AS TO THE ADMISSIBILITY OF

Application No. 22814/93
by K. N.
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 23 August 1993 by K. N. against Switzerland and registered on 25 October 1993 under file No. 22814/93;

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, a Swiss citizen born in 1935, is a pig-breeder residing at Oberbüren in Switzerland.

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

The particular circumstances of the case

On 25 June 1990 the applicant introduced with the Federal Finance Department (Eidgenössisches Finanzdepartment) a claim for damages totalling 223,291.50 Sfr. The damages allegedly resulted from seven Federal Court (Bundesgericht) decisions delivered in 1989 and 1990. On 17 July 1990 the Finance Department dismissed the claim on the ground that the Federal Court decisions had become final and their legality could not be examined in liability proceedings.

On 15 January 1991 the applicant introduced with the Federal Court a liability action against the Swiss Confederation (Schweizerische Eidgenossenschaft) in which he claimed the aforesaid damages. He affirmed, inter alia, that the Federal Court decisions could not have become final as they were challenged in applications then pending before the European Commission of Human Rights.

The applicant further requested, with reference to his indigence which had been recognised by the Federal Court, the waiver of court fees (unentgeltliche Rechtspflege) and free legal aid (Rechtsverbeiständung).

He also requested the exclusion of all Federal Court judges and the examination of his request by an extraordinary chamber pursuant to Section 26 para. 3 of the Federal Judiciary Act (Bundesgesetz über die Organisation der Bundesrechtspflege). He considered that all the Federal Court judges were biased as some of them had allegedly taken wrong decisions in other proceedings to which he had been a party and the others would not decide differently because of loyalty to their colleagues.

On 17 December 1991 the Federal Court informed the applicant that his case lacked prospects of success since, in 1990, a similar claim introduced by him had been declared inadmissible and his requests for legal aid and exclusion of judges had been rejected on that occasion. The Federal Court held that the allegedly wrong decisions contested by the applicant had become final despite the applications pending before the European Commission of Human Rights. It was suggested to the applicant that he might discontinue his action in which case he would be charged no fees. On 17 January 1992 he informed the Federal Court that he maintained his claim.

By decision of 3 May 1993 the Federal Court, consisting of three judges who had not participated in previous proceedings concerning the applicant's case, declared inadmissible his challenge of the Federal Court judges. The Federal Court found that proceedings under Section 26 para. 3 of the Federal Judiciary Act were only applicable in cases of controversy and not when the reasons adduced were manifestly ill-founded. It held that a challenge of judges could not be substantiated by the sole fact of alleged fellowship among judges. The applicant had not invoked other relevant reasons.

The Federal Court further dismissed the applicant's request for legal aid. It considered that his action lacked prospects of success as the legality of final decisions and judgments cannot be examined in liability proceedings. The applicant was invited to pay advance court fees of 8,000 SFr by 1 June 1993.

On 28 May 1993 the applicant informed the Federal Court that he was not able to pay the required sum and reiterated his request for the judges to be excluded.

By judgment of 6 July 1993 the Federal Court, consisting of the same judges as on 3 May 1993, declared the applicant's liability action inadmissible pursuant to Section 150 para. 4 of the Federal Judiciary Act. It noted that the applicant had not introduced new arguments and that the advance court fees imposed on him conformed to the scale of fees as enacted on 1 April 1992. Under these circumstances the Federal Court decided not to examine the merits of the action and charged the applicant court fees of 1,000 SFr, i.e. the minimum amount the law provided for.

The relevant domestic law

According to Section 26 para. 1 of the Federal Judiciary Act, if the reason adduced for the exclusion of a judge is contested (streitig), the question of exclusion is to be decided by the chamber without the participation of the challenged judge. Para. 3 of the same Section provides for the appointment, if no valid deliberation is possible because of the number of challenged judges, of the necessary number of extraordinary judges from among Presidents of the cantonal Courts of Appeal. The extraordinary judges are appointed by drawing lots. They decide on the request for exclusion and, if necessary, also on the merits.

Pursuant to Section 38 of the Federal Judiciary Act, Federal Court decisions become final (rechtskräftig) upon their delivery (Ausfällung).

Pursuant to Section 150 para. 1 of the Federal Judiciary Act, a person who introduces a civil case before the Federal Court must, upon an 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.

According to Section 152 para. 1 of the Federal Judiciary Act, upon request the Federal Court will exempt an indigent party, whose application does not appear without prospects of success, from paying the court fees.

The scale of fees for the proceedings before the Federal Court, as enacted on 1 April 1992, provides for court fees between 8,000 and 20,000 SFr if the value of the subject-matter is between 200,000 and 500,000 SFr.

Liability for damages caused by the Swiss Confederation and her members of office and civil servants is governed by the Federal Liability Act (Verantwortlichkeitsgesetz). According to Section 10 of the Act, the Federal Court shall decide as the only court on disputed claims. Section 12 of the Act provides that the legality of orders, decisions and judgments which have formally become final cannot be examined in liability proceedings.

COMPLAINTS

The applicant complains of the Federal Court's refusal to grant him legal aid, to exclude all judges and also of the advance court fees imposed on him. He alleges that he was thereby deprived of a fair hearing by an impartial tribunal and invokes Article 6 paras. 1 and 3 (c) and (d) of the Convention.

THE LAW

1. The applicant alleges a violation of Article 6 paras. 1 and 3 (c) and (d) (Art. 6-1, 6-3-c, 6-3-d) of the Convention, which provide, so far as relevant, as follows:

> "1. 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. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

The Commission finds that the applicant's liability action introduced with the Federal Court aimed at the determination of his "civil" right over which there was a contestation (cf. N. v. Switzerland, Comm. Report 14.5.93, paras. 80-85 with further references, unpublished). It follows that Article 6 para. 1 (Art. 6-1) of the Convention is applicable to the proceedings for damages which the applicant introduced with the Federal Court.

The Commission further recalls that Article 6 para. 3 (Art. 6-3) of the Convention applies where anyone is "charged with a criminal offence". However, in the present case no criminal proceedings were instituted against the applicant and the liability proceedings which he introduced with the Federal Court did not determine any criminal charge. It follows that Article 6 para. 3 (Art. 6-3) of the Convention is not applicable to the proceedings at issue.

2. To the extent that the applicant complains of the Federal Court's refusal to grant him legal aid and of the imposition of advance court fees by biased judges, 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). According to the Commission's case-law, the right to free legal aid in civil cases is not as such included among the rights and freedoms guaranteed by the Convention and, furthermore, free legal aid, or the waiver of courtcosts, can be made dependent on the prospects of success of the proceedings (No. 8158/78, Dec. 10.7.80, D.R. 21 p. 95; No. 10594/83, Dec. 14.7.87, D.R. 52 p. 158).

Further, 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 the principles summarised in Eur. Court H.R., Fayed judgment of 21 September 1994, Series A no. 294-B, para. 65).

The Commission notes that in the present case the applicant was charged advance court fees of 8,000 SFr, i.e. the minimum amount provided for on the scale of fees then applicable. The applicant's requests for legal aid and for the waiver of court fees were dismissed as his action lacked prospects of success. The Federal Court in its letter of 17 December 1991 and decision of 3 May 1993 informed the applicant why his action, like his previous similar action, lacked prospects of success and the Commission does not find the reasons adduced arbitrary.

To the extent that the applicant alleges bias on the part of the participating judges who limited his access to court (by imposing a requirement that he pay advance court fees), 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.

The Federal Court in the applicant's case, however, consisted of three judges who had not participated in the previous proceedings concerning the applicant's case. They declared his request for the exclusion of all Federal Court judges inadmissible on the ground that a challenge of judges cannot be substantiated by the sole fact of alleged fellowship among judges.

In these circumstances, the Commission finds that the applicant has not substantiated his allegation of bias, and that the refusal to grant him legal aid and the imposition of advance court fees on him represented the regulation of his access to court which was not contrary to 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 of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)