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. 31827/96
by J.B.
against Switzerland

The European Court of Human Rights (Second Section), sitting on 6 April 2000 as a Chamber composed of

Mr C.L. Rozakis, *President*,
Mr L. Wildhaber
Mr B. Conforti,
Mr P. Lorenzen,
Mrs M. Tsatsa-Nikolovska,
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 6 June 1996 and registered on 12 June 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:

Commented [Note1]: Judges names are to be followed by a **COMMA** and a **MANUAL LINE BREAK** (Shift+Enter). When inserting names via *AltS* please remove the substitute judge's name, if necessary, and the extra paragraph return(s). (There is to be no extra space between the judges' names and that of the Section Registrar.)

THE FACTS

The applicant, a Swiss citizen born in 1914, is a retired ski-teacher and mountain-guide residing in Zermatt in Switzerland.

He is represented before the Court by Messrs. U. Behnisch and M. Lustenberger, lawyers practising in Zürich.

A. The circumstances of the case

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

In 1987 the Federal Tax Administration (*Eidgenössische Steuerverwaltung*) consulted the case-file of the financial manager P. It was noted that between 1979 and 1985 the applicant had made investments with P. and his companies. However, these amounts had not been declared in the taxation periods between 1981/82 and 1987/88.

In view thereof, the Zermatt District Tax Commission (*Bezirkssteuerkommission*) introduced on 11 December 1987 tax evasion proceedings (*Steuerhinterziehungsverfahren*) in respect of the applicant's federal taxes. He was requested to submit all the documents which he had concerning these companies.

On 22 December 1987 the applicant admitted that he had "in fact made investments with P. and his companies from 1979 to 1985 and that the income had not been properly declared by him in his personal tax form". However, the applicant did not submit the necessary documents.

On 24 June 1988 the applicant was again requested to declare the source of the income, amounting to 238,000 Swiss Francs (CHF), which he had invested with P. The applicant did not reply.

On 2 September 1988 the District Tax Commission decided to issue a supplementary tax (*Nachsteuer*) on the interests on the income which the applicant had invested with P. for the years 1979 to 1986. In letters dated 29 September and 11 October 1988 the applicant was informed of the assessment of his taxes (*Steuerveranlagung*) and of the supplementary tax due.

Following an intervention of the Federal Tax Inspector, the President of the District Tax Commission withdrew the supplementary tax decision in two letters dated 7 and 20 October 1988. At the same time the President again requested the applicant to explain the source of the income invested. A further such request was served on the applicant on 19 January 1989.

The applicant not having reacted to any of these requests, the Cantonal Administration for Direct Federal Taxes (*kantonale Verwaltung für die direkte Bundessteuer*) imposed on 28 February 1989 on the applicant a disciplinary fine (*Ordnungsbusse*) of 1,000 CHF. The Administration relied on S. 131 § 1 of the Decree of the Federal Council on the imposition of a direct federal tax (*Bundesratsbeschluss über die Erhebung einer direkten Bundessteuer*; see below, Relevant domestic law and practice). The applicant duly paid the fine.

On 7 April 1989 and on 19 June, 17 July and 16 August 1990 the District Tax Commission again admonished the applicant as he still had not submitted the required information.

On 3 August and 5 September 1990 the applicant replied that in his view the decision to impose additional taxes on him had been settled with legal force (*Rechtskraft*) on 29 September and 11 October 1988, for which reason he could not be obliged to give further information.

As a result, on 29 November 1990 the Cantonal Administration for Direct Federal Taxes imposed a second disciplinary fine of 2,000 CHF on the applicant in respect of federal taxes and based on S. 131 § 1 of the Decree of the Federal Council.

On 4 December 1990 and 22 January 1991 the Cantonal Tax Administration imposed a third disciplinary fine of 2,000 CHF in respect of cantonal taxes.

The applicant's appeal against the second disciplinary fine imposed on 29 November 1990 was dismissed by the Tax Appeals Commission (*Steuerrekurskommission*) of the Canton of Valais on 18 December 1992.

In its decision the Tax Appeals Commission found that the applicant had intentionally not complied with the order of the tax authorities to give information. However, according to S. 131 § 1 of the Decree of the Federal Council, persons liable to pay taxes were obliged to co-operate with the tax authorities, in particular to submit accounts, documents and other receipts in their possession which could be of relevance when determining the taxes. Moreover, the decision to impose taxes on the applicant had not acquired legal force as it had been withdrawn on 7 and 20 October 1988 by the President of the District Tax Commission.

Insofar as the applicant complained of a breach of the principle *non bis in idem*, the Appeals Tax Commission referred to the Federal Court's case-law according to which this principle was not breached by the repeated imposition of a disciplinary fine.

The applicant filed an administrative law appeal (*Verwaltungsgerichtsbeschwerde*) with the Federal Court (*Bundesgericht*) in which he complained under Article 6 of the Convention that as an accused he should not be obliged to incriminate himself. He also complained under Article 4 of Protocol No. 7 of a breach of the principle *non bis in idem*.

Meanwhile, the applicant also filed an objection against the third disciplinary fine issued on 4 December 1990 and 22 January 1991, though the proceedings were suspended before the Visp District Court (Bezirksgericht) awaiting the outcome of the proceedings before the Federal Court.

On 7 July 1995 the Federal Court dismissed the applicant's administrative law appeal, the decision being served on the applicant on 12 December 1995.

In its decision the Federal Court considered that the fine for tax evasion was a criminal sanction, whereas the supplementary tax was not. Nevertheless, the supplementary tax was imposed in tax evasion proceedings to which the guarantees of criminal procedure applied.

The next question thus arose whether the applicant could be obliged to incriminate himself in tax evasion proceedings in view of the determination of a supplementary tax. The Court reiterated the principle of tax proceedings according to which the burden of proof falls to the tax authorities to demonstrate that a person had not declared certain taxable income. It could not be said that the person concerned was obliged to incriminate himself. Rather, the person had merely to give information as to the sources of untaxed income of which the tax authorities already knew that they existed. If in such a situation, the person concerned had the right to remain silent, the entire tax system would be called in question. The regular tax assessment proceedings would then have to be concluded according to principles of criminal proceedings. The right to remain silent would complicate control, or even render it impossible. This could not be the purpose of Article 6 of the Convention.

In the Federal Court's opinion, there were a number of obligations in criminal law obliging a person to act in a particular way in order for the authorities to be able to obtain his conviction (*die dazu dienen, einen Straftäter zu überführen*). Reference was made in particular to lorries which had to be equipped with a tachograph as to speed and driving hours. In case of an accident, the lorry driver was obliged to hand over the device. Similarly, a motorist might be obliged to submit to a blood or a urine test, and he would be punished if he refused to do so.

The Court noted an essential difference to the Funke v. France case (Eur. Court HR, judgment of 25 February 1993, Series A no. 256), namely that in that case the tax authorities believed that certain documents existed although they were uncertain of the fact. In the present case, the authorities were aware of the income which the applicant had invested. The purpose of their intervention was to ensure that the income itself stemmed from incomes or fortunes which had been duly taxed. All the applicant had to do was to explain the source of this income. In fact, he should have done so during the regular tax assessment proceedings.

Finally, the Federal Court referred to the Salabiaku v. France case according to which presumptions of fact and law were compatible with Article 6 § 2 of the Convention as long as they were confined within reasonable limits and the rights of defence were maintained (see Eur. Court HR, judgment of 7 October 1988, Series A no. 141-A, p. 16, § 28).

The Court concluded that there was no breach of the applicant's right to the presumption of innocence or of his right not to incriminate himself.

In respect of the complaint about a breach of the principle *non bis in idem,* the Court found that the first fine imposed on the applicant had concerned the period before 28 February 1989, and not his activities thereafter. An issue might arise if repeated fines became disproportionate. However, the applicant had not argued that the cantonal authorities had repeatedly issued the same order without reasonable grounds.

On 5 June 1996 the cantonal authorities imposed a fourth fine of 5,000 CHF on the applicant, though this fine never acquired legal force.

Following the Federal Court's decision of 7 July 1995, an agreement was reached between the applicant and the cantonal tax authorities on 28 November 1996 which closed all tax and criminal tax proceedings for the years 1981/82 until 1995/96. On the one hand, the agreement fixed non-declared amounts of 244,727.35 CHF which were to be considered for taxation, the applicant having to pay a total sum of 91,975.45 CH. On the other hand, it was agreed that all pending proceedings were cancelled, including the proceedings concerning the

third and fourth disciplinary fines; and that the fine already paid was deducted from the total amount of taxes and criminal taxes. Finally, it was stated that "the proceedings filed before the Strasbourg Human Rights organs against the decision of the Federal Court on account of a disciplinary fine will not be affected by this agreement".

B. Relevant domestic law and practice

1. Supplementary tax proceedings and tax evasion proceedings

Tax evasion proceedings (*Steuerhinterziehungsverfahren*) serve the purpose of imposing a supplementary tax (*Nachsteuer*) where the latter has not duly been paid. They furthermore serve to bring about the criminal conviction of a person concerned who has acted culpably.

Supplementary tax proceedings and tax evasion proceedings are conducted by the same tax authorities which may employ the same means of investigation. The information obtained can serve to bring about both a supplementary tax and the person's conviction for tax evasion.

2. Decree of the Federal Council

The Decree of the Federal Council on the imposition of a direct federal tax refers in its Part 9 to "Contraventions" (*Widerhandlungen*).

S. 129 and 130 in Part 9 concern "tax evasion" and include the threat of a fine. For instance, S. 129 § 1 concerns persons who withdraw taxes by not filling in the tax form correctly. S. 130bis concerns "Tax and Inventory Fraud" (*Steuer- und Inventarbetrug*) and includes the threat of a fine or of imprisonment.

S. 131 § 1 of the Decree states:

> "A person ... liable to pay taxes or to give information who contravenes, intentionally or negligently, the official decisions and orders of this Decree, in particular as to:
>
> handing in a tax declaration;
> submitting or presenting accounts, the preparation or submission of confirmations and other receipts;
> complying with summons or the prohibition to act;
> giving information; or
> making payments and securities;
>
> will be fined between 5 and 10,000 CHF. The same punishment will be incurred if the obligation according to S. 90 §§ 5, 6 and 8 to provide information is not complied with."

S. 90 §§ 5, 6 and 8 of the Federal Decree concern obligations, *inter alia*, of third persons to submit information. S. 89 states that the tax payer must give truthful information and that he can be requested to submit documents etc. which may be relevant for the assessment of taxes. S. 132 regulates the procedure in case of tax evasion. Thus, the cantonal tax administration will undertake any necessary investigations.

COMPLAINTS

1. The applicant complains under Article 6 § 1 of the Convention of the unfairness of the proceedings in that he was obliged to submit documents which could have incriminated him. Conflicts arise under Swiss law in that the same authorities impose supplementary taxes and impose fines for tax evasion. In the present case the information required from the applicant amounted to "fishing expeditions" on the part of the authorities.

2. The applicant further complains under Article 4 of Protocol No. 7 of a breach of the principle *non bis in idem*. Thus, he was first fined the amount of 1,000 CHF for refusing to submit information. For the same refusal to provide information he was then fined 2,000 CHF in respect of federal taxes, and 2,000 CHF in respect of cantonal taxes.

THE LAW

1. The applicant complains under Article 6 § 1 of the Convention of the unfairness of the proceedings in that he was obliged to submit documents which could have incriminated him.

The Government submit, with reference to the pertinent legislation, that in such cases, as a matter of political choice, the tax authorities have no powers of investigation so as not to criminalise the person concerned. They cannot search a person's premises, confiscate objects, hear witnesses or impose detention. The bank secret remains intangible. To compensate for these shortcomings, the authorities may oblige a person to furnish pertinent documents on which in fact they will depend. The fine mentioned in S. 131 of the Federal Decree is the only coercive measure left to the authorities.

The procedures at issue are *sui generis*, though they resemble more administrative than criminal procedures. Both the applicant's taxes and any tax evasion were examined in one and the same, mixed procedure. The Federal Court accepted that Article 6 of the Convention applied to these proceedings, without stating that they determine a "criminal charge".

The Government doubt whether the guarantees of Article 6 § 1 of the Convention are applicable without discrimination to such proceedings regardless of the question whether the proceedings concern the determination of a "criminal charge" within the meaning of this provision. In this respect, the present case is distinguished from the Court's judgments in the Funke and Bendenoun cases v. France (see Eur. Court HR, judgments of 25 February 1993, Series A no. 256-A, and of 24 February 1994, Series A no. 284, respectively). There, the French authorities had far reaching powers, such as searching premises and confiscating documents, and imposed more severe fines.

In the Government's opinion, the present case is completely different. The Swiss authorities were well aware of the amounts of the income involved, and indeed the applicant had admitted them. The documents requested from the applicant would have served to confirm this knowledge rather than to obtain the applicant's conviction. It cannot be said that the authorities were out on a "fishing expedition". In general, tax evasion proceedings differ from other criminal proceedings in that the authorities are called upon to demonstrate what a person should have done, rather than not have done. As a result, Article 6 of the Convention should not be applied with the same rigour.

The Government conclude that a separation of proceedings - the regular tax proceedings, on the one hand, and the criminal tax evasion proceedings, on the other - as practised, for instance, in Germany would be impractical as the administration would have to conduct two different sets of proceedings, and the taxpayer would have to defend himself twice. The additional problem arises whether or not information gathered in the regular tax proceedings could be used in the criminal proceedings. Indeed, if a breach of Article 6 of the Convention were to be found in the present case, the legislative changes would be disproportionate and not further human rights, since the Swiss tax authorities would be obliged to resort to all the means normally reserved to the criminal investigation organs.

The applicant considers that Article 6 of the Convention is applicable, and that the imposition of fines breached the principle of proportionality. He points out that he was not in a position to submit the documents at issue as they were deposited with third persons, in particular banks which were not obliged to hand out the documents, or as they had already been destroyed. The bank secret cannot be breached in such cases and indeed constitutes a considerable obstacle to the prosecution for tax evasion. Nevertheless, the bank secret leads to an inflow of funds from foreign taxpayers.

In respect of his own situation the applicant points out that from the outset he had admitted evading taxes. Why did the authorities, if they already knew everything about the applicant's investments, ask for the documents concerned? Their purpose was to look for other bank accounts. In response to the District Tax Commission's promise not to ask any questions about the origin of the money, he submitted a statement of the payments made to Mr. P. However, the Federal Tax Inspector had the impression that more income and assets had not been declared. The revocation of the order was for the applicant a breach of promise that destroyed his faith in any action taken by the State.

The applicant submits that in view of the financial penalties involved, the fines can no longer be regarded as disciplinary measures. There aim is not to protect Swiss taxpayers, but to enhance the country's attractiveness internationally. The fines appear particularly high when compared with the amounts in the Funke v. France case (see Eur. Court HR, *loc. cit.*). The Swiss authorities also threatened the applicant with estimates of his taxable income totalling millions of CHF.

In the applicant's submissions, the combination of assessment proceedings and tax evasion proceedings repeatedly leads to incorrect decisions. In the assessment proceedings, the taxpayer is obliged to co-operate and declare all income and assets. In proceedings to fix a fine for unpaid taxes, this obligation can no longer be imposed. In criminal proceedings it is generally up to the prosecuting authorities to prove that the accused has broken the law. It is impossible to see why in such criminal proceedings in which fines of millions of CHF can be imposed, other principles should apply than those applying elsewhere in the criminal law. In fact, the new Tax Act of the Canton of Berne will separate these two proceedings if the taxpayer does not agree to combine them. The separation is not felt by anyone to be impracticable.

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 4 of Protocol No. 7 of a breach of the principle *non bis in idem*. Thus, he was first fined the amount of 1,000 CHF for refusing to submit information. For the same refusal to provide information he was then fined 2,000 CHF in respect of federal taxes, and 2000 CHF in respect of cantonal taxes.

The Government submit that the imposition of a disciplinary fine for failing to comply with a procedural obligation cannot amount to a criminal charge within the meaning of Article 6 of the Convention and does not concern Article 4 of Protocol No. 7. In any event, there was no breach of the latter provision, since the present case concerns the punishment for repeating a contravention. The authority in question is thereby bound by the principle of proportionality.

The applicant replies that the punishment could have envisaged a fine up to 10,000 CHF and therefore constituted a sanction under criminal law. In the present case, he did not repeat a contravention, but merely continued to do nothing, i.e. he refused to co-operate. The principle of proportionality was not observed.

Article 4 of Protocol No. 7 states as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> 3. No derogation from this Article shall be made under Article 13 of the Convention."

The Court notes that it is in dispute between the parties whether Article 4 of Protocol No. 7 applies to the proceedings in which the disciplinary fines were imposed on the applicant. This issue need nevertheless not be resolved since the complaint is in any event inadmissible for the following reason.

In the present case the Federal Court in its decision of 7 July 1995 was called upon to examine the imposition on 28 February 1989 and 29 November 1990 of two successive fines of 1,000 and 2,000 CHF, respectively, on the applicant.

According to the Court's case-law, the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings which have been concluded by a final decision (see Eur. Court HR, Gradinger v. Austria judgment of 23 October 19956, Series A no. 328-C, p. 65, § 53).

The Court notes that the first fine of 28 February 1989 was imposed on the applicant as he had not reacted to their requests to submit the documents at issue. The second and increased fine was imposed on him 21 months later on 29 November 1990 in the light of further correspondence between the authorities and the applicant and his continuing refusal, despite the first fine, to submit the documents. The punishable conduct thus differed in time

and in substance, and it cannot, therefore, be said that the two "impugned decisions were based on the same conduct" (see Eur. Court HR, Gradinger judgment, *loc.cit.*, p. 66, § 55).

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

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaint under Article 6 § 1 of the Convention about the obligation to submit certain documents; and

DECLARES INADMISSIBLE the remainder of the application.

Erik Fribergh
Registrar

Christos Rozakis
President