AS TO THE ADMISSIBILITY OF

Application No. 22441/93
by J. M.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 17 May 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Ms. M.-T. SCHOEPFER, 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 9 June 1993 by J. M. against Switzerland and registered on 11 August 1993 under file No. 22441/93;

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 applicant is a Swiss citizen born in 1924. He is a businessman and resides in Zurich.

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

The particular circumstances of the case

A. Proceedings concerning the decision of the Canton of Zurich Government of 23 October 1991 (first proceedings).

On 11 December 1991 the applicant introduced a public law appeal (staatsrechtliche Beschwerde) with the Federal Court (Bundesgericht). He appealed against a decision of the Canton of Zurich Government (Regierungsrat) of 23 October 1991 by which two appeals lodged by him against municipal zoning plans (Nutzungsplan) had been dismissed.

The applicant requested the exclusion for bias, on different grounds, of thirty Federal Court judges. The applicant further alleged that the remaining Federal Court judges were also biased because they would decide against him through loyalty to their colleagues. He requested that an extraordinary chamber should be established pursuant to Section 26 para. 3 of the Federal Judiciary Act (Bundesgesetz über

die Organisation der Bundesrechtspflege).

On 8 January 1992 the applicant was invited to pay, pursuant to Section 150 of the Federal Judiciary Act, advance court fees of 5,000 SFr by 7 February 1992. He was informed that if he failed to pay the sum, his appeal would be declared inadmissible (auf Ihre Rechtsvorkehr wird nicht eingetreten). Upon the applicant's request the time-limit was extended until 13 March 1992.

On 13 March 1992 the applicant complained of the amount of the advance court fees. He alleged that an appropriate amount in his case would be 1,500 SFr. He disagreed with the Federal Court's arguments that this sum conformed with the law in force. He informed the Federal Court that if the amount was not reduced, he waived, pursuant to Section 150 para. 4 of the Federal Judiciary Act, his entitlement to a formal judgment in the matter. He claimed that his appeal should then be struck off the list of cases by a simple order (Abschreibungsbeschluss) implying no or minimum court fees.

By judgment of 3 November 1992 the Federal Court, consisting of three judges challenged on the ground of having participated in earlier proceedings involving the applicant (which concerned different subject-matters), declared the public law appeal inadmissible pursuant to Section 150 para. 4 of the Federal Judiciary Act. It noted that the applicant had neither waived his claim nor paid, within the extended time-limit, the advance court fees.

The Federal Court declared inadmissible the general request for the exclusion of judges. The applicant was charged court fees of 1,000 SFr. The judgment was served on 10 December 1992.

B. Proceedings concerning the decision of the Administrative Commission of the Canton of Zurich Court of Appeal of 23 October 1992 (second proceedings)

On 3 December 1992 the applicant introduced, as the chairman of his limited company (Verwaltungsratspräsident), a public law appeal with the Federal Court. The appeal concerned the refusal of the Administrative Commission (Verwaltungskommission) of the Canton of Zurich Court of Appeal (Obergericht) to exclude for bias a Zurich District Court (Bezirksgericht) judge in proceedings concerning the enforcement (Rechtsöffnung) of a sum owed by the limited company.

As in the first proceedings, the applicant requested the exclusion of thirty Federal Court judges and alleged that the remaining judges were also biased because of loyalty to their colleagues.

On 17 December 1992 the applicant was invited to pay advance court fees of 3,000 SFr by 15 January 1993. The order was issued by a judge who was challenged because of his participation in earlier proceedings brought by the applicant and on the ground that the applicant had requested, in 1990, his criminal prosecution. On 14 January 1993 the applicant challenged the order to pay the advance court fees. He claimed, with reference to a decision of the Zurich Landlord and Tenant Court (Mietgericht), that the Administrative Commission was not a judicial body and that its decision challenged before the Federal Court was null and void. He considered that under those circumstances his public law appeal was to be approved (gutheissen) and that it was therefore unnecessary to pay any court fees in advance.

The applicant further informed the Federal Court that should his request for the waiver of the advance court fees be rejected, he wished to exhaust domestic remedies in order to introduce his case before the European Commission of Human Rights. He expressed the opinion that the public law appeal should then be struck off the list of cases by an order. He also reiterated his request for the exclusion of judges.

He alleged that the judge who had issued the advance fees order was not impartial because of his active participation in the public discussion on Switzerland's accession to the European Economic Area.

It appears from the documents submitted that the time-limit for payment of the advance court fees was extended on 26 January 1993.

On 23 March 1993 the Federal Court delivered a judgment by which it declared the public law appeal inadmissible. The Court consisted of three judges two of whom were challenged on the ground of their previous participation in proceedings brought by the applicant which concerned a different subject-matter. One of the judges was also challenged on the ground that on 31 May 1990 the applicant had lodged a request for his criminal prosecution as he had taken wrong decisions in matters raised by the applicant. The Federal Court imposed court fees of 1,000 SFr on the limited company of the applicant.

C. Proceedings concerning the decision of the Canton of Zurich Court of Cassation of 1 December 1992 (third proceedings)

On 19 June 1992 the Canton of Zurich Court of Appeal confirmed the Zurich District Court's decision not to grant a provisional attachment of property (Arrest). The property at issue belonged to a debtor of the limited company owned by the applicant and was valued at 21,543.70 SFr. On 1 December 1992 the Canton of Zurich Court of Cassation (Kassationsgericht) dismissed the applicant's plea of nullity (Nichtigkeitsbeschwerede) in respect of the Court of Appeal's decision. On 25 January 1993 the applicant introduced, as the chairman of his limited company, a public law appeal with the Federal Court.

The applicant requested, for various reasons, the exclusion of all Federal Court judges.

On 27 January 1993 the applicant was invited to pay advance court fees of 10,000 SFr by 19 February 1993. On 19 February 1993 he requested the exclusion of the President of the Civil Law Chamber II (Zivilabteilung) who had issued the advance court fees order. The applicant alleged that this judge had taken wrong decisions in previous proceedings to which the applicant was a party (which had concerned a different subject-matter). Furthermore, this judge was allegedly biased because he had once refused the applicant's request to authorise the disclosure of the applicant's full name in a Federal Court judgment published in a newspaper.

The applicant also complained that the advance court fees were prohibitively high and requested their reduction, by an independent and impartial judge, to a maximum of 800 SFr.

On 24 February 1993 the Federal Court reduced the advance court fees to 2,000 SFr and extended the time-limit for their payment until 19 March 1993. The applicant was informed that his additional request of 19 February 1993 for the President of the Civil Law Chamber II to be excluded was of no effect (unbeachtlich).

On 18 March 1993 the applicant reiterated his request for the President of the Civil Law Chamber II to be excluded and asked for a further reduction of the advance court fees to 800 SFr. On 24 March 1993 the Federal Court declared the public law appeal inadmissible. The judges who delivered the judgment were subject to challenge because of their participation in earlier proceedings brought by the applicant (with a different subject-matter). In addition, one of them was challenged on the ground that the applicant had lodged a request for his criminal prosecution in 1988. The limited company of the applicant was charged court fees of 2,000 SFr.

The Federal Court noted that the general request for the exclusion of all judges was inadmissible. Furthermore, the Federal

Court did not consider the reasons adduced in the request for the exclusion of the President of the Civil Law Chamber II as a sufficient proof of the latter's bias.

D. Proceedings concerning the decision of the Canton of Zurich Department of the Economy of 25 February 1993 (fourth proceedings)

On 25 February 1993 the Canton of Zurich Department of the Economy (Direktion der Volkswirtschaft) refused to enforce an earlier decision it had made on an official survey (Grundbuchvermessung) and rejected the applicant's request to prevent the municipality concerned from requiring payment of 55,509 SFr for the local zoning proceedings (Quartierplanverfahren). On 19 March 1993 the applicant introduced an administrative law appeal (Verwaltungsgerichtsbeschwerde) against this decision with the Federal Court.

The applicant requested the exclusion of all Federal Court judges elected prior to 31 October 1991 and challenged, for various reasons, 32 particular judges.

On 25 March 1993 the applicant was invited to pay advance court fees of 2,000 SFr by 30 April 1993. On 29 April 1993 he asked for the exclusion, on the same grounds as in the third proceedings, of the President of the Civil Law Chamber II who had issued the advance fees order. The applicant further requested the revocation, or, as the case might be, an extension of the time-limit for payment of the advance court fees. He claimed that his request for the exclusion of judges should be examined in public proceedings to which he would be a party.

Since the applicant had neither contested the obligation to pay the fees for the proceedings in advance nor complained of their amount, the Federal Court considered his request for an extension of the time-limit abusive. On 5 May 1993 the Federal Court declared the administrative law appeal inadmissible. The President of the Civil Law Chamber II and a judge whose criminal prosecution the applicant had requested in 1988 participated in the delivery of the judgment. The applicant was charged court fees of 2,000 SFr.

The Federal Court noted that, like in the previous proceedings brought by the applicant or his limited company, the challenge of practically all Federal Court judges for bias was abusive and inadmissible for reasons of which the applicant had earlier been informed.

The relevant domestic law

Pursuant to Section 150 para. 1 of the Federal Judiciary Act, a person who calls upon the Federal Court in civil cases must, upon order of the President, provide a security for the probable court fees. According to para. 4 of the same Section, if the security is not provided within the time-limit, the claim shall be declared inadmissible.

Pursuant to Section 153 para. 2 of the Federal Judiciary Act, the Federal Court can dispense with the court fees entirely or partially if a case is settled by waiver (Abstandserklärung) or if it is terminated by a friendly settlement (Vergleich).

Pursuant to Section 153a para. 1 of the Federal Judiciary Act the fees for the proceedings are to be determined according to the value, the volume and the complexity of the subject-matter, the way the proceedings have been conducted and the financial situation of the participants. Para. 2 (b) of the same Section provides for fees of between 200 and 5,000 SFr in case of public or administrative law appeals which do not involve pecuniary interests.

The scale of fees supplementing Section 153a of the Federal Judiciary Act provides for the following fees when the Federal Court does not decide as the only court:

Value of the subject-matter (SFr)	Court fees (SFr)
20,000 - 50,000	1,000 - 5,000
50,000 - 100,000	1,500 - 5,000

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention that his right to a fair and public hearing by an impartial tribunal was violated in the above four proceedings leading to the Federal Court judgments of 3 November 1992, 23 and 24 March 1993 and 5 May 1993 in that:

a) the matters were decided by biased judges in spite of the applicant's requests for their exclusion;

b) the advance court fees were imposed on him by biased judges and were disproportionately high;

c) the judgments were delivered despite the fact that he had waived his claims by failure to pay the advance court fees;

d) there was no public hearing in his cases.

The applicant further alleges a violation of Article 13 of the Convention in that he was deprived, by the above Federal Court judgments, of an effective remedy against the alleged violations of the Convention by different Canton of Zurich authorities.

Finally, the applicant alleges a violation of Article 14 of the Convention in that the Federal Court delivered judgments in his cases despite the fact that he had not paid the advance court fees. He considers that the judgments represented a punishment. He alleges that instead of delivering the judgments the Federal Court could have issued orders striking off the cases (Abschreibungsverfügungen), as in cases brought by other applicants, and charged him considerably lower fees.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention, which provides, so far as relevant, as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

The Commission does not consider it necessary to examine the applicability of Article 6 (Art. 6) of the Convention to each of the proceedings at issue as the application is in any event inadmissible for the following reasons.

a) To the extent that the applicant complains of the imposition of disproportionately high advance court fees and of participation of biased judges in the proceedings leading to the four judgments complained of, the Commission recalls that Article 6 para. 1 (Art. 6-1) of the Convention embodies the right to a court, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see Eur. Court H.R., Philis judgment of 27 August 1991, Series A no. 209, p. 20, para. 59).

However, Article 6 para. 1 (Art. 6-1) of the Convention does not debar Contracting States from making regulations, in the interests of

the good administration of justice, concerning the access to courts (No. 6916/75, Dec. 8.10.76, D.R. 6 p. 107).

Furthermore, when the State regulates access to court, it must not restrict the access to such an extent that the very essence of the right is impaired and the limitation will not be compatible with Article 6 para. 1 (Art. 6-1) of the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, e.g., Eur. Court H.R., Fayed judgment of 21 September 1994, Series A no. 294-B, para. 65).

In the present case the applicant did not claim that he was indigent, nor did he request legal aid. With the exception of the second proceedings (where he considered that the payment of fees in advance was not necessary as the cantonal decision complained of was null and void) the applicant did not request the waiver of court fees.

Pursuant to Section 153 para 1 of the Federal Judiciary Act the Federal Court has a margin of appreciation in deciding on court fees. The advance fees ultimately imposed (between 2,000 and 5,000 SFr) in no case exceeded the maximum amount (5,000 SFR) on the relevant scale of fees.

As to the complaint of alleged bias on the part of the judges who limited the applicant's access to court (by imposing a requirement that he pay advance court fees and by declaring his appeals inadmissible when he failed to do so), the Commission considers that clear evidence of bias on the part of the authority which limits access to court could well be a relevant consideration in determining whether a limitation is proportionate to the aim pursued.

In the applicant's case, however, the reasons adduced for alleged bias of the judges who limited his access to court ((i) participation and wrong decisions in earlier proceedings with different subject-matters; (ii) alleged fellowship among judges; (iii) the fact that the applicant had attempted to have criminal proceedings brought against some of the judges in the past; (iv) participation in public debate on Switzerland's accession to the European Economic Area and (v) refusal to authorise the disclosure of the applicant's full name in an earlier Federal Court judgment published in a newspaper) were considered irrelevant by the Federal Court. The Commission does not find this position arbitrary.

In particular, reasons (i), (ii), (iv) and (v) do not give rise to doubts as to impartiality of a judge. As to reason (iii), participation in the proceedings by a judge who had been reasonably suspected of criminal acts involving a litigant could give rise to suspicions of lack of impartiality. In the present case, however, the applicant had requested, in the past, criminal prosecution of several judges and the request was not pursued. Thus before the domestic authorities the applicant was not able to substantiate the facts which lay behind the request for introduction of criminal proceedings. He has not substantiated the claim before the Commission either, but merely refers to the proceedings brought.

The Commission has also considered whether a judge could be regarded as biased in view of the fact that a party to proceedings before him has attempted to introduce criminal proceedings against that judge. However, the Commission rejects this hypothesis. In fact, the possibility to attempt to have criminal proceedings introduced against a person is available to anyone without limitations. Therefore, a party could create a reason of his or her own choice in order tochallenge a judge whom this party would - for any reason - prefer not to sit on his or her case. Such a situation would not be compatible with a proper administration of justice.

In these circumstances, the Commission finds that the applicant has not substantiated his allegation of bias and that the regulation of his access to court (by imposition of advance court fees) was not contrary to Article 6 para. 1 (Art. 6-1) of the Convention.

b) To the extent that the applicant complains of the absence of a public hearing in his cases, the Commission recalls that the Federal Court did not determine the merits of the appeals because of his failure to pay the advance court fees.

In this respect the Commission finds that the full substantive guarantees of Article 6 para. 1 (Art. 6-1) of the Convention - including the right to a public hearing - do not apply to proceedings by which, like in the present case, a person is denied access to court in a way compatible with the provisions of Article 6 para. 1 (Art. 6-1) of the Convention.

c) The applicant also complains that the Federal Court dealt with his cases after his failure to pay the court fees in advance. He alleges that the cases should have been struck off the list of cases and that no judgments should have been delivered. However, the Commission finds that this complaint does not raise an issue under Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning or Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further alleges a violation of Article 13 (Art. 13) of the Convention in that he was deprived, by the above Federal Court judgments, of an effective remedy against the alleged violations of the Convention by different Canton of Zurich authorities. However, the requirements of Article 13 (Art. 13) of the Convention are less strict than, and are here absorbed by, those of Article 6 (Art. 6) (see Eur. Court H.R., Kamasinski judgment of 19 December 1989, Series A no. 168, p. 45, para. 110, with further references).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Finally, the applicant alleges a violation of Article 14 (Art. 14) of the Convention in that the Federal Court delivered judgments in his cases despite the fact that he had not paid the advance court fees.

However, the applicant has not shown that the Federal Court treated his cases differently from other comparable cases. It follows that this part of the application is also manifestly ill-founded 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 Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)