

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

SECOND SECTION

CASE OF JOOS v. SWITZERLAND

(Application no. 43245/07)

JUDGMENT

STRASBOURG

15 November 2012

FINAL

15/02/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the the case of Joos v. Switzerland,

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

Ineta Ziemele, *President,*
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 16 October 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 43245/07) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Hans Joos ("the applicant"), on 27 September 2007.

2. The applicant was represented by Mr M. Biancotti, a lawyer practising in St Moritz. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, a violation of his right to a fair hearing.

4. On 27 May 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1945 and lives in Samedan (canton of Graubünden). He practises as a lawyer in Switzerland.

6. The applicant is the owner of a house built in 1599 in the centre of Samedan which is subject to a number of measures aimed at the protection of the historical heritage.

7. On 21 March 2006, the company I.G.W. requested the Municipality of Samedan to issue a building permit for the construction of a "wellness centre" on the plot of land adjacent to the applicant's house. The building plan envisaged, *inter alia*, the construction of a swimming pool on top of the building. The applicant objected to the issuing of the building permit.

8. On 23 May 2006 the Municipal Council of Samedan rejected the objection. The applicant lodged a motion with the administrative court of the canton of Graubünden which was rejected by judgment of 27 November 2006. The administrative court considered, *inter alia,* that the municipality did not have an obligation to hear expert submissions by the Federal Commission for the protection of historic buildings or by the Federal Commission on nature and homeland protection, because the instant case did not fall within the Federal State's competencies.

9. On 15 January 2007 the applicant lodged an appeal under public law as well as an administrative appeal with the Federal Tribunal. He complained that the swimming pool would create emissions of steam and noise which exceeded the limits allowed under the regulations for the protection of the environment and that the presence of such an installation in the quarter was contrary to the rules for the protection of historic buildings, to which the applicant's house belonged. He further alleged that the remainder of the planned building would not respect the pertinent legal regulations. Finally, he complained that the proceedings before the Samedan Municipal Council had been unfair.

10. By letter of 13 February 2007, the Federal Tribunal invited the Federal Department of Interior to submit comments on the applicant's appeal. On 13 April 2007, the General Secretary of the Federal Department of Interior submitted two pages of comments to the tribunal. He considered, in particular, that the building permit did not violate the provisions of the Federal Law on Nature and Homeland protection, because the building project did not fall within the Federal State's competence. In the 1960s, the Federal State had subsidised archaeological searches and restoration work on the Samedan church. However, these subsidies did not constitute Federal tasks and did not establish the Federal State's competency. It followed that the Federal provisions necessitating further expert examination were not applicable in this case. Furthermore, the Federal Department considered that the building project did not have a relevant impact on the centre of Samedan. On 20 April 2007 the Federal Tribunal forwarded a copy of the comments to the applicant for information. The applicant received it on 23 April 2007.

11. By judgment of 16 May 2007 the Federal Tribunal rejected the applicant's appeals as being admissible, but unfounded. With regard to the admissibility of the appeal under public law, it noted that the applicant contested the lawfulness of a building permit and that he complained, in particular, about the arbitrary application of the town planning law. Under

the pertinent case-law, an appeal under public law was only admissible if the legal provisions relied upon also protected the applicant's own interests. In view of the fact that the applicant's building marked the historical centre of Samedan, the Tribunal concluded that the provisions serving the protection of the overall appearance of the locality also served the protection of the applicant's building. With regard to the admissibility of the administrative appeal, the Tribunal considered that the applicant's building was situated at a distance of only a few metres from the place where the impugned wellness centre was to be constructed, leading to the conclusion that the applicant had an "interest warranting protection". The Federal Tribunal considered, however, that the appeals were unfounded because the pertinent legal provisions had not been breached in the instant case. With regard to the applicability of the Federal Law on Nature and Homeland protection, the Federal Tribunal considered that the fact that the church had been restored with the help of federal subsidies did not mean that all building projects in the church's vicinity fell within the competency of the Federal State.

II. RELEVANT DOMESTIC LAW AND PRACTICE

12. The relevant provisions of the Federal Law on Judicial Organisation (*Organisationsgesetz*) as applicable at the time of the instant proceedings read as follows:

Fourth Title: Public Law proceedings before the Federal Tribunal

...

Article 93
Exchange of written submissions

"1. If the tribunal orders an exchange of written submissions, it serves the appeal on the authority which had issued the impugned decision or act, on the adverse party and on other possible parties. It sets an adequate time-limit for submitting the case-file and comments.

2. If the reasons for the judgment or decision are contained for the first time in the authority's submissions, the applicant may be granted a time-limit allowing him or her to submit supplementary observations.

3. A further exchange of submissions takes place only exceptionally."

Fifth Title: Administrative Law proceedings before the Federal Tribunal

Article 110
Exchange of written submissions

"1. If the tribunal orders an exchange of written submissions, it serves the appeal on the previous court instance and possible other parties ...

2. At the same time, it sets a time-limit for submissions and orders the previous instance to submit the case-files within that same time-limit.

3. ...

4. A second exchange of submissions takes place only exceptionally."

13. By judgment of 22 November 2005 (published in the official collection (BGE) 132 I 42, summarised in *Schaller-Bossert v. Switzerland*, no. 41718/05, § 20, 28 October 2010), the Federal Tribunal considered that, in proceedings which provided, as a rule, for a simple exchange of submissions, it was sufficient to send the respective submissions to the adverse party for information, without expressly inviting him or her to submit comments. That way, the party had the possibility to examine the need to comment on the new submissions. If, in such a case, the party did not react after having taken notice of the new submissions, the tribunal could assume that he or she had waived their right to comment. The Federal Tribunal considered that this approach was "a pragmatic way of implementing Article 6 § 1 of the Convention". Referring to a previous judgment, the tribunal further considered that an applicant, who deemed it necessary to submit comments on submissions which had been served on him for information, was obliged, without undue delay, to submit his comments or to request leave to submit such comments.

THE LAW

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

14. The applicant complained that he had not been able to submit comments on the written observations submitted by the Federal Department of Interior. He relied on 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 fair ... hearing ... by [a] ... tribunal ..."

15. The Government contested that argument. They alleged, in particular, that the applicant had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention, as he could have followed the new practice introduced by the Federal Tribunal (compare § 13, above) by either requesting the tribunal to be granted leave to submit comments on the observations or submitting such comments immediately to the tribunal.

A. Admissibility

1. Applicability of Article 6 § 1

16. The Court notes, at the outset, that the Government have not contested that Article 6 § 1 of the Convention was applicable in the instant case. The Court reiterates that, for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law (see, among many other examples, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV; *Taşkın and Others v. Turkey*, no. 46117/99, § 130, ECHR 2004-X and *L'association des amis de Saint-Raphaël et de Fréjus v. France* (dec.), no. 45053/98, § 20, 29 February 2000).

17. The Court notes, firstly, that the applicant opposed the municipality of Samedan's decision to issue a building permit to a third party for the construction of a "wellness centre" on the ground that the building project would create emissions of steam and noise which exceeded the limits allowed and that the presence of such an installation in the quarter was contrary to the rules for the protection of historic buildings, to which the applicant's house belonged. The Court further observes that the Federal Tribunal, in its judgment of 16 May 2007, expressly acknowledged that the legal provisions relied upon by the applicant also served the protection of the applicant's building and that the applicant, as a close neighbour to the envisaged building project, had an "interest warranting protection". The Court concludes that the applicant could rely on a right that was recognised under Swiss law.

18. As to whether the right in issue was a civil right, the court reiterates that Article 6 § 1 is applicable if there is a close link beween the proceedings brought by the applicant and the consequences of their outcome for the applicant's property (compare *Ortenberg v. Austria*, 25 November 1994, § 28, Series A no. 295-B; *Antonetto v. Italy*, (dec.), no. 15918/89, 16 Decmber 2007 and *Stifung Giessbach dem Schweizervolk AG v. Switzerland*, (dec.), no. 26886/06, 10 April 2007). The Court observes that the applicant submitted that the steam and noise emanating from the envisaged building project had a direct impact on his own property.

Consequently, the outcome of the proceedings was directly related to the applicants' property and thus to his civil rights. It follows that Article 6 § 1 of the Convention is applicable in the instant case.

2. The Government's objection under Article 35 § 3 (b)

19. With regard to the Government's objection that the applicant would have been in a position to submit comments on the Federal Department's submissions, the Court observes that the applicant's complaint precisely evolves around the question as to whether the applicant had been in a position allowing him to submit further comments. It follows that this consideration cannot lead to a rejection of the claim under Article 35 § 3 (b) of the Convention.

20. The instant case further falls to be distinguished from a number of cases where a similar complaint was declared inadmissible because the applicant had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention (see, *inter alia*, *Holub v. the Czech Republic* (dec.), no. 24880/05, 14 December 2010; *Matoušek v. the Czech Republic* (dec.), no. 9965/08, 29 March 2011; *Liga Portuguesa de Futebol Profissional v. Portugal* (dec.), no. 49639/09, 3 April 2012 and *Jirsák v. the Czech Republic*, no. 8968/08, §§ 89-90, 5 April 2012). In those cases, the Court based its decision on the fact that the non-communicated observations did not contain anything new or relevant to the case and that the impugned decision had not been based on them. In the present case, the Federal Department of Interior, which had not been heard in the previous proceedings before the administrative authorities, made submissions falling within its own competency as a Federal organ. It does not appear that the Federal Department merely repeated arguments which had already been raised before. It cannot thus be said – and it has not been alleged by the Government – that the submissions were completely irrelevant for the proceedings before the Federal Tribunal. In these circumstances, the Court cannot conclude that the applicant has not suffered a "significant disadvantage" in exercising his right to adversarial proceedings before the Federal Tribunal (also compare *BENet Praha, spol. s r.o. v. the Czech Republic*, no. 33908/04, § 135, 24 February 2011).

21. The Court finally notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the applicant

22. The applicant alleged that, in the proceedings before the Federal Tribunal, he did not have an opportunity to submit comments on the observations submitted by the Department of Interior. He further complained that the Federal Tribunal had failed to inform him that it had requested information from the Department of Interior and that he had been thus prevented from addressing his own questions to that department.

23. The applicant pointed out that he had received the observations submitted by the Department of Interior on 23 April 2007 and that the Federal Tribunal had given its judgments only 24 days later, on 16 May 2007. It had thus been simply impossible for him to react in such a short time. The applicant further submitted that "for information" implied that there would not be any further exchange of observations. Accordingly, the applicant had to assume that he would not have any possibility to address his own questions to the Department of Interior.

2. Submissions by the Government

24. The Government submitted that the Federal Tribunal, since the first conviction by the Court in the case of *Nideröst-Huber v. Switzerland* (18 February 1997, *Reports of Judgments and Decisions* 1997-I) had sought to find practical solutions which ensured respect for the Court's requirements and, at the same time, avoided a disproportionate and useless exchange of submissions, in order to comply with the demand to adjudicate a case within a reasonable time. The Government referred, in particular, to the judgment issued by the Federal Tribunal on 22 November 2005 (see paragraph 14, above). The Government emphasised that this judgment was published in the court's official collection and that the new practice had subsequently been confirmed by other judgments of the Federal Tribunal.

25. According to the Government, this new practice allowed to strike a fair balance between the party's interest to submit comments, if he or she wished to do so, on any observation submitted by the adverse party or by an authority, and the interest in processing the case within a reasonable time. The applicant's interests were duly taken into account by the alternatives offered by the Tribunal's case-law, either of submitting further observations directly to the tribunal or of requesting leave to submit further observations. In the instant case, the Federal Tribunal had given judgment 26 days after having served the department's submissions on the applicant. As the applicant, who was a jurist himself, did not react during an interval of almost one month, the tribunal could presume that he had waived his right to reply.

26. The Government finally pointed out that the Federal Tribunal had not put any specific questions when soliciting the Federal Department's comments.

3. The Court's assessment

27. The Court reiterates that the concept of a fair hearing implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to have made known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (see, among many other authorities, *Nideröst-Huber*, cited above, § 24; and *Göç v. Turkey* [GC], no. 36590/97, § 55, ECHR 2002-V).

28. The Court further reiterates that it has frequently found violations of Article 6 § 1 of the Convention on the ground that the applicant had not been invited to submit comments on observations filed by a lower court instance, by an administrative authority or by the adverse party (see, in chronological order, *Nideröst-Huber*, cited above, § 24; *F.R. v. Switzerland*, no. 37292/97, § 36, 28 June 2001; *Ziegler v. Switzerland*, no. 33499/96, § 33, 21 February 2002; *Contardi v. Switzerland*, no. 7020/02, § 40, 12 July 2005; *Spang v. Switzerland*, no. 45228/99, § 28, 11 October 2005; *Ressegatti v. Switzerland*, no. 17671/02, § 55, 13 July 2006; *Kessler v. Switzerland*, no. 10577/04, § 32, 26 July 2007; *Werz v. Switzerland*, no. 22015/05, § 55, 17 December 2009; *Schaller-Bossert v. Switzerland*, no. 41718/05, § 26, 28 October 2010 and *Ellès and Others v. Switzerland*, no. 12573/06, § 26, 16 December 2010).

29. Turning to the circumstances of the instant case, the Court observes that the Federal Tribunal sent the Federal Department's submissions to the applicant "for information" only, which could be interpreted as implying that no further comments were solicited from the applicant. The procedural situation thus resembles the one examined by the Court in the case of *Schaller-Bossert.* In that case, the Court was not called upon to pronounce an opinion on the impact of the case-law adopted by the Federal Tribunal by judgment of 22 November 2005 (see paragraph 13, above), because this judgment was given only after the relevant proceedings had been terminated (see *Schaller-Bossert*, cited above, § 41). The Court observed, however, that it was not convinced that the applicant, who was not represented by counsel before the Federal Tribunal, should have replied immediately to the observations in order not to lose her right under Article 6 § 1. In this respect, the Court emphasised that the letter accompanying the observations clearly bore the reference "for information" and that the relevant provisions of the Law on Judicial Organisation unequivocally provided for a further exchange of submissions only under exceptional circumstances (see *Schaller-Bossert*, cited above, § 42).

30. The Court observes that the proceedings in the instant case took place more than a year after the Federal Tribunal had issued its judgment of 22 November 2005, in which that court outlined its new practice regarding the exchange of additional observations, designed to comply with the requirements of Article 6 § 1 of the Convention (compare paragraph 13, above). Under this practice, if submissions were served on the adverse party "for information", that party had the option either to request leave to submit comments or to submit such comments straight away. Conversely, if the adverse party did not react without undue delay after having taken notice of the new submissions, the tribunal could assume that he or she had waived the right to comment.

31. The Court accepts that the practice adopted by the Federal Tribunal is calculated to save time and expedite the proceedings. As its case-law bears out, the Court attaches great importance to that objective, which does not, however, justify disregarding such a fundamental principle as the right to adversarial proceedings. In fact, Article 6 § 1 is intended above all to secure the interests of the parties and those of the proper administration of justice (see *Nideröst-Huber*, cited above, § 30). Consequently, it falls within the responsibility of the domestic courts to ensure that the standards set by Article 6 § 1, and, in particular, the protection of the equality of arms, are respected in each individual case. This implies the obligation to interpret the provisions on the admissibility of a further exchange of comments (see paragraph 12, above) in a way which does not curtail the adverse party's right to comment on any new submissions.

32. The Court further considers that the applicant, in his capacity as a lawyer, could have been expected to be aware of the Federal Tribunal's relevant case-law and to act accordingly. The Court considers that the new practice might raise problems with regard to legal certainty. It observes, in particular, that the Federal Tribunal, when serving new submissions on the adverse party "for information", does not appear to indicate to that party when it will give its decision on the case. Consequently, the adverse party may encounter difficulties in assessing how much time is left for examining the new submissions and preparing comments. However, in the specific circumstances of the instant case, the Court is satisfied that this procedural disadvantage was sufficiently counterbalanced by the option to request leave to submit comments. In this respect, the Court notes that the comments of the Federal Department of Interior that had been served on the applicant contained not more than two pages and that the Federal Tribunal gave its judgment more than three weeks after serving this document on the applicant. The Court consider that the applicant should have been in a position to examine whether the content of the documents necessitated further comments, in which case he could have requested leave to submit such comments. In light of the fact that the Federal Tribunal, in its judgment of 22 November 2005, expressly referred to the case-law of this Court on

Article 6 § 1 of the Convention, the Court has no reason to assume that such a request would have lacked any prospect of success.

33. The foregoing considerations are sufficient to enable the Court to conclude that the applicant would have been given sufficient opportunity to comment on the Federal Department's observations if he had requested leave to do so.

34. In view of the above, the Court does not consider that the applicant's complaint about not having been informed by the Federal Tribunal about the question put to the Federal Department of Interior raises a separate issue under the Convention, as the applicant would have been in a position to formulate any additional questions once he had been informed of the Department of Interior's comments.

35. There has accordingly been no violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

36. The applicant further complained under Article 6 § 1 of the Convention that the Municipal Council of Samedan had not been impartial. He finally complained that the domestic courts had failed to apply correctly the Convention for the Protection of the Architectural Heritage of Europe of 3 October 1985 (Granada Convention).

37. The Court recalls that Article 6 § 1 of the Convention is not applicable to proceedings before the administrative authorities and that the Court, under Article 19 of the Convention, does not have jurisdiction to ensure the observance of other instruments than the Convention and the Protocol thereto. It follows that these complaints are incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint about the lack of a fair hearing before the Federal Tribunal admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 15 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Ineta Ziemele
President