CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 33958/96
by H. P. W.
against Switzerland

The European Court of Human Rights (Second Section), sitting on 23 March 2000 as a Chamber composed of

Mr C.L. Rozakis, *President*,
Mr M. Fischbach,
Mr. L. Wildhaber,
Mr G. Bonello,
Mr P. Lorenzen,
Mr A.B. Baka,
Mr A. Kovler, *judges*,

and Mr E. Fribergh, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 7 November 1996 and registered on 25 November 1996,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, a Swiss citizen born in 1930, is a businessman residing in Pfäffikon in Switzerland. Before the Court he is represented by Mr A. Staffelbach, a lawyer practising in Zurich.

A. The circumstances of the case

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

The applicant is the proprietor of two real properties in the municipality (*Gemeinde*) of Kloten of 115 m² and 51 m². Half of the second real property is tied up with a joint ownership of part of a path. In the 1950's an area zoning plan (*Quartierplan*) was prepared, though no general settlement (*Bereinigung*) of the applicant's real properties was achieved. The applicant also unsuccessfully requested the Kloten municipality on a number of occasions to take over the two real properties and to compensate him accordingly.

The applicant was also involved in other building proceedings in the Kloten municipality in which the opposing party, a cantonal insurance pension office, was represented by lawyer W.

The applicant was furthermore involved in building proceedings against the Küsnacht municipality in which that municipality was represented by lawyer R. These proceedings were conducted before the Administrative Court (*Verwaltungsgericht*) of the Canton of Zurich and in last resort before the Federal Court, its decision being given on 24 October 1995.

Mrs R. and Mr W. are practising lawyers (*Rechtsanwälte*) who at that time shared office premises in Zurich together with Mr L. Lawyers R. and L. also acted as part-time administrative judges at the Administrative Court of the Canton of Zurich.

In the proceedings concerning the applicant's real properties in Kloten, he filed on 15 February 1995 an action with the Administrative Court, requesting an order that the Kloten municipality take over the two real properties, including the joint ownership, for the sum of 368,200 Swiss Francs (CHF).

The Administrative Court consists of both full-time and part-time judges, the latter also acting as legal representatives in their spare time.

In the applicant's case, the bench was composed of five judges, i.e. the Vice-President, three administrative judges and one substitute judge. Among the administrative judges were R. and L.

On 15 December 1995 the Court rejected the applicant's action. The Court found that it was not competent to deal with the matter which appertained to the jurisdiction of the Assessment Commission (*Schätzungskommission*). However, the Court declined to transmit the case to the Assessment Court as the applicant had forfeited (*verwirkt*) his right to claim compensation. Thus, if he had disagreed with the area zoning plan, in particular with the settlement of accounts (*Abrechnung*) of 1957, he should have requested the institution of assessment proceedings at that time. The Court found that the claim for compensation would in

any event be unfounded as it had to be directed towards other proprietors of the area zoning plan, rather than the municipality.

The applicant filed a public law appeal (*staatsrechtliche Beschwerde*) with the Federal Court (*Bundesgericht*) in which he complained on the one hand about the outcome of the proceedings, on the other that judge R. had shortly before acted in separate appeal proceedings, instituted by the applicant, as the legal representative of the opposing party, i.e. the Küsnacht municipality. Moreover, judge R. shared office premises with judge L., and also with W. who, in separate proceedings instituted by the applicant, had represented the opposing party.

The public law appeal was dismissed by the Federal Court on 29 April 1996, the decision being served on 9 May 1996. In its decision, the Court first dealt with the applicant's complaint that certain judges of the Administrative Court had not been impartial. The Court stated:

> "The interrelations (*Verflechtungen*) mentioned may raise certain doubts in view of S. 58 § 1 of the Federal Constitution which requires the impartiality of judges. However, the applicant does not claim that R. or another member of the Administrative Court was in fact biased when giving the contested decision. The Federal Court has already previously held that the fact that legal representatives in the Canton of Zurich also acted as part-time administrative judges could under certain circumstances result in an interrelation of interests. The Court found, however, that it could be expected from a part-time judge that he could distinguish between his official function and his private professional activities. A part-time judge was not, therefore, obliged to stand down merely because he had represented legal interests in other proceedings which were opposed to those of the applicant ... In view of these principles it can equally not be assumed in the present case that the Administrative Court was composed of judges who could be regarded as biased when giving the contested decision."

The Federal Court furthermore did not consider it arbitrary that the Administrative Court had found that the applicant's claims were forfeited as he had failed duly to raise them.

On 20 August 1996 the Federal Court dismissed the applicant's request to reopen the proceedings.

B. Relevant domestic law and practice

In Switzerland no particular magistrate's training is required to enter the judiciary profession. This explains, *inter alia*, the comparatively high number of practising lawyers acting as part-time or substitute judges.

§ 34 of the Administrative Judiciary Procedure Act (*Verwaltungsrechtspflegegesetz*) of the Canton of Zurich of 1959 concerns "Incompatibility" (*Unvereinbarkeit*) and stated in the version in force at that time:

> "1. The office of a full-time judge of the Administrative Court is incompatible with any other full-time professional activity (*hauptberufliche Tätigkeit*). Full-time judges may not be a member of the Federal Assembly nor member or registrar of a municipal or district council. They are not allowed legally to represent third persons before courts and administrative bodies. An authorisation of the Cantonal Parliament is required if they wish to belong to the administration or management of a commercial company or cooperative acting for commercial purposes.

2. Part-time judges may not be employed full-time by an administrative authority or a court, and may not be member or registrar of a municipal or district council."

The Administrative Judiciary Procedure Act was revised in 1997 and § 34 now states:

"1. The office of a full-time member of the Administrative Court is incompatible both with any other full-time professional activity and with the professional representation of third persons before courts or administrative authorities.

2. The office of a part-time member of the Administrative Court is incompatible with the professional representation of third persons before the Administrative Court ... "

The Federal Court has pronounced itself on various occasions on the question of the impartiality of lawyers acting as judges, in particular the danger of a link of dependency between the judge and one of the parties. For instance, a lawyer may not act as judge in a case where he is representing one of the parties, or where in separate pending proceedings he is representing the opposing party. On the other hand, no issue arises as a rule where the lawyer has once represented a party and the mandate has been closed. The mere fact that the lawyer generally advises in building matters does not imply that as judge he will necessarily favour a plaintiff who is involved in the construction of a house (see judgment of 15.5.1992, *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 94, 1993, 87; judgment of 20.12.1990, Arrêts du Tribunal fédéral suisse [ATF] 116 Ia 485).

COMPLAINTS

1. Under Article 6 § 1 of the Convention, the applicant complains of the bias of the two administrative judges R. and L. These judges had themselves, or through the office partner W., acted against the applicant in other proceedings.

2. The applicant further complains under Article 6 § 1 of the Convention that the Administrative Court barred his access to court by refusing to transfer his action to the Assessment Court. The applicant is not in a position himself to introduce expropriation proceedings. Rather, he depends on the Administrative Court to do so.

3. Under Article 8 of the Convention the applicant complains that he could not dispose of his real property as he wished.

THE LAW

1. Under Article 6 § 1 of the Convention, the applicant complains of the bias of the two administrative judges R. and L. These judges had themselves, or through an office partner, acted against the applicant in other proceedings.

The Government submit, with reference to the Federal Court's case-law, that in the present case there was no link of dependency between judge R. and the party opposing the applicant in the Administrative Court proceedings. R. had represented another municipality - Küsnacht and not Kloten - and in proceedings concerning a matter completely unrelated to the present case. R.'s representation of the Küsnacht municipality had been terminated when the Administrative Tribunal gave its decision. One cannot therefore say that judge R. in any way

appeared to favour the Kloten municipality. Lawyer W., on the other hand, acted in a completely different case and did not represent Kloten. The applicant does not submit that the three lawyers R., L. and W. undertook a concerted action in order to favour Kloten. Indeed, it can be expected from a part-time judge that he distinguishes between his different professional activities.

In the Government's opinion, Article 6 of the Convention does not exclude "mixed" courts where, as for instance in the Sramek v. Austria case, practising lawyers act as judges (see Eur. Court HR, judgment of 22 October 1984, Series A no. 84, p. 19, § 40). In the present case, there were no grounds to doubt the impartiality of judges R. and L. on subjective grounds. As regards the objective grounds, appearances may be of a certain importance for the accused person, though they cannot be decisive. What is decisive is whether the fear of lack of impartiality can be objectively justified. Doubts alone cannot suffice. Thus, judge R. never represented as a lawyer the Kloten municipality before the Administrative Court. In the light of the Sramek case, her impartiality would not even be called in question if she had represented Kloten in other proceedings (see *loc. cit.*). On the whole, there is no link *ratione loci, materiae* or *pesonae* between the different proceedings in which R. was involved as judge and lawyer, respectively. The same applies to lawyer W., who had not represented the Kloten municipality.

The applicant replies that in some areas of administration in Switzerland there are particularly close links between lawyers and the judiciary. In view of the problems which have arisen, the Canton of Zurich has revised its legislation which now excludes for part-time judges the professional representation of third parties. As a result of these changes, the office in which lawyers R., L. and W. worked no longer exists.

The applicant refers to everyday legal practice where a conflict of interests experienced by an individual lawyer in a partnership consisting of several lawyers implies that not only he but all other staff are equally excluded from taking on the same work. Reference is made to the strict standards applying to lawyers, for instance that a lawyer may not act for two opposing parties and may not accept a request from a third party to represent him or her against a previous client. These standards must also apply to courts with a mixed composition. In the present case, it is not therefore important which of the three lawyers were affected by the conflict of interests. The lawyers should not have been allowed to act as judges. There is always a danger of at least a potential conflict of interests for Administrative Court judges: Either they consider the possibility of obtaining future work from the public authorities concerned and do not want to annoy them by voting against them; or they do not want to lose their goodwill when they take future decisions on granting planning permission, on which they are dependent for their private clients who want to carry out construction projects. The interrelated interests of a total of two out of five judges in the instant case constitute an appearance of lack of impartiality.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant further complains under Article 6 § 1 of the Convention that the Administrative Court barred his access to court by refusing to transfer his action to the Assessment Court. In this respect the applicant complains that he is not in a position himself to introduce expropriation proceedings. Rather, he depends on the Administrative Court to do so.

According to the Convention organs' case-law, Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. The right of access, however, is not absolute but may be subject to limitations since the right by its very nature calls for regulation by the State. Nevertheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see Eur. Court HR, Philis v. Greece judgment of 27 August 1991, Series A no. 209, p. 20 et seq., § 59).

In the present case, the Administrative Court in its judgment of 15 December 1995 found, on the one hand, that it was not competent to deal with the matter as it appertained to the jurisdiction of the Assessment Court. On the other, the Administrative Court declined to transmit the case to the Assessment Court as the applicant should have instituted assessment proceedings at the relevant time in the context of the area zoning plan. As he had failed to do so, he had forfeited his right to claim compensation.

The Court further notes that the Federal Court in its judgment of 29 April 1996 did not regard these conclusions as arbitrary.

The Court recalls that regulations concerning the time-limits to be observed for filing claims are aimed at ensuring the proper administration of justice (see Eur. Comm. HR, no. 10857/94, Dec. 15.7.86, D.R. 48, p. 106).

It follows that the limitation applied did not restrict or reduce the applicant's right of access to court in such a way or to such an extent that the very essence of his right was impaired (see the Philis judgment*, loc. cit.*).

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

3. Insofar as the applicant complains under Article 8 of the Convention that he could not dispose of his real property as he wished, the Court finds no issue under this provision. The remainder 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 ADMISSIBLE, without prejudging the merits, the applicant's complaint under Article 6 § 1 about the alleged lack of impartiality of the Administrative Court of the Canton of Zurich;

DECLARES INADMISSIBLE the remainder of the application.

Erik Fribergh
Registrar

Christos Rozakis
President