

BGE 20020418_54079_00 vom 18. April 2002

Bundesgericht (BGE), 2002-04-18, FR

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Regeste

Regeste Diese Zusammenfassung existiert nur auf Französisch. DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 6 par. 1 CEDH. Impartialité d'une cour d'appel composée d'un juge qui a fonctionné comme juge instructeur de la cour civile en première instance et du même greffier que dans la procédure pénale dirigée contre le requérant. La Cour d'appel a statué sur la répartition des frais de la procédure civile, ce qui n'était pas litigieux lorsque le juge en question a préparé l'affaire pour le jugement de première instance. Il n'a traité que des questions procédurales et s'il a effectivement reçu copie des jugements pénaux rendus à l'encontre de ce dernier, les procédures avaient des objets distincts. Ces circonstances ne sauraient dès lors justifier les appréhensions quant à son impartialité. S'agissant du greffier, même s'il a fonctionné lors de la procédure pénale, les procédures avaient des objets distincts et surtout le jugement a été rendu par les seuls juges, sans que le greffier ne prenne la moindre décision. Les griefs du requérant sont donc infondés. Conclusion: requête déclarée irrecevable.

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Volltext

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The European Court of Human Rights (Third Section), sitting on 18 April 2002 as a Chamber composed of Mr G.Ress, President, Mr L. Wildhaber, Mr L. Caflisch, Mr R. Türmen, Mr B. Zupancic, Mrs H.S. Greve, Mr K.Traja, judges, and Mr V.Berger, Section Registrar, Having regard to the above application lodged on 30 December 1999, Having deliberated, decides as follows:

THE FACTS The applicant, P.W., is a Swiss national who was born in 1926 and lives in Therwil in Switzerland. He is represented before the Court by Mr B. Gelzer, a lawyer practising in Basel. The facts of the case, as submitted by the applicant, may be summarised as follows. The applicant worked in Basel as a real property administrator in the C. company. In 1987 he was given notice as he had allegedly appropriated payments for repairs which had not been undertaken. Criminal proceedings were instituted against the applicant on account of professional fraud. Upon appeal, the Court of Appeal (Appellationsgericht) of the Canton of Basel-Stadt on 31 March 1995 sentenced the applicant to three years' imprisonment. The court was composed of three judges and assisted by court registrar W. Meanwhile, in 1987 the applicant brought an action before the Basel Commercial Arbitration Court against the C. company, claiming 8,000 Swiss francs (CHF), inter alia, for outstanding salary claims. In 1988 the defendant company brought a counter-action against the applicant, claiming CHF 592,864. Proceedings were then continued before the Civil Court (Zivilgericht) of the Canton of Basel-Stadt which on 5 December 1988 suspended the proceedings in view of the criminal proceedings instituted against the applicant. Proceedings were resumed in 1993. The defendant company brought a further counter-action against the applicant, now claiming CHF 4,170,644 for damages caused by fictitious bills. As from 1 January 1994 onwards, judge R., the President of the Civil Court, acted in the applicant's case as the judge responsible for the preparation of cases for trial (Instruktionsrichter). On 30 May 1994 the applicant extended his claims to CHF 73,685. He also requested free legal aid. On 21 July 1994 judge R. authorised the amendments of the action and counter-action. In order to examine the applicant's request for free legal aid, he obtained copies of judgments from the competent courts which had conducted the criminal proceedings and had refused the applicant free legal aid. On 30 November 1994 judge R. refused the applicant's request for legal aid as he had not demonstrated his indigence. On 27 January 1995 judge R. fixed 31 May 1995 as the time-limit for filing replies to the action and counter-action. On 20 November 1995 the defendant company filed further submissions, accompanied by photocopies of certain documents. As the applicant contested their authenticity, judge R. requested the defendant company to submit the original documents. On 18 April 1996 the applicant amended his action and requested, in addition, CHF 184,000 from the defendant company. As a result, judge R. instructed the applicant to pay advance costs of CHF 6,000. The applicant replied

that he was unable to pay this sum whereupon judge R. declared the amendment to the action inadmissible(aus dem Recht gewiesen). On 24 March 1997 both the applicant and the defendant company filed further submissions. On 30 July 1997 judge R. closed the exchange of statements and ordered the documents of the criminal proceedings to be included in the case-file. On 31 December 1997 judge R. terminated his functions at the Civil Court and became a judge at the Court of Appeal of the Canton of Basel-Stadt. Thereafter, judge M. undertook the functions in the applicant's case before the Civil Court as judge responsible for the preparation of cases for trial. On 3 June 1998 a hearing took place before the Civil Court at which both parties were present. In its judgment of 9 September 1998 the court ordered the applicant to pay CHF 38,789 to the defendant company, while formally taking note that the latter accepted the applicant's action to the extent of CHF 11,210. It imposed the costs of the court proceedings concerning the action, amounting to CHF 3,630, on the applicant, who was furthermore ordered to pay 25% of the costs of the counter-action, amounting altogether to CHF 75,490. The applicant appealed against the judgment in respect of the imposition of costs, claiming that the defendant company should pay the entire costs of the counter-action, and 15% of the costs of his action. On 10 March 1999 the Court of Appeal of the Canton of Basel-Stadt dismissed the appeal. It transpires from the judgment that the bench was composed of four judges, among them judge R., as well as the court registrar W. The applicant's public law appeal(staatsrechtliche Beschwerde) was dismissed by the Federal Court on 16 July 1999. Insofar as the applicant complained of the lack of impartiality of judge R. and court registrar W., the Federal Court stated: "According to the submissions of the Court of Appeal ... R. had acted, in the case at issue, as judge responsible for preparing cases for trial between 1 January 1994 and 31 December 1997. During this period of time he examined the applicant's requests for free legal aid; imposed advance court costs; dealt with requests concerning amendments of the action and the counter-action; fixed time-limits for the exchange of statements; and decided on requests for the transmittal of files, including those of the criminal proceedings. On 31 December 1997, when a new judge took over these functions, the preparation of the case for trial was not yet completed. In particular, the successor had to decide on the taking of evidence requested; to prepare the trial; and to participate in the decision. As a result, while R., as the first instance judge responsible for the proceedings, took all decisions necessary for the progress of the proceedings and for the preparation of the judgment, at no moment was he obliged to express himself on the admissibility or the merits of the legal requests stated in the action or the counter-action ... The participation of R. also does not raise an issue under ... Article 6 § 1 of the Convention. It has not been made clear why the procedure in second instance - despite the participation of R. - could no longer be described as open and undetermined in respect of the legal questions to be resolved, a fortiori as the judgment of the lower court was only contested in respect of the costs. When acting as judge responsible for preparing cases for trial, R. did not have to deal with the issue of attributing the costs of the proceedings. He therefore appears as an impartial judge in this respect. This conclusion is not altered by the fact that R. obtained knowledge of certain aspects playing a rôle in respect of the question whether or not the defendant company had instituted proceedings in good faith. ... The complaint of a breach of the Swiss Constitution and the Convention is equally unfounded insofar as court registrar W. collaborated in the second instance criminal and civil proceedings. In view of the criteria previously referred to, no partiality can objectively be made out if a court registrar participates in the decision-making in two proceedings with different contentious

objects. It plays no part here that in both proceedings similar partial questions - albeit from a completely different vantage point - may have arisen." COMPLAINTS The applicant complains that he did not have an independent and impartial court, as required by Article 6 § 1 of the Convention, in respect of judge R. and court registrar W. both of whom participated in the judgment of the Court of Appeal of 10 March 1999. Thus, judge R. was not impartial as judge responsible for preparing cases for trial at the Civil Court of the Canton of Basel-Stadt. As such, he had dealt in substance with, and formed an opinion on, the matters at issue before the Court of Appeal. For instance, in order to reply to the applicant's request for legal aid before the Civil Court, he had had to assess the prospects of success of the applicant's case. Moreover, court registrar W. was not impartial as he had previously acted as court registrar in the criminal proceedings brought against the applicant. Yet in the proceedings before the Court of Appeal he played an important role in the preparation and drafting of the judgment of 10 March 1999. Erwägungen THE LAW The applicant complains that he did not have an independent and impartial court, as required by Article 6 § 1 of the Convention in respect of judge R. and court registrar W. both of whom participated in the judgment of the Court of Appeal of 10 March 1999. Article 6 § 1 states, insofar as relevant: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law." According to the Court's case-law, there are two aspects to the requirement of impartiality in Article 6 § 1 of the Convention. First, the tribunal must be subjectively impartial, i.e. no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, i.e. it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see *Academy Trading Ltd. and Others v. Greece*, no. 30342/96, 4.4.2000, § 43; *Wettstein v. Switzerland*, no. 33958/96, 21.12.2000, § 44). As to the subjective test, the Court notes that no evidence has been produced in the present case, which might suggest personal bias on the part of judge R. or court registrar W. Under the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see the *Academy Trading Ltd and Others* judgment cited above, § 45). This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held objectively justified (see the *Ferrantelli and Santangelo v. Italy* judgment of 7 August 1996, Reports of Judgments and Decisions 1996-III, p. 951 et seq., § 58). The Court has first examined the complaint as to the alleged lack of impartiality of judge R. In this connection, the fear of lack of impartiality was based on the fact that judge R. who sat on the bench of the Court of Appeal of the Canton of Basel-Stadt deciding on the applicant's appeal, had already dealt with the case at an earlier stage of the proceedings, namely from 1 January 1994 until 31 December 1997 as the judge responsible for preparing cases for trial at the Civil Court of the Canton of Basel-Stadt. As such, he had to give various decisions with regard to the applicant at an early stage of the proceedings. The Court has examined the various functions which judge R. exercised. It notes that the Court of Appeal in its judgment of 10 March 1999 was called upon to divide the costs of the proceedings among the parties, whereas this matter was not at issue when judge R. prepared the applicant's case for the first instance trial. Moreover, judge R.'s functions in the proceedings before the Civil

Court were limited to procedural decisions such as authorising amendments of the action and counter-action and to fixing time-limits for filing replies. It is true that judge R. also had to examine whether or not to grant free legal aid, though when on 30 November 1994 he decided to refuse the applicant's request, he did so as the applicant had failed to demonstrate his indigence, rather than with reference to the prospective merits of the case. Insofar as judge R., in the course of preparing the case before the Civil Court, obtained copies of judgments of other courts concerning criminal proceedings against the applicant, the Court notes the Federal Court's decision of 16 July 1999 according to which the two proceedings had different contentious objects. It follows that the decisions which judge R. took during the proceedings before the Civil Court were not decisive for the judgment of the Court of Appeal of 10 March 1999. Accordingly, these circumstances cannot justify the applicant's apprehension as to judge R.'s lack of impartiality. The Court has next examined the complaint as to the alleged lack of impartiality of court registrar W. In this connection the fear of lack of impartiality was based on the fact that W. had previously participated as court registrar in the criminal proceedings instituted against the applicant. The Court has already considered that the two proceedings had differing contentious objects. Moreover, the judgment of the Court of Appeal of 10 March 1999 was reached solely by the Court of Appeal judges. While W. assisted in the organisation and the preparation thereof, there is no indication - nor has it been claimed by the applicant - that W. took any decision in respect of the judgment itself. As a result, these circumstances cannot justify the applicant's apprehension as to W.'s lack of impartiality. The applicant's allegation concerning the partiality of judge R. and court registrar W. is, therefore, unsubstantiated. It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention. Entscheid For these reasons, the Court unanimously Declares the application inadmissible. Vincent Berger Registrar Georg Röss President

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