APPLICATION N° 21861/93

Peter ZIHLMANN v/SWITZERLAND

DECISION of 28 June 1995 on the admissibility of the application

---

Article 10, paragraph 1 of the Convention *Fining a lawyer, by way of disciplinary penalty, for publishing a press release criticising,* inter alia, *the conditions in which his client was being detained constitutes an interference with exercise of the freedom to communicate information or ideas.*

Article 10, paragraph 2 of the Convention *Lawyer fined, by way of disciplinary penalty, for publishing a press release criticising,* inter alia, *the conditions in which his client was being detained*

Interference prescribed by a sufficiently accessible and precise legal provision (Basle-ville Cantonal Law governing the legal profession) and considered in this case, in the light of a lawyer's position in the judicial system, as necessary in a democratic society to maintain the authority and impartiality of the judiciary. Examination of the proportionality of the interference to the aim pursued

Article 19 of the Convention *The Commission is not competent to examine alleged errors of fact or law committed by national courts, except where it considers that such errors might have involved a violation of the rights and freedoms set forth in the Convention*

THE FACTS

The applicant, who is a Swiss citizen born in 1938, practises as a lawyer (avocat) and notary (notaire) He was represented before the Commission by Mr Stefan Suter, a lawyer practising in Basle.

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

1 *Particular circumstances of the case*

The applicant was officially assigned to defend P, born in 1928, who was arrested and remanded in custody during the summer of 1989 in Basle in connection with an investigation into a major case of white-collar crime which was widely reported in the media On 8 December 1990 he published the following press release

> «(P) wird seit dem 15 Juni 1989 im mittelalterlichen Gefängnis Lohnhof durch die Basler Staatsanwaltschaft wegen angeblicher Fluchtgefahr und Betrugsverdacht in Untersuchungshaft behalten, obwohl eindeutig sowohl Fluchtgefahr wie dringender Tatverdacht weggefallen sind Trotz einer nahezu funfjahrigen angeblich intensiven Ermittlungstatigkeit der Abteilung Wirtschaftsdelikte der Staatsanwaltschaft ist diese nicht in der Lage, gegenuber dem Verhafteten einen konkreten Vorwurf zu formulieren und Anklage zu erheben Heute (10 Dezember), dem Tag der Menschenrechte, ist der Verhaftete ohne Anklage 543 Tage in Einzelhaft, gesundheitlich ruiniert und als Haftfolge schwer herzkrank Dieses Vorgehen ist einem Rechtsstaat und der Schweiz als Signatarstaat der EMRK unwurdig Das Vorgehen stellt eine eklatante Verletzung der EMRK dar Trotzdem lehnt es die Basler Ueberweisungsbehorde auch in diesem Fall ab, Konsequenzen aus der Verletzung der EMRK zu ziehen, wie sie im Entscheid des Europaischen Gerichtshofes vom 23 Oktober 1990 i S Jutta Huber fur den Kanton Zurich festgestellt worden ist Zudem bedeutet die Fortfuhrung der Haft uber einen Menschen, der arztlich nicht mehr adaquat versorgt werden kann und der einem konkreten Herzinfarktrisiko gegenuber steht, Folter Nachdem die kantonalen Behorden in Basel es ohne Angabe rechtlicher Erwagungen abgelehnt haben, (P) aus der Haft zu entlassen, gelangt der Verteidiger aufgrund des lebensbedrohlichen Zustands des Haftlings und wegen der ungeheuerlichen Verschleppung in dieser Sache zum vierten Mal mit einem Haftrekurs an das Schweizerische Bundesgericht wegen Verstosses gegen das Verbot der Folter (EMRK Art 3), wegen Verletzung von EMRK Art 5 Ziff 3 betreffend neutrale Haftrichterinstanz (Verbot der Identitat zwischen Haftanordnungs- und Anklagebehorde, Fall Jutta Huber) sowie wegen Verletzung des Beschleunigungsgebotes (EMRK Art 5 Ziff 3 Satz 2), wonach jeder Verhaftete Anspruch auf Aburteilung innerhalb einer angemessenen Frist oder auf Haftentlassung hat Der Fall ist umso grotesker als wegen offensichtlich fehlender Fluchtgefahr eine Bezugsperson bereit ist, nicht nur eine Barkaution zu stellen, sondern sich auch personlich zu verburgen und alles im Umfang der bereits richterlich festgesetzten Kaution in Hohe von Fr 300 000 Die Staatsanwaltschaft stuft fiskalische Interessen hoher als Rechtsstaatlichkeit und Menschenrechte ein und lehnt Haftentlassung auch gegen die angebotenen Sicherheiten ab »

(Translation)

"(P.) has been detained on remand by Basle prosecution authorities since 15 June 1989 in the medieval prison of Lohnhof on the ground that he may abscond and on suspicion of fraud, regardless of the fact that there is no longer any risk of his absconding nor any further serious suspicion of fraud. Despite an allegedly thorough investigation lasting nearly five years by the prosecution's economic crime unit, no concrete accusation has been made against the defendant nor has he been charged. Today (10 December), Human Rights Day, the defendant will be spending his 543rd day in solitary confinement without charge, his health ruined and suffering from a serious heart condition as a result of his detention. These conditions are unworthy of a State in which the rule of law prevails and of Switzerland which has signed the Convention for the Protection of Human Rights and Fundamental Freedoms Such conduct constitutes a flagrant violation of the Convention. Despite this, Basle prison transfer authorities have refused to follow the European Court's ruling in the Jutta Huber case of 23 October 1990 that the Canton of Zürich had violated the Convention. Furthermore, the decision to continue to hold in custody someone who can no longer be given adequate medical treatment and who is at real risk of a heart attack is tantamount to torture. Prompted by the Basle cantonal authorities' refusal, with no legal justification, to release (P.), by the life-threatening conditions in which he is being detained and by the shocking delays in the proceedings, his defence lawyer is making a fourth application to the Swiss Federal Court for a ruling that the authorities have violated the prohibition on torture (Article 3 of the Convention), have violated Article 5 para. 3 regarding the impartiality of the judge ordering his detention (the authorities ordering the arrest must not be the same as the prosecuting authorities, see Jutta Huber case) and have violated the obligation to conduct the trial speedily (Article 5 para. 3, 2nd sentence) according to which any prisoner is entitled to trial within a reasonable time or to release This case is made all the more grotesque by the fact that given the obvious lack of any risk that [P] will abscond, an individual has agreed not only to deposit a security in cash, but also to stand personal surety in the amount of the recognizance already fixed by the judge, i e. 300,000 Swiss francs (CHF). More preoccupied with protecting tax interests than abiding by the rule of law and respecting human rights, the prosecution refuses to release the prisoner even against the securities being offered "

On 10 December 1990 Basle cantonal prosecution's economic crime unit replied in a press release

At the request of the cantonal prosecution authorities, disciplinary proceedings were commenced against the applicant and on 3 January 1992 Basle Lawyers' Professional Conduct Committee (hereafter referred to as the Professional Conduct Committee) fined him CHF 350 for serious breach of the duties incumbent on him under Article 10 paras. (a) and (c) of the Cantonal Law governing the legal profession

on the grounds that his criticisms of the conditions in which P was being detained and of the judicial authorities were not only exaggerated, but extreme and unqualified (Kritik ist somit nicht nur übertrieben, sondern masslos und unqualifiziert), inaccurate and manifestly unjustifiable

That decision was given on the basis of an assessment of the case as a whole, particular consideration being given to two judgments of the Federal Court dated 24 August 1990 and 21 December 1990, which dismissed P 's allegations of a violation of Article 5 para 3 of the Convention, and to two medical reports dated 18 August 1990 and 28 November 1990 These reports stated that P was suffering partly from psychosomatic ailments, brought on by his detention and also from a heart condition for which he was receiving proper attention from the prison's medical service and various specialised departments of Basle cantonal hospital, the reports specified, moreover, that he did not need to go into hospital ("eine Hospitalisation ist aufgrund des derzeitigen Gesundheitszustandes nicht notwendig) The Professional Conduct Committee found the scathing tone of the press release to be an aggravating circumstance and concluded that the applicant had probably adopted it in order to put pressure on the authorities In mitigation, it took into account that the applicant had not been motivated by personal gain, but had acted in his client's interests, and that he had had a long and unblemished career

On 21 December 1992, the Federal Court dismissed the applicant's appeal, holding that there was a proper legal basis for the penalty imposed on him, that it had been imposed in pursuance of a legitimate aim, i e to maintain the authority and impartiality of the judiciary, and that it complied with the proportionality principle

2 *Relevant domestic law and practice*

According to the Basle-ville Cantonal Law governing the legal profession

Article 10

(German)

'a) Die Advokaten haben ihre Berufstatigkeit so auszuuben, wie es dem Ansehen und der Wurde des Anwaltsstandes entspricht

c) Die Advokaten sind verpflichtet, sich keine ihnenerkennbare Entstellung von Tatsachen zu erlauben "

(Translation)

"a) Lawyers must carry on their profession in a way which is commensurate with the reputation and dignity of their status

c) Lawyers must not knowingly distort facts "

Article 15:

(German)

"1 Wegen Pflichtverletzung kann ein Advokat bestraft werden mit

a) Verweis ,

b) Geldbusse bis zu Fr. 1.000., in ausserordentlichen Fallen bis zu Fr 10 000 ,

c) Einstellung in der Berufstätigkeit bis auf eine Dauer von zwei Jahren ;

d) ganzlicher Entzug des Rechts zur Ausubung des Anwaltsberufes ... "

(Translation)

"1 Lawyers may be liable to any of the following penalties for breach of duty

a) a rebuke;

b) a fine of up to 1,000 francs and, in exceptional cases, up to 10,000 francs,

c) suspension from practice for a period not exceeding two years,

d) striking off the register of lawyers . "

The Federal Court has clarified its case-law on lawyers' freedom of expression in a number of judgments published in the official law reports It has held that although lawyers, as their clients' representatives, are allowed to be partial and acerbic in the way in which they conduct their cases, they must observe strict standards as regards any statements they may make in public, or which are to be made public, relating to any pending proceedings. In such cases, a certain discretion is required of defence lawyers who must ensure that they present the facts objectively, using neutral language Exaggerated and unqualified criticisms of the judicial authorities are particularly improper

COMPLAINTS

The applicant invokes Article 10 of the Convention, complaining that the disciplinary penalty imposed on him following the press release published on 8 December 1990 infringed his right to freedom of expression He alleges that he was

penalised both on the basis of Article 10 para. (a) of the Basle cantonal law governing the legal profession, which is worded in insufficiently precise terms due to the fact that the concepts it refers to are not clearly defined, and on the basis of Article 10 para. (c) of that Law which did not apply in his case.

The applicant submits further that the restriction on his freedom of expression cannot be deemed to be a necessary measure in a democratic society, as the proper administration of justice requires lawyers to exercise their profession independently of the investigating authorities and to act in their clients' interests, and that the measure in question did not protect any public interest as the case had been widely reported in the media

The applicant alleges finally that the penalty is disproportionate, as he was motivated purely by his commitment to securing a fair trial for his client in accordance with the Convention.

THE LAW

The applicant complains that his right to freedom of expression was infringed in that he was the subject of a disciplinary penalty for publishing, in his capacity as a lawyer, a press release which referred to the conditions in which his client was being detained and criticised the manner in which the case was being handled He invokes Article 10 of the Convention.

The relevant parts of this provision read as follows

> "1 Everyone has the right to freedom of expression This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"

The Commission considers that the penalty imposed on the applicant amounts to an interference by a public authority with the exercise of his freedom to communicate information and ideas It recalls that such interference violates Article 10 of the Convention unless, under paragraph 2 of that provision, it is prescribed by law, is inspired by a legitimate aim and is necessary in a democratic society to achieve that aim (No 18714/91, Dec. 9 5 94, D R 77-A p. 42).

1 The Commission must therefore examine first whether the impugned penalty was prescribed by law

The Commission recalls that a rule cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail, given the impossibility of attaining absolute precision in the framing of laws It also recalls the Court's ruling that a decree governing the legal profession and providing that " [any] breach of integrity, honour or discretion shall render the avocat responsible liable to sanctions " satisfied the criterion of precision as defined by the case-law of the Convention institutions (Eur Court H R , Ezelin judgment of 26 April 1991, Series A no 202, p 21, para 45)

The Commission recalls further that its sole task, under Article 19 of the Convention, is to ensure that the Contracting Parties' obligations under the Convention are complied with and observes in particular that it is not competent to examine alleged errors of fact or law committed by national courts, except where it considers that such errors might have involved a violation of the rights and freedoms guaranteed by the Convention (No 21283/93, Dec 5 4 94, D R 77-A p 81)

The Commission observes that, on the facts, the legal basis for the impugned penalty was Article 10 of the Basle Cantonal Law governing the legal profession, which provides unequivocally that all lawyers have specific obligations which have, moreover, been clarified by the Federal Court in its case-law and that the applicant, who is a lawyer and notary, must have known of these The Commission considers further that the domestic courts did not apply that provision arbitrarily

The interference was therefore prescribed by law

2 The Commission must now examine whether the interference pursued a legitimate aim

The Commission notes that according to the judgment delivered by the Federal Court on 21 December 1992, the disciplinary penalty was imposed on the applicant for the purpose of maintaining the authority and impartiality of the judiciary The Commission considers that there is no reason to conclude that the measure was taken in pursuance of other objectives which do not meet the requirements of the Convention

The penalty thus pursued a legitimate aim

3 Finally, the Commission must examine the question whether the public authorities' interference with the applicant's exercise of his right to freedom of expression was necessary in a democratic society

The Commission recalls in this respect that freedom of expression constitutes one of the essential foundations of a democratic society, that it includes ideas or information which may offend, shock or disturb, that the exceptions contained in Article 10 para. 2 of the Convention must be narrowly interpreted and the necessity for any restrictions convincingly established. The Contracting States have a certain margin of appreciation to judge whether there is such a need and it is not for the Convention institutions to take the place of the competent national authorities, but rather to look at the interference complained of in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient (Eur. Court H.R., Sunday Times judgment (No. 2) of 26 November 1991, Series A no. 217, p. 28, para. 50).

A lawyer's freedom of expression is somewhat unusual in this respect. Owing to their special status, they occupy centre stage in the administration of justice, acting as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of lawyers and also the monitoring and supervisory powers vested in the councils governing each category of legal practitioner. As they have direct and continuous contact with lawyers and the administration of justice, these councils and the national courts are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved, namely the requirements of the proper administration of justice and the dignity of the profession (Eur Court H.R., Casado Coca judgment of 24 February 1994, Series A no 285-A, p. 21, paras. 54 and 55)

In the instant case, the Commission observes that the rules of professional conduct laid down by the Basle Cantonal Law and the Federal Court's case-law did not impose a duty on the applicant to refrain from disclosing any information whatsoever regarding the P. case, but obliged him to be discreet in his statements and, more specifically, to show objectivity and to keep the tone of his comments neutral The Commission notes in this respect that the applicant was not penalised for publishing a press release on a case which was in the investigation stage, but for making comments which were not only exaggerated, but also extreme and unqualified. The Commission notes finally that the disciplinary penalty imposed on the applicant was one of the lightest of those listed in Article 15 of the Basle Cantonal Law governing the legal profession.

Having regard to the circumstances of the case and bearing in mind the margin of appreciation available to the Contracting States, the Commission considers that the interference cannot be deemed disproportionate to the aim pursued

It follows that the application is manifestly ill-founded and must be rejected, pursuant to Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,
DECLARES THE APPLICATION INADMISSIBLE.