AS TO THE ADMISSIBILITY OF

Application No. 28334/95
by Paul FRISCHKNECHT
against Switzerland

The European Commission of Human Rights (First Chamber) sitting in private on 18 January 1996, 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 23 August 1995 by Paul Frischknecht against Switzerland and registered on 28 August 1995 under file No. 28334/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, a Swiss citizen born in 1956, resides at Herisau in Switzerland.

Particular circumstances of the case

Since 1990 the applicant is a house husband (Hausmann) and not gainfully employed. His wife is a teacher.

The Compensation Office (Ausgleichskasse) of the Canton of St. Gallen registered the applicant as a person who was not gainfully employed (erwerbstätig) and ordered him to pay insurance contributions for the Old Age and Survivors' Insurance (Alters- und Hinterlassenenversicherung) amounting to 333.60 CHF per year for 1991, 1992 and 1993. On 21 February 1992 the Compensation Office annulled its previous decision and ordered the applicant to pay yearly amounts of 832 CHF for 1991-1993.

The applicant filed an appeal (Rekurs) with the Insurance Court

(Versicherungsgericht) of the Canton of St. Gallen, claiming that he should be exempted from the obligation to pay contributions. He referred in particular to the situation of housewives who according to Section 3 para. 2 b) of the Federal Old Age and Survivors' Insurance Act (Bundesgesetz über die Alters- und Hinterlassenenversicherung: see below, Relevant domestic law) were exempted from the obligation to pay contributions. The Insurance Court on 30 June 1994 dismissed the appeal insofar as the applicant had complained of unequal treatment between man and woman; the appeal was partly upheld in respect of the calculation of the amounts.

The applicant's administrative law appeal (Verwaltungsgerichts-beschwerde) was dismissed by the Federal Insurance Court (Eidgenössisches Versicherungsgericht) on 2 February 1995, the decision being served on 23 February 1995. In its decision, the Court stated inter alia:

<Translation>

> "One must agree with the applicant that the notion of family underlying the Old Age and Survivors' Insurance Act is hardly reconcilable with present legal reality, in particular with the principle of the distribution of roles among partners on which the new matrimonial law is based. However, the law in force offers no possibility to consider the concerns put forward by him. Section 4 para. 2 of the Federal Constitution only offers the person concerned a directly enforceable right in the area of equality of pay ... For the rest, Section 4 para. 2 of the Federal Constitution, according to its clear text, is directed at the legislator who must ensure equality between man and woman in particular in family, education and labour. According to case-law, since the entry into force of Section 4 para. 2 of the Federal Constitution the cantonal and federal legislator is prohibited in principle from enacting laws which treat man and woman unequally ... On the other hand, statutes enacted by Federal Parliament ... cannot be examined by the judge as to their constitutionality (Section 113 para. 3 ... of the Federal Constitution). The Federal Insurance Court cannot, therefore, examine in the light of the principle of legal equality statutory unequal treatment between wives and husbands who are exclusively active in the household in respect of their obligation to pay contributions. This also implies that it cannot set aside the clear meaning of a legal rule by means of an interpretation conforming to the constitution ... The clear text of Section 3 para. 2 a) of the Old Age and Survivors' Insurance Act expressly excludes solely wives who are not gainfully employed from the obligation to pay contribution; thus, the judge is prohibited from correcting by means of an interpretation the distribution of roles as conceived by the model of the Civil Code in 1907."

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> "Dem Beschwerdeführer ist darin beizupflichten, dass das Familienbild, wie es dem AHVG zugrundeliegt, mit der heutigen Rechtswirklichkeit, insbesondere auch dem auf dem Prinzip der partnerschaftlichen Rollenverteilung aufbauenden neuen Eherecht, kaum vereinbar ist. Das geltende Recht enthält jedoch keine Handhabe, um dem von ihm vorgetragenen Anliegen Rechnung zu tragen. Art. 4 Abs. 2 BV gibt den Betroffenen nur einen direkt klagbaren Anspruch im Bereiche der Lohngleichheit ... Im übrigen wendet sich Art. 4 Abs. 2 BV nach seinem klaren Wortlaut an den Gesetzgeber, der für die Gleichstellung von Mann und Frau vor allem in Familie, Ausbildung und Arbeit zu sorgen hat. Nach der Rechtsprechung ist es dem kantonalen und dem eidgenössischen Gesetzgeber seit Inkrafttreten von Art. 4 Abs. 2 BV grundsätzlich untersagt, Normen zu erlassen, welche Mann und Frau ungleich behandeln ... Anderseits können die von der Bundesversammlung

erlassenen Gesetze ... vom Richter nicht auf ihre Verfassungsmässigkeit überprüft werden (Art. 113 Abs. 3 ... BV). Das Eidgenösasische Versicherungsgericht kann daher die gesetzlich festgelegte Ungleichbehandlung zwischen ausschliesslich im Haushalt tätigen Ehefrauen und Ehemännern bezüglich der Beitragspflicht nicht am Grundsatz der Rechtsgleichheit messen. Dies beinhaltet zugleich aber auch, dass es den klaren Sinn einer Gesetzesnorm nicht durch eine verfassungskonforme Auslegung beiseite schieben darf ... Da nach dem klaren Wortlaut des Art. 3 Abs. 2 lit. b AHVG ausdrücklich nur die nichterwerbstätigen Ehefrauen von der Beitragspflicht ausgenommen sind, ist es dem Richter untersagt, das nach dem Muster des ZGB von 1907 konzipierte Rollenverständnis auf dem Weg der Auslegung zu korrigieren."

Relevant domestic law

Section 4 para. 2 of the Swiss Federal Constitution (Bundesverfassung) provides that "man and woman are equal; the law shall ensure their equality, in particular in family, education and labour ..." ("Mann und Frau sind gleichberechtigt. Das Gesetz sorgt für ihre Gleichsstellung in Familie, Ausbildung und Arbeit ...").

According to Section 113 para. 3 of the Federal Constitution, "the statutes ... enacted by Federal Parliament ... are binding for the Federal Court" ("die von der Bundesversammlung erlassenen Gesetze (sind) für das Bundesgericht massgebend").

Section 3 of the Federal Old Age and Survivors' Insurance Act (Bundesgesetz über die Alters- und Hinterlassenenversicherung) determines those persons who are obliged to pay insurance contributions (beitragspflichtig). Para. 2 b) states:

<Translation>

"2. There shall be no obligation to pay contributions for:

...

b. wives of insured persons who are not gainfully employed, and wives who collaborate in the husband's enterprise to the extent that they have no salary."

<German>

"2. Von der Beitragspflicht sind befreit:

...

b. die nichterwerbstätigen Ehefrauen von Versicherten sowie im Betriebe des Ehemannes mitarbeitenden Ehefrauen, soweit sie keinen Barlohn beziehen."

COMPLAINTS

The applicant complains under Article 14 of the Convention of unequal treatment in that he, as a house husband, is obliged to pay insurance contributions, whereas a housewife is not. He submits that his wife must pay approximately 10% more contributions than her male colleagues earning the same salary. There is, therefore, a difference of pay of approximately 0,5%.

THE LAW

1. The applicant complains of unequal treatment in that he, as a house husband, is obliged to pay insurance contributions, whereas a housewife is not. He relies on Article 14 (Art. 14) of the Convention

which states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

2. The Commission notes that the Federal Insurance Court in its decision of 2 February 1995 stated that it was bound by the text of Section 3 para. 2 b) of the Federal Old Age and Survivors' Insurance Act. An issue arises therefore whether the applicant had an effective remedy at his disposal and whether he has complied with the time-limit of six months within the meaning of Article 26 (Art. 26) of the Convention. The Commission need nevertheless not resolve these issues since the application is inadmissible for the following reasons.

3. According to the Convention organs' case-law, Article 14 (Art. 14) of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 (Art. 14) does not necessarily presuppose a breach of those provisions - and to this extent it is autonomous -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see Eur. Court H.R., Abdulaziz and others v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 35, para. 71).

The Commission has therefore considered whether the facts at issue fall within the ambit of any other provision of the Convention or its Protocols.

As Switzerland has not ratified Protocol No. 1, the Commission must not examine whether the facts at issue fall within the ambit of Article 1 of Protocol No. 1 (P1-1) of the Convention which enshrines the right to the peaceful enjoyment of possessions.

Next, the Commission has had regard to Article 8 (Art. 8) of the Convention which states, insofar as relevant:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In the Commission's opinion, however, the applicant has not shown that the obligation to pay insurance contributions hindered him in the enjoyment of, or in any other way affected, his right to respect for family life.

This part of the application is, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The Commission has also had regard to Article 5 of Protocol No. 7 (P7-5) which states, insofar as relevant:

> "Spouses shall enjoy equality of rights and responsibilities of a private law character between them ... during marriage ..."

The Commission notes that the issue in the present case is the exemption from the obligation to pay social insurance contributions. It is true that the Convention organs have considered social-security disputes as involving the determination of a "civil right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, while distinguishing them from private-law disputes in the traditional sense (see Eur. Court H.R., Deumeland v. Germany judgment of 29 May 1986, Series A no. 100, p. 22, para. 60; Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 17, para. 46).

In the Commission's opinion, however, it cannot be concluded that as a result of the above interpretation the "rights and responsibilities" at issue were of a "private law character" within the meaning of Article 5 of Protocol No. 7 (P7-5).

The Commission finds a confirmation herefor in the explanatory report to Protocol No. 7 (P7) to the Convention according to which Article 5 (Art. 5) does not apply to other fields of law, such as administrative, fiscal, social or labour laws.

The remainder of the application is, therefore, incompatible ratione materiae with the provisions of the Convention 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)