstrated the excess in speed, and there was no indication that the registration system was faulty. In view thereof and of B.'s statement of 1 December 1993, the Court refused to hear the other police officer. The Court also found that the applicant, who alleged that he had been pressed by the police, had been able to comment on B.'s statements.

On 21 March 1995 the applicant challenged the Deputy District Court President in view of the manner in which he had conducted the proceedings.

On 12 September 1995 the applicant filed an appeal in which he requested, *inter alia,* to be shown the entire video film leading to his conviction, and to be able to put questions to both police officers.

The appeal was dismissed by the Court of Appeal of the Canton of Aargau on 21 November 1995. The Court, which had the competence to decide on both the factual and legal issues of the case, relied in its decision, *inter alia*, on statements of police officer B. as to the events. The Court found that one particular statement of B. was an incorrect assessment, namely that a police car regularly drove 500 m behind a car when the speed exceeded 100 km/h; in fact the pictures demonstrated that the police had driven approximately 100 m behind the applicant.

In respect of the applicant's requests for the taking of evidence, the Court of Appeal found that the applicant had been shown twelve pictures of the video film which sufficed to demonstrate that he had exceeded the speed limit, and that he had not been pressed by the police. The gaps of some two to five seconds between the pictures were too short to prove otherwise. For the same reason the police officers need not be heard, and their statements would not alter the Court's opinion. Indeed, even if the police had pressed the applicant, this would not justify the excess in speed. In any event, police officer B. had been heard, and his statement had been shown to the applicant.

The applicant's public law appeal (*staatsrechtliche Beschwerde*) and plea of nullity (*Nichtigkeitsbeschwerde*) were dismissed by the Federal Court on 18 March 1996, the decision being served on 25 March 1996. In its decision the Court found that the applicant had not shown that the Court of Appeal had acted arbitrarily. Thus, even if it was accepted that the police car had pressed him by coming up towards him and falling back again this would not help him, as he would then have had periods where he would have reduced his speed. In respect of the applicant's complaint about the alleged bias of the Rheinfelden District Court, the Federal Court found that the decision of the Court of Appeal would have healed any such shortcoming.

Under the headline "disciplinary punishment", the Federal Court stated that the applicant's appeals clearly lacked prospects of success in view of the convincing reasons given by the Court of Appeal of the Canton of Aargau in its decision. The decision continues:

<Translation>

"The long-winded statements in his plea of nullity and in large parts also in his public law appeal are not reasonable. The applicant's representative shall therefore be admonished in accordance with S. 31 (1) of the Federal Judiciary Act."

COMPLAINTS

1. Under Article 6 § 1 of the Convention the applicant complains that the domestic courts relied for his conviction on the final stretch of 1,6 km, not on the entire 6,6 km when he was followed by the police. In fact, he only accelerated at the end of the stretch. The photos of the video film which he was shown and the statement of one police officer did not suffice to demonstrate that he could have moved to the right line.

2. The applicant further complains under Article 6 § 1 of the Convention that the typed minutes of the statements of police officer B. were incorrect in that they differed from the hand written minutes, and that this was not considered by the Federal Court.

3. Also under Article 6 § 1 of the Convention, the applicant complains that the courts refused to see the entire video film. The nine photos shown incompletely depicted the situation.

4. Under Article 6 § 1 of the Convention the applicant complains that his challenge of the Deputy District Court President on 21 March 1995 was never decided by the Court of Appeal of the Canton of Aargau.

5. Under Article 6 § 2 of the Convention, the applicant complains that in the proceedings he was in fact obliged to prove his innocence.

6. Under Article 6 § 3 (c) of the Convention the applicant complains of the disciplinary punishment by the Federal Court of his lawyer.

7. The applicant complains under Article 6 § 3 (d) of the Convention that the only witness, the police officer B., was heard while he was absent through no fault of his own. He was therefore deprived of his right to put questions to this witness.

PROCEEDINGS BEFORE THE COURT

The application was introduced on 26 July 1996 and registered on 16 September 1996.

On 17 January 1997, the Commission decided to communicate to the respondent Government the applicant's complaints under Article 6 §§ 1 and 3 (d) concerning the hearing and the taking of evidence.

The Government's written observations were submitted on 15 April 1997. The applicant replied on 27 January 1998, after an extension of the time-limit fixed for that purpose.

On 16 September 1997, the Commission granted the applicant legal aid.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

1. The applicant complains that the domestic courts relied for his conviction on the final stretch of 1,6 km, not on the entire 6,6 km when he was followed by the police. The photos of the video film which he was shown and the statement of one police officer did not suffice to demonstrate that he could have moved to the right line. Indeed, the courts refused to see the entire video film. Moreover, the only witness, the police officer B., was heard while he, the applicant, was absent through no fault of his own. He was therefore deprived of his right to put questions to this witness. The typed minutes of the statements of police officer B. were incorrect in that they differed from the hand written minutes, and that this was not considered by the Federal Court.

The applicant relies on Article 6 §§ 1, 2 and 3 (d) of the Convention which state, insofar as relevant:

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

3. Everyone charged with a criminal offence has the following minimum rights: ...

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..."

The Government submit that these complaints are manifestly ill-founded and that they amount to an abuse of the right of application within the meaning of Article 35 § 3 of the Convention.

Insofar as the applicant complains that he could not question police officer B., the Government point out that this would not have permitted the applicant to prove that he had been pressed by the police car to drive too fast. Thus, the pictures demonstrate that the police car was constantly 100 m behind the applicant except at the end when the car drove up to photograph the number plate of the applicant's car. The photos themselves were taken at intervals of two to five seconds, and it was not possible for the police to press the applicant within these intervals. For this reason, it would serve no purpose to show the applicant the entire video film.

The Government submit that the applicant was convicted on the basis of substantive proof, namely the photos, and not the statement of the police officer B. Indeed, the statements made by B. on 1 December 1993 proved to be innocuous. It can also not be said that the applicant was acting in a state of emergency, particularly as the traffic on the right lane would have permitted him to move over.

As regards the statement that "he (the applicant) had allegedly been chased by the police", the Government point out that these words merely reflect what the applicant himself had told the police. Thus, no value can be attached to this statement or the fact that it was later not included in the typed minutes of the statements of police officer B.

The applicant, who contests that he has abused the right of petition within the meaning of Article 35 § 3 of the Convention, replies that in their entire submissions the Government are anticipating the assessment of evidence which is contrary to Article 6 § 3 (d) of the Convention. The Swiss authorities intended from the outset on not allowing the applicant the right to defend himself. The Swiss Government have now argued for the first time that it was unnecessary to hear police officer B. In the domestic proceedings it was precisely the questioning of B. that helped the courts reach their decisions. Indeed, if it is argued that it was unnecessary to hear him, then why was B. at all heard by the Rheinfelden District Court?

The applicant submits that he wanted to prove, by exercising his right to question in his presence a witness responsible for establishing the facts, that the remaining distance of driving had been approximately 6 km during which there had been an uncontrolled traffic situation provoked by the Swiss police officers. It was insufficient merely to read out the statements of police officer B. at the hearing. Indeed, when this happened the applicant immediately pointed out that he wanted to question B. himself.

The applicant recalls that he did not realise that the persons sitting in the car behind him were police officers. Their car came far too close to his car. He was at a loss to understand their behaviour. As he could not change to the right-hand lane, he thought that he could only avoid a collision by accelerating himself. Such a situation arouses fear in the person concerned. Even the gap of 100 m to which the police refer can never be a safe distance at a high speed.

The applicant submits that the photographs do not record the entire chase which took place. When he was stopped in his car, he was shown the entire film. It was there that he realised that he had been chased. For this reason he later wished to see the entire film, and to question police officer B. Indeed, the intervals between the photos would have been up to eight seconds which period of time would have sufficed for the police car rapidly to accelerate and to chase him. For these reasons it would have been imperative to see the entire video film.

To the extent that the Government submit that the hand written note in fact records the applicant's submissions, namely that he had been chased by the police, the applicant agrees that this was indeed his point of view. However, he argues that it is clear why this remark was later not included in the typed minutes - namely as the Swiss authorities from the outset did not believe the applicant.

With regard to the judicial decisions of which the applicant complains, the Court recalls that, in accordance with Article 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 Court refers, on this point, to its established case-law (see e.g. the Garcia Ruiz v. Spain judgment of 21 January 1999, § 28 to be published in the Court's official reports; the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, § 45).

It is true that in the present case the applicant complains under Article 6 §§ 1, 2 and 3 (d) of the Convention that he could not see the entire video film; that he could not question the police officer B.; and that the typed version of the minutes of the statement of police officer B. differed from the hand written minutes.

Insofar as the applicant complains about the taking of evidence, the Court recalls its case-law according to which the admissibility of evidence is primarily a matter for regulation by national law, and as a general rule it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see *e.g.* the Asch v. Austria judgment of 26 April 1991, Series A no. 209, § 10).

In the present case, the Court notes that the car which followed the applicant on the motorway was a police car with two policemen, one of whom filmed the applicant with a video camera. The video film showed the applicant's speed, and as a result he was fined and eventually convicted of exceeding the speed limit.

Insofar as the applicant complains that in these proceedings neither he nor the judges were shown the entire video film, the Court notes that the pictures of the video film were part of the case-file, and that the domestic courts considered that these pictures sufficed to prove the offence, and that the applicant had not been pressed by the police.

It is true that the applicant complains that it would have been essential to see the other pictures of the film, as he was in fact chased in the intervals between the pictures shown, lasting up to eight seconds. The Court nevertheless recalls that the applicant had been shown the video film immediately after his excess speed had been recorded. As a result he had been made aware of the content of the film and was in a position to prepare his defence.

The applicant further complains that he was not able to question police officer B. The Court notes that the Rheinfelden District Court heard police officer B. on 1 December 1993, though the applicant was absent through no fault of his own. When the applicant was heard on 8 March 1995, police officer B. was absent, and the applicant was confronted with the minutes of his statement of 1 December 1993.

According to the Court's case-law, the defendant must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *e.g.* the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

In the present case, however, the Court has just found that the applicant was convicted on the basis of the pictures of the video film recording his excess speed, rather than on the statements of police officer B. Indeed, it does not transpire from the minutes of the questioning of police officer B. of 1 December 1993, that B.'s testimony was of any direct relevance for the applicant's conviction.

Insofar as the applicant complains that the typed minutes of the statements of police officer B. were incorrect in that they differed from the hand written minutes, the Court notes that the original minutes submitted at the hearing of 1 December 1993 included the statement that "(the applicant) had allegedly been chased by the police" whereas this statement was not included in the subsequent typed minutes of the hearing. However, the applicant does not dispute that this statement merely reflects what he himself maintained throughout the proceedings, namely that he had been pressed by the police. Indeed, the Court notes the particular formulation in German of the hand written statement, namely that the indirect speech was employed ("*sei ... gejagt worden*"), reporting the applicant's point of view.

The Court moreover finds no indication that in these proceedings the applicant, who was represented by a lawyer, could not sufficiently put forward his point of view or that the proceedings were in any other way conducted unfairly. Consequently, there is no indication of a violation of Article 6 §§ 1, 2 or 3 (d) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. Under Article 6 § 1 of the Convention the applicant complains that his challenge of the Deputy District Court President on 21 March 1995 was never examined by the Court of Appeal of the Canton of Aargau. However, the Court notes, on the one hand, that this particular complaint was indeed examined by the Federal Court in its decision of 18 March 1996. On the other hand, upon the decision of the Rheinfelden District Court of 8 March 1995, his conviction and sentence were re-examined, upon appeal, by the Court of Appeal of the Canton of Aargau which had the competence to decide on the factual and legal issues of the case. Consequently, irrespective of whether there were any shortcomings in the procedure before the District Court,

they must therefore be considered as having been remedied in the procedure before the Court of Appeal.

This part of the application is, therefore, manifestly ill-founded within the meaning of Article 35 § 2 of the Convention.

3. The applicant complains under Article 6 § 3 (c) of the Convention of the disciplinary punishment by the Federal Court of his lawyer. The Court notes that in its decision of 18 March 1996 the Federal Court admonished the applicant's lawyer on account of the long-winded statements in his plea of nullity and appeal statements. However, the applicant has not shown, or even claimed, that this admonition in any way affected his rights under the Convention to a fair hearing.

This part of the application is, therefore, also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Erik Fribergh
Registrar

Christos Rozakis
President