AS TO THE ADMISSIBILITY OF

Application No. 22335/93
by Josef MÜLLER
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 July 1993 by Josef MÜLLER against Switzerland and registered on 26 July 1993 under file No. 22335/93;

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

On 14 September 1990 the applicant introduced with the Federal Court (Bundesgericht) a public law appeal (staatsrechtliche Beschwerde) against five decisions of the Canton of Zurich Court of Appeal (Obergericht). At the same time he challenged for bias several Federal Court judges. On 8 October 1990 he was invited to pay advance court fees of 13,100 SFr. The applicant repeatedly requested the reduction of the fees imposed on him and also the exclusion of the President of the Civil Law Chamber II (Zivilabteilung). Since his requests were not granted he decided not to pay the fees within the determined time-limit.

On 14 January 1991, i.e. after the expiry of the extended time-limit for payment of the advance court fees, the Federal Court delivered five judgments in which it dismissed the applicant's request for the exclusion of the Federal Court judges. It further declared inadmissible the applicant's public law appeal because of his failure

to pay the advance fees for the proceedings. The applicant was charged 8,726 SFr in court fees. Following a garnishee notice the applicant was obliged to pay, on 25 May 1992, the fees plus interest, totalling 9,469.30 SFr. He reserved himself the right to reclaim this sum.

On 13 October 1992 the applicant introduced with the Federal Court an action for recovery (Rückforderungsklage) of the aforesaid court fees pursuant to Section 86 of the Federal Debt Recovery and Bankruptcy Act (Bundesgesetz über Schuldbetreibung und Konkurs). He asked for the exclusion of all Federal Court judges and in particular of those who had previously participated in proceedings brought by him. He alleged that none of the judges could be impartial since the matter concerned an earlier decision of the Federal Court. The applicant requested that his case should be examined by an extraordinary chamber pursuant to Section 26 para. 3 of the Federal Judiciary Act (Bundesgesetz über die Organisation der Bundesrechtspflege).

On 29 October 1992 the applicant was invited, by a decision of the President of the Civil Law Chamber II, to pay advance court fees of 2,000 SFr. He was informed that if he failed to pay the fees his action would be declared inadmissible. On 20 November 1992 the applicant protested against his matter being dealt with by the same chamber which had delivered the judgments of 14 January 1991. He was informed that a judge who is challenged for bias is entitled to take urgent official decisions including orders to pay advance court fees. A new, non-extendible time-limit expiring on 9 December 1992 was set for the applicant.

On 8 December 1992 the applicant requested the revocation (Abnahme) of the time-limit and the examination of his case by an independent chamber. He did not receive any reply.

On 28 December 1992 the Civil Law Chamber II (comprising one judge who had participated in the delivery of the judgments of 14 January 1991) delivered a judgment declaring inadmissible both the applicant's request for the exclusion of the Federal Court judges andhis action for the recovery of the court fees. The applicant was charged court fees of 1,000 SFr and the judgment was served on him on 14 January 1993.

The Federal Court held that the fact that one member of its chambers had previously decided against the applicant was not sufficient proof of bias of every individual judge. It further considered that no personal interest of the participating judges as to the outcome of the proceedings was established. Moreover, it noted that by his action for recovery of the court fees the applicant had introduced new proceedings with a different subject-matter.

The Federal Court further noted that the applicant did not contest as such the obligation to advance the fees, nor did he complain about the amount of the advance fees imposed on him. It considered the request for revocation of the time-limit of 8 December 1992 abusive and decided not to grant a further extension. Since the applicant had failed to pay the advance fees for the proceedings, the Federal Court decided, pursuant to Section 150 para. 4 of the Federal Judiciary Act, to declare his action inadmissible.

The applicant considered that as he had not paid the advance court fees the Federal Court was not entitled to deliver a judgment in his case. On 15 February 1993 he introduced a request for reopening of the proceedings (Revisionsbegehren). He also requested the exclusion of certain judges.

The applicant failed to pay, within the extended time-limit, the advance court fees of 2,000 SFr imposed on him in connection with these reopening proceedings. On 5 April 1993 the Civil Law Chamber II, for the same reasons as mentioned in its judgment of 28 December 1992,

declared inadmissible both the applicant's request for reopening of the proceedings and his request for exclusion of judges. The applicant was charged court fees of 1,000 SFr.

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 judge challenged. 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 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.

The scale of fees supplementing Section 153a of the Federal Judiciary Act provides for fees, in cases where the Federal Court decides as the first and only court, between 1,000 and 5,000 SFr when the value of the subject-matter is between 0 and 20,000 SFr.

According to Section 86 of the Federal Debt Recovery and Bankruptcy Act, anyone who has paid a sum which was not due has the right to introduce an action for its recovery. It is the obligation of the claimant to prove that the sum at issue was not due.

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 proceedings leading to the Federal Court judgments of 28 December 1992 and 5 April 1993 in that:

a) the matter was decided by biased judges in spite of the applicant's request 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 case.

The applicant further alleges a violation of Article 13 of the Convention in that (i) he was charged advance court fees; and (ii) the Federal Court declared inadmissible his request for reopening of the proceedings.

Finally, the applicant alleges a violation of Article 14 of the Convention in that the Federal Court delivered judgments in his case 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 case (Abschreibungsverfügungen) 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 notes that the proceedings introduced with the Federal Court on 15 February 1993 concerned the reopening of the proceedings terminated in the Federal Court judgment of 28 December 1992. According to the Commission's case-law, there is no right under the Convention to have proceedings reopened, nor do such proceedings concern "the determination of (the applicant's) civil rights andobligations or of any criminal charge against him" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (cf. No. 7761/77, Dec. 8.5.78, D.R. 14 p. 171).

The part of the application which concerns the proceedings terminated in the Federal Court judgment of 5 April 1993 is therefore incompatible ratione materiae with the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. a) To the extent that the applicant complains of the imposition of disproportionately high advance court fees on him and of participation of biased judges in the proceedings leading to the judgment of 28 December 1992, 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 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, 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 or the waiver of court fees. The advance fees imposed on him (2,000 SFr) conformed to the scale in force which provided for fees between 1,000 and 5,000 SFr when the value of the subject-matter (9,469.30 SFr in the applicant's case) is between 0 and 20,000 SFr. Moreover, the applicant did not complain before the Federal Court of the amount of the fees imposed on him in advance.

As to the complaint of alleged bias on the part of the participating judges who limited the applicant's access to court (by imposing a requirement that he pay advance court fees and by declaring his appeal 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 (the point at issue being fees for previous Federal Court proceedings and participation of one of the judges in those proceedings) were considered irrelevant by the Federal Court as by his action for recovery the applicant introduced new proceedings with a different subject-matter. The Commission does not find this position arbitrary.

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 case, the Commission recalls that the Federal Court did not determine the merits of his action for recovery 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 case after his failure to pay the court fees in advance. He alleges that the case should have been struck off the list of cases and that no judgment 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.

3. The applicant further alleges a violation of Article 13 (Art. 13) of the Convention in that he was charged advance court fees. However, the requirements of Article 13 (Art. 13) are less strict than, and are here absorbed by, those of Article 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.

4. The applicant also alleges a violation of Article 13 (Art. 13) of the Convention in that the Federal Court declared inadmissible his request for reopening of the proceedings. However, the guarantees of Article 13 (Art. 13) apply only to a grievance which can be regarded as "arguable" (cf. Eur. Court H.R., Powell and Rayner judgment of 21 February 1990, Series A no. 172, p. 14, para. 31, with further references). In the present case the Commission has rejected the substantive claim as being incompatible ratione materiae with the Convention. Accordingly, it cannot be regarded as "arguable".

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.

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

However, the applicant has not shown that the Federal Court treated his case 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 by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)