BGE 20130402_4380_09 vom 2. April 2013

Bundesgericht (BGE), 2013-04-02, FR

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Regeste

Regeste Diese Zusammenfassung existiert nur auf Französisch. DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 6 par. 1 et 3 let. a et d CEDH combinés. Restriction des droits de la défense. Le requérant se plaint de n'avoir pas pu interroger ou faire interroger un témoin à charge. Par ailleurs, il allègue que pendant la phase de l'enquête, il n'a pas été informé des charges retenues contre lui et n'a pas bénéficié de l'assistance d'un interprète. Enfin, il fait valoir que les juridictions suisses n'ont pas donné suite à ses offres de preuve. Selon la Cour, les droits de défense de l'intéressé n'ont pas été restreints de manière incompatible avec la Convention. Le requérant était représenté par un avocat et a eu l'occasion de présenter sa propre version des faits et de réfuter les témoignages à charge (ch. 35 - 58). Conclusion: requête déclarée irrecevable. Inhaltsangabe des BJ(2. Quartalsbericht 2013) Recht auf ein faires Verfahren (Art. 6 Abs. 1 und 3 EMRK); Zeugenbefragung und Abweisung von Beweisanträgen. Gestützt auf Art. 6 Abs. 1 und 3 EMRK rügte der Beschwerdeführer, dass er während des gesamten gegen ihn geführten Strafverfahrens keine Gelegenheit hatte, den Zeugen R.A. zu befragen. Der Beschwerdeführer machte zudem geltend, er sei nicht rechtzeitig über die Eröffnung des Strafverfahrens informiert worden, habe keinen Übersetzer erhalten, mehrere seiner Beweisanträge seien abgewiesen worden und die von den nationalen Gerichten angerufenen Beweise wiesen seine Schuld nicht genügend nach. Der Gerichtshof stellte fest, dass die Aussagen von R.A. nicht entscheidend für die Verurteilung des Beschwerdeführers waren und der Beschwerdeführer keine Befragung von R.A. beantragt hatte, obwohl er im Schlussprotokoll über die Möglichkeit, Beweisanträge zu stellen, informiert worden war. Der Gerichtshof befand weiter, dass der Beschwerdeführer in genügender Weise über die Art und den Grund der gegen ihn erhobenen Beschuldigung informiert worden sei und dass er - anwaltlich vertreten - über genügende Möglichkeiten verfügte, um seine Verteidigung vorzubereiten. Zudem sei die Schlussfolgerung, wonach die Argumente des Beschwerdeführers durch die vorliegenden Beweise entkräftet werden und die zusätzlich beantragten Beweise nicht entscheidend für die Beurteilung des Falles seien, nicht willkürlich. Der Gerichtshof kam zum Schluss, dass das Verfahren insgesamt fair gewesen sei. Unzulässigkeit infolge offensichtlicher Unbegründetheit (einstimmig).

Regeste DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 6 par. 1 et 3 let. a et d CEDH combinés. Restriction des droits de la défense. Le requérant se plaint de n'avoir pas pu interroger ou faire interroger un témoin à charge. Par ailleurs, il allègue que pendant la phase de l'enquête, il n'a pas été informé des charges retenues contre lui et n'a pas bénéficié de l'assistance d'un interprète. Enfin, il fait valoir que les juridictions suisses n'ont pas donné suite à ses offres de preuve. Selon la Cour, les droits de défense de l'intéressé n'ont pas été restreints de manière incompatible avec la Convention. Le requérant était représenté par un avocat et a eu l'occasion de présenter sa propre version des faits et de réfuter les témoignages à charge (ch. 35 - 58). Conclusion: requête déclarée irrecevable.

Synthèse de l'OFJ(2ème rapport trimestriel 2013) Droit à un procès équitable (art. 6 §§ 1 et 3 CEDH); Interrogatoire des témoins et rejet d'offres de preuves. Invoquant l'art. 6 §§ 1 et 3 CEDH, le requérant critiqua ne pas avoir eu l'occasion, durant toute la procédure pénale menée contre lui, d'interroger le témoin R.A. De plus, il n'aurait pas été informé à temps de l'ouverture de la procédure pénale, n'aurait pas bénéficié de l'aide d'un traducteur, plusieurs de ses offres de preuves auraient été rejetées et les preuves retenues par les tribunaux internes ne démontreraient pas suffisamment sa culpabilité. La Cour constata que les dépositions de R.A. n'avaient pas été décisives pour la condamnation du requérant et que ce dernier n'avait pas demandé la possibilité d'interroger le témoin bien qu'il ait été informé, dans le protocole final, de la possibilité de fomer des demandes de preuve. La Cour considéra ensuite que le requérant avait suffisamment été informé des accusations pénales soulevées contre lui et que, représenté par un avocat, il avait suffisamment pu préparer sa défense. De plus, la conclusion des tribunaux internes selon laquelle les arguements du requérant auraient été invalidés par les preuves disponibles et les preuves supplémentaires demandées n'auraient pas été décisives pour l'issue de la procédure ne serait pas arbitraire. La Cour conclut que la procédure, considérée dans son ensemble, avait été équitable. Irrecevabilité pour défaut manifeste de fondement (unanimité).

Regesto Questo riassunto esiste solo in francese. DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 6 par. 1 et 3 let. a et d CEDH combinés. Restriction des droits de la défense. Le requérant se plaint de n'avoir pas pu interroger ou faire interroger un témoin à charge. Par ailleurs, il allègue que pendant la phase de l'enquête, il n'a pas été informé des charges retenues contre lui et n'a pas bénéficié de l'assistance d'un interprète. Enfin, il fait valoir que les juridictions suisses n'ont pas donné suite à ses offres de preuve. Selon la Cour, les droits de défense de l'intéressé n'ont pas été restreints de manière incompatible avec la Convention. Le requérant était représenté par un avocat et a eu l'occasion de présenter sa propre version des faits et de réfuter les témoignages à charge (ch. 35 - 58). Conclusion: requête déclarée irrecevable. Sintesi dell'UFG(2° rapporto trimestriale 2013) Diritto ad un processo equo (art. 6 cpv. 1 e 3 CEDU); audizione di testimoni e rigetto di istanze probatorie. Richiamandosi all'art. 6 cpv. 1 e 3 CEDU, il ricorrente ha contestato di non aver avuto la possibilità di interrogare il testimone R.A. nel corso del procedimento penale condotto a proprio carico. Il ricorrente ha inoltre criticato di non essere stato informato tempestivamente dell'apertura del procedimento penale, di non aver avuto un traduttore, che varie sue istanze probatorie sono state rigettate e che i mezzi di prova accolti dai giudici nazionali non erano sufficienti a dimostrare la sua colpevolezza. La Corte ha constatato che le dichiarazioni di R.A. non erano decisive per la condanna del ricorrente e che quest'ultimo non aveva richiesto l'audizione di R.A., sebbene nel verbale conclusivo fosse stato informato della possibilità di presentare istanze probatorie. Inoltre la Corte ha ritenuto che il ricorrente fosse stato informato in modo sufficiente sul tipo e sul motivo delle accuse mosse contro di lui e che disponesse di sufficienti possibilità di preparare la sua difesa, essendo rappresentato da un legale. Per di più non è arbitraria la conclusione che gli argomenti del ricorrente risultano invalidati dai mezzi probatori a disposizione e che le prove aggiuntive da lui richieste non sono decisive per valutare il caso. La Corte è giunta alla conclusione che nel complesso il procedimento è stato equo. Il ricorso è irricevibile per manifesta mancanza di fondamento (unanimità).

Erwägungen

E. 1

The applicant, Mr Liborio Garofolo, is an Italian national, who was born in 1969 and lives in Liestal, Canton of Basel-Landschaft. He was represented before the Court by Mr A. Joset, a lawyer practising in Liestal.

E. 2

The Swiss Government ("the Government") were represented by their Deputy Agent, Mr A. Scheidegger, of the Federal Office of Justice. The Italian Government, who had been informed of their right to intervene under Article 36 of the Convention, did not make use of this right. A. The circumstances of the case

E. 3

The facts of the case, as submitted by the parties, may be summarised as follows. 1. Background to the case

E. 4

In 2001 the Swiss Federal Gaming Board(Eidgenössische Spielbankenkommission - "FGB") opened investigations against VSA AG (the "AG"), a stock corporation under Swiss law, on suspicion of having illegally installed gaming machines in establishments other than licensed casinos. On the occasion of a search of the AG's business premises on 25 April 2001, FGB officials seized documents indicating that the gaming machines had been installed in agreement with the operators or tenants of such establishments who had shared the profits resulting from the machines' illegal operation with the AG.

E. 5

It followed from several of the documents seized during the search that two illegal gaming machines delivered by the AG had been operated in a club run by the applicant. For instance, according to two letter agreements addressed to the applicant's club and dated 13December 1999 and 9June 2000 respectively it was stipulated that in each case a gaming machine of a type that was not authorised for use outside licensed casinos was to be installed by the AG at the applicant's club. It was further agreed that the proceeds from the operation of the respective machines were to be equally split between theparties. The agreement dated 9June 2000 was accompanied by a delivery note(Lieferschein) of the same date stating the type and serial number of the machine supplied to the applicant's club.The seized documents further comprised three bills dated 26 February, 6 March and 26 April 2000 respectively, demonstrating that gaming machines installed at the applicant's club by the AG had generated proceeds which had been divided equally between the AG and the club's tenant. Each of the receipts carried the signature of R.A. who at the time had been an employee of the AG as well as of a representative of the club's tenant or - as regards the receipt of 26 April 2006 - the applicant's own signature. The authorities further seized a list dated 12 November 2000 setting out commissions collected by R.A. on behalf of the AG in connection with the operation of gaming machines installed by the AG at the applicant's club. The list referred, inter alia , to machines of the type that had been the subject of the aforementioned agreements of13 December 1999 and 9June 2000. In addition, the FGB officials seizedseveral computer-generated reports depicting revenues of the AG resulting from the operation of the said two gaming machines.

E. 6

On 24 October 2001 an official of the FGB accompanied by a police officer carried out a control visit at the applicant's club, where they discovered an unlicensed gaming machine. The machine carried several stickers indicating that it was for sale. After having verified that the machine, even though switched off, was nevertheless fully operational, the FGB officer ordered that it be confiscated.

E. 7

On 21 August 2002, the applicant was heard as a witness(Auskunftsperson) in the administrative criminal proceedings (Verwaltungsstrafverfahren) instituted by the FGB against the AG and its management. While conceding that the AG had installed gaming machines at his club's premises in the past which had included machines of the type appearing on the documents seized at the AG's premises, the applicant maintained that he had not been aware that the use of such machines outside licensed casinos was prohibited. A machine of the type in question had been operated at his club for a period of two months but had been disposed of in February 2000. By contrast, the gaming machine confiscated by the authorities on 24 October 2001 had not been installed by the AG but had been bought by himself several years back in Italy for private use. The applicant explained that since the machine was no longer functioning he had brought it to the club for the purpose of selling it. The applicant further contended that he did not have any recollection of having been in contact with R.A. in the past.

E. 8

On an unspecified date, the FGB also commenced an investigation against the applicant without the latter's knowledge.

E. 9

On 30 January 2004, R.A. was heard as a witness in the criminal administrative proceedings instituted against P.V., one the AG's management board members. R.A. specified that as an employee of the AG at the time of the events at issue it had been his task to empty the cash registers of the gaming machines installed by the AG at a given establishment and to divide the proceeds between the AG and the respective tenant in accordance with the previously agreed ratio. R.A. testified in this context that he had also collected proceeds generated by gaming machines installed by the AG at the club run by the applicant, whom he knew personally. He further confirmed that he had drawn up and signed the aforementioned statements on the division of the related proceeds dated 26 February, 6 March and 26 April 2000 at the club's premises and in the presence of its tenant but did not have any recollection who had signed the receipts on the tenant's behalf. When presented with a photo of an illegal gaming machine of the type allegedly operated at the applicant's club, R.A. recalled having seen a similar machine at the club's premises. He pointed out that it followed from the information on the receipts dated 6 March and 26 April 2000 that proceeds had also been generated by such gaming machine. This clearly showed that the machine had been in use since otherwise its cash register would have been empty. R.A. further stated that he did not know who had drawn up the remainder of the seized reports on revenues generated by the two allegedly illegal gaming machines. In R.A.'s opinion it was unlikely that the applicant had been aware that the operation of these machines had been illegal. 2. The proceedings before the Federal Gaming Board

E. 10

On 26 August 2004 the FGB established the final record(Schlussprotokoll) of its investigations conducted against the applicant which was served on the latter the following day. The record informed the applicant that he was accused of having illegally organised games of chance in violation of Article 56 § 1 lit. a of the Federal Act pertaining to gambling and gambling houses (Bundesgesetz über Glücksspiele und Spielbanken - see Relevant domestic law below). According to the record, the information obtained in the course of the investigations, in particular the documents seized at the AG's premises, had demonstrated that in the period from 1 April 2000 until 29 January 2001 the applicant had operated up to two unlicensed gaming machines at his club and that the resulting proceeds had been equally split between him and the AG. While the applicant when heard as a witness in the proceedings against the AG had admitted that an illegal gaming machine supplied by the AG had been operated at his club for a period of two months, he had denied that the machine seized at his club had been installed by the AG or operated for commercial purposes. Having regard to the fact that this machine showed the same serial number as indicated on the delivery note dated 9 June 2000, the FGB did, however, conclude that it had been delivered by the AG. It was further specified in the record that according to the documents seized, the profit realised by the applicant in the period at issue as a consequence of the illegal operation of the said machines amounted to a total of 4,405 Swiss francs (CHF - 3,619 euros (EUR)). The final record further informed the applicant that, within a time-limit of ten days, he had the right to comment on the FGB's findings, to apply for the investigations to be complemented and to inspect the investigation files. It was further specified that since the applicant had so far only been heard as a witness in the proceedings against the AG, he would have the right to request a further hearing in his capacity as accused in respect of the charges brought against him.

E. 11

As the applicant did not submit any comments within the set time frame the FGB, by an order(Strafbescheid) of 2 November 2004, found him guilty as charged and imposed a fine of CHF 4,000 Swiss francs (EUR 3,286). It further ordered that the confiscated gaming machine be destroyed and sentenced the applicant to pay compensation to the State in the amount of CHF 4,405 corresponding to the profits he had generated by the machines' illegal operation. He was further informed about his right to file an objection (Einsprache) against the order within a time-limit of thirty days, providing reasons and setting out possible means of evidence in its support.

E. 12

On 6 December 2004 the applicant, now represented by counsel, objected to the order after having been granted access to the investigation files. He contended, in particular, that while he had been heard as a witness in the proceedings against the AG, he had not been informed that investigations had also been commenced with respect to him. He had thus not been granted an opportunity to defend himself. He further contested having exploited illegal gaming machines at his club for commercial purposes. The confiscated machine had not been in use at the club. As regards any other gaming machines installed by the AG these had been exclusively operated by and for the benefit of the latter.

E. 13

By a penal order(Strafverfügung) of 3 March 2005 the FGB, endorsing its order of 2 November 2004, dismissed the applicant's objection. It pointed out that Swiss

administrative criminal law did not request a formal decision by the authorities on the opening of investigations against an individual but merely required that the initiation of such proceedings was apparent from the official files. In the instant case it followed from the final record of the investigations served on the applicant on 27 August 2004 that investigations had been opened against him. In accordance with Articles 37 and 38 of the Swiss Code on Administrative Criminal Law (see Relevant domestic law below) such final record could be drawn up even before the accused had been questioned. The record had further informed the applicant about his right to submit comments, to apply for further evidence to be taken and to be heard again by the FGB in his capacity as accused. The applicant had, however, not availed himself of these rights. The FGB further pointed out that the applicant's allegations that the AG alone had been entitled to the profits resulting from the machines' operation and that the gaming machine seized at his club had never been used for commercial purposes were clearly refuted by the content of the documents seized and the veracity of which the FGB had no reason to doubt. 3. The proceedings before the criminal courts (a) The proceedings before the Basel-Landschaft Criminal Court

E. 14

Following the applicant's appeal against the FGB's penal order, the case was referred at his request to the Basel-Landschaft Criminal Court(Strafgericht Basel-Landschaft) for judicial review in accordance with Article 72 of the Swiss Code on Administrative Penal Law (see Relevant domestic law below).

E. 15

In his written submissions to the Criminal Court the applicant reiterated his allegations that the proceedings before the FGB had disregarded basic rights of the defence on the grounds already set out in his objection of 6 December 2004 (see § 12 above). He complained that criminal proceedings had never been formally opened against him and he had not been informed in due course of the investigations instituted against him. Furthermore, he had never been heard in his capacity as accused in the course of the investigations but only as a witness in the proceedings against P.V. He further invoked that due to his insufficient command of the German language he had not understood the content of the FGB's final protocol dated 26 August 2004. He finally maintained that the charges brought against him were time-barred. The applicant requested that the originals of the seized documents be produced at trial, that the signatures of the club's representative on the receipts dated 26 February, 6 March and 26 April 2000 as well as the delivery order of 9 June 2000 be compared with his own handwriting and that the files in the proceedings against the AG's management be included as evidence in his trial. He further requested that R.A., P.V. and two further employees of the AG, namely A.T. and M.S., who had allegedly supplied gaming machines to his club, be heard as witnesses. He argued that R.A. was a key witness in the proceedings since he was the author of several of the documents that had been used by the FGB as evidence against him and the accuracy of which he contested.

E. 16

By a decision of 5 October 2006 the Criminal Court granted the applicant's request to hear the aforementioned witnesses and to admit the investigation files against the AG's management as evidence in his own proceedings since these additional means of evidence could contribute to the clarification of the circumstances of the case. It dismissed the remainder of the applicant's motion on the ground that he had not established why the

taking of the requested evidence was relevant for the court's finding of facts. On 6 November 2006 the Criminal Court decided to abstain from summoning M.S. The witness had informed the Court that he was currently residing in Italy and while he was ready to appear at trial against compensation of his travel expenses, he did in any event not know the applicant or have any recollection of events relating to the period at issue. Under the circumstances, the court concluded that his convocation would be disproportionate.

E. 17

On 6 December 2006 the Criminal Court heard, inter alia , the applicant, who was represented by counsel and assisted by an interpreter, the FGB official who had seized the illegal gaming machine at the applicant's club on 24 October 2001, P.V., one of the managing directors of the AG, as well as A.T., an employee of the AG who had been involved in the delivery of gaming machines to the applicant's club. R.A. did not attend the hearing.

E. 18

By a judgment of the same day, the vice-president of the Criminal Court(Strafgerichtspräsidium) found the applicant guilty as charged. While reducing the fine previously imposed by the FGB from CHF 4,000 to 2,000 (EUR 1,643) the Criminal Court upheld the remainder of the sentence imposed by the FGB.

E. 19

The Criminal Court, relying in particular on the contents of the documents seized at the AG's premises, found it established that the illegal gaming machines had been used at the applicant's club for commercial purposes. The copy of the letter agreement dated 13 December 1999 on the supply of an illegal gaming machine by the AG to the applicant's club had provided for the equal splitting of the proceeds resulting from the machine's operation between the parties. By agreement dated 9 June 2000 it had been agreed that a gaming machine of the type that later was confiscated by the FGB at the applicant's club was to be delivered by the AG and that the proceeds from its operation were also to be divided equally between the AG and the applicant. The related delivery note of the same date showed the serial number of the installed gaming machine which was identical with the serial number on the confiscated machine. Furthermore, the compilation of commissions collected by R.A. on behalf of the AG dated 12 November 2000 as well as the further reports on revenues obtained by the AG demonstrated that proceeds had been generated by both such machines during the period at issue and showed what proportion of such profits had been allocated to the AG. The related figures corresponded to statements on the amounts of payments credited to the AG's accounts. The court further pointed out that the applicant's allegations that the confiscated gaming machine had not been functioning was refuted by the testimony of the FGB official who had been present at the club on the occasion of the control visit on 24 October 2001 and, when heard as witness at trial, had confirmed that the machine had been accessible to the public and fully operational.

E. 20

The Criminal Court further referred to the witness statement made by R.A. on 30 January 2004 in the proceedings against P.V. (see above § 9). The court explained that it had not been possible to hear the witness in person on the ground that the latter, according to information provided by the cantonal police, was hospitalised abroad. The court, while noting that the applicant had not had the opportunity to confront R.A. at any stage of the

proceedings against him, held that R.A.'s statements could nevertheless be admitted as evidence in the instant proceedings since they were not decisive for the applicant's conviction and the remaining available evidence was sufficient to prove the applicant's guilt.

E. 21

The Criminal Court specified in this context that in addition to the aforementioned documentary evidence, P.V. had testified at trial that as a rule the proceeds from the operation of gaming machines had been equally split between the AG and the tenants of the enterprises where the machines had been installed. A.T., who at the time had worked as commercial executive for the AG, had confirmed that the proceeds from the operation of gaming machines installed at the applicant's club had also been divided equally. He had further confirmed that he had drawn up the documents dated 9 June 2000 in relation to the delivery of the machine that had later been confiscated at the applicant's club. He had handed the documents over to the chauffeur who had been charged with delivering the machine to the applicant's club. A.T. had further testified that the conclusion and implementation of agreements on the installation of gaming machines had been within the exclusive competence of P.V. and A.T. and it was inconceivable that machines had been delivered also by R.A. whose function had been limited to emptying the cash registers of machines installed by the AG. P.V. stated in this context that R.A. had been a reliable employee and the commission invoices established by him had always been accurate. In view of these testimonies the Criminal Court concluded that the applicant's allegations that R.A. had regularly exchanged and replaced the machines installed at his club and that for this reason he had not been aware of the type of machines installed at a given moment, were not credible. (b) The proceedings before the Basel-Landschaft Cantonal Court

E. 22

The applicant appealed against the judgment to the Basel-Landschaft Cantonal Court(Kantonsgericht Basel-Landschaft) and by written submissions dated 13 July 2007 requested to be acquitted. He invoked again that the proceedings had disregarded fundamental rights of the defence in violation of Article 6 of the Convention for the reasons already set out on the occasion of his previous appeals. He further argued that while he had been assisted by an interpreter on the occasion of the trial before the Criminal Court he had not disposed of such assistance at the pre-trial stage in the proceedings before the FGB. For this reason his statements on the occasion of his hearing as a witness in the proceedings against the AG on 21 August 2002 had been contradictory. The applicant further maintained that neither he nor his counsel had been granted an opportunity to examine R.A., the main witness against him, at any stage of the proceedings in breach of Article 6 § 3 (d) of the Convention. This witness had not only incriminated the applicant on the occasion of his hearing on 30 January 2004 in the proceedings against P.V. but had also produced several of the documents on which the Criminal Court had based his conviction and the veracity of which the applicant contested. In the instant case the national authorities could also not exceptionally dispense with a witness hearing on the ground that R.A. was not in a position to attend the trial due to his hospitalisation. In this context it was relevant that the FGB had failed to provide for a possibility to examine R.A. at the pre-trial stage where such confrontation could have been arranged without problems. The applicant consequently reiterated his request that R.A. be heard as a witness in the proceedings. He further repeated his request for an examination of M.S. at trial.

E. 23

By a decision of 7 August 2007 the Cantonal Court granted the applicant's request to hear R.A. and dismissed the remainder of his request for the taking of evidence. On 24 September 2007 the court was informed by the municipal police that R.A. was currently hospitalised in Singapore. This information was confirmed by e-mail messages from R.A. and a representative of the hospital. Furthermore, R.A.'s brother had explained over the phone that R.A. had undergone surgery and had to remain in hospital for further treatment. By a decision of 27 September 2007 the court, pointing out that a confrontation between the applicant and R.A. was not so important as to justify the postponement of the hearing scheduled for 30 October 2007, ordered that the trial be pursued without R.A. being questioned.

E. 24

On the occasion of the hearing on 30 October 2007 counsel for the defence again requested that R.A. be examined at trial. The FGB, acting as joint plaintiff to the prosecution, moved that the application be dismissed since the court disposed of sufficient further means of evidence for a conviction. The Cantonal Tribunal dismissed the applicant's request.

E. 25

In its judgment rendered on the same day the Cantonal Court fully endorsed the Criminal Court's findings at first instance. The court further took the view that the rights of the defence had been fully respected in the proceedings.

E. 26

As regards the applicant's request to hear R.A. as a witness the Cantonal Court, while noting that the applicant had not been granted an opportunity to confront R.A. at any stage of the proceedings, emphasised that by the FGB's final record of 26 August 2004, the applicant had been informed of his right to request that the investigations be complemented and could thus have asked already at this point in time for R.A. to be examined. The Cantonal Court further pointed out that the courts at both instances had made efforts to enable R.A.'s examination at trial. The Criminal Court had summoned R.A. to appear at the hearing. The latter being hospitalised abroad, however, could not attend the trial. The witness had again been summoned to appear at the hearing on 30 October 2007 in the appellate proceedings. According to information obtained through the competent municipal police on 24 September 2007 and from the witness's brother, the latter was subject to further treatment in a hospital in Singapore where he had to remain for some time. His examination had thus been objectively impossible. Another adjournment of the hearing would have further delayed the proceedings that had already lasted a considerable time and would have contravened the principle that criminal proceedings should be conducted expeditiously.

E. 27

The Cantonal Court further stated that pursuant to Article 188 of the Code of Criminal Procedure evidence was only to be obtained to the extent this was necessary with a view to establishing the facts relevant for deciding on an appeal. The Court took the view that in the instant case it disposed of sufficient elements for its findings of fact and that R.A.'s testimony and the documents produced by him were not of significant importance in this respect. The fact that R.A. had not been examined had thus not violated the rights of the defence. The Criminal Court at first instance had based its assessment of the applicant's

guilt on the applicant's submissions, the testimonies of the witnesses heard at trial as well as the agreements and delivery notes of 9 June 2000 and 13 December 1999 and the reports on profits allocated to the AG. The documents issued by R.A. had been taken into account to the extent they were consistent with and had corroborated these available pieces of evidence.

E. 28

In the Cantonal Court's view, on the basis of the whole body of evidence taken together, and even without taking into account R.A.'s testimony, it was established that the applicant had operated two illegal gaming machines at his bar which had been provided by the AG and that the latter and the applicant had equally shared the gains from their illegal operation. The applicant's submissions to the contrary had all been refuted by the available evidence. The fact that at his hearing before the FGB on 21 August 2002 the applicant had stated that he did not recall having met R.A. in the past whereas in the proceedings before the Cantonal Court he had submitted that R.A. had regularly installed and replaced gaming machines at his club and had also been a good client provided a further indication that his testimony was not credible.

E. 29

As regards the applicant's additional complaint regarding the lack of a formal decision by the authorities with respect to the opening of criminal investigations against him and the fact that he had not been heard by the FGB in his capacity as accused, the Cantonal Tribunal reiterated the related explanations provided in the FGB's penal order of 3 March 2005 (see § 13 above). It recalled that even though in the final record of the investigations established by the FGB the applicant had been informed about his defence rights and had disposed of sufficient time to avail himself of such rights he had failed to do so. The court specified in this context that although the applicant's knowledge of the German language was limited it could have been expected of him to enquire about the record's contents. (c) The decision of the Federal Supreme Court

E. 30

By a judgment of 20 June 2008 the Federal Supreme Court(Bundesgericht), endorsing the Cantonal Court's decision, rejected the applicant's related appeal lodged on 1 February 2008. The Federal Court's judgment was posted on 2 July 2008 and served on the applicant on 3 July 2008. B. Relevant domestic law 1. The Federal Act pertaining to gambling and gambling houses

E. 31

Article 56 § 1 lit. a of the Federal Act pertaining to gambling and gambling houses(Bundesgesetz über Glücksspiele und Spielbanken) stipulates that the organisation or commercial offering of games of chance outside licensed gambling houses is subject to imprisonment or a fine of up to CHF 500,000. The Federal Gaming Board is the competent authority for the prosecution of illegal gambling. 2. The Federal Act on Administrative Criminal Proceedings

E. 32

The Federal Act on Administrative Criminal Proceedings(Bundesgesetz über das Verwaltungsstrafrecht) of 22 March 1974 as amended provides for the procedural rules to be observed in the event the prosecution of an offence falls within the competence of an

administrative authority. Pursuant to Article 20 et seq. of the Act the relevant administrative authority is competent to rule on breaches of administrative criminal law unless a superior authority holds that the offence committed requires that a prison sentence be imposed, in which case the matter is referred to the criminal courts. Officers of the competent administrative authority who are specifically trained for this purpose may conduct the investigations with the support of the cantonal and municipal police. Article 38 of the Act requires that the opening of investigations, their conduct and their outcome shall be apparent from the official files. Articles 40 et seq. stipulate that the investigating officers may collect written and oral evidence and hear witnesses. The provisions further specify under which conditions the search of apartments or business premises and the confiscation of documents or objects be ordered within the scope of ongoing investigations.

E. 33

According to Article 61 of the Act, once the investigating officer deems the investigations to be complete he or she draws up a final record(Schlussprotokoll) which sets out the facts underlying the charges brought against the accused. Article 37 provides that in the event specific investigation measures are not necessary to clarify the circumstances of the case, the investigating officer may directly draw up the final record. The final record is notified to the accused who is granted the opportunity to submit comments, to inspect the files and to request that the investigations be complemented. The accused may file related applications within a time-limit of ten days starting from the date on which the record was served on him (Article 61). The administrative authority then may either decide to impose a penalty on the accused (Strafbescheid), to discontinue the proceedings or to refer the case to the criminal courts. The convict may object to such a decision within 30 days from the date it was served on him. The objection has to be made in writing, contain a specific and reasoned request and set out any related means of evidence. The administrative authority, having re-examined the case, then renders a new decision. The convict may, within a period of ten days after the decision has been served on him, request that the case be referred for judicial review to the criminal courts (Article 72). In this case, the concerned administrative authority transfers the files to the prosecution authorities at the competent cantonal criminal court. Articles 73 to 81 contain rules regarding the ensuing proceedings before the criminal courts. The referral shall constitute the bill of indictment. The accused, the competent public prosecution authorities and the concerned administrative authority are parties to the court proceedings. The evidence gathered within the scope of the administrative criminal proceedings as set out in the investigation file established by the administrative authority shall form an integral part of such court proceedings. The criminal court may on its own motion or at the request of either party order the taking of further evidence. The rules of the Code of Criminal Procedure apply to the proceedings to the extent the Act on Administrative Criminal Proceedings does not contain specific regulations. 3. The Code of Criminal Procedure Pursuant to Section 145 of the Code of Criminal Procedure(Strafprozessordnung) of the Canton Basel-Landschaft of 3 June 1999 the parties to proceedings before the criminal court may within a time-limit set by its president file an application for the taking of further evidence. The president may, inter alia , refuse a related request in the event the taking of the requested evidence is obviously not necessary or in the event it is impossible to obtain. As regards the proceedings before the Cantonal Court, Section 188 provides that the latter may only take such evidence that it considers being relevant for the appellate decision and the clarification of the circumstances of the case.
COMPLAINTS

E. 34

The applicant complained that the criminal proceedings against him had disregarded fundamental rights of the defence as guaranteed under domestic law of criminal procedure as well as under Article 6 of the Convention. He complained, in particular, that he did not have an opportunity to question R.A., the main witness against him, at any stage of the proceedings in breach of Article 6 § 1 read in conjunction with § 3 (d) of the Convention. He also argued that the evidence referred to by the domestic courts had not been sufficient to establish his guilt and that the latter had rejected his requests for the hearing of additional witnesses. The applicant finally invoked that he had not been informed in due course of the opening of criminal proceedings against him and had therefore been deprived of a possibility to mount an effective defence. He specified in this context that in view of the fact that he was Italian-speaking and lacked sufficient command of German he had not been capable of understanding the contents of the final record established by the FGB on 26 August 2004 setting out the results of the investigations conducted and the resulting charges brought against him. Moreover, given that he had not disposed of the assistance of an interpreter on the occasion of his hearing as a witness in the proceedings against the AG on 21 August 2002, the domestic courts' conclusion that the discrepancies between his pre-trial testimony as a witness and his subsequent submissions at his own trial showed that he was not credible as a whole, had been arbitrary. Erwägungen THE LAW

E. 35

The applicant complained that neither he nor his counsel had been granted an opportunity to confront and examine R.A., the main witness in the criminal proceedings against him. Furthermore, at the investigative stage, he had not been informed in due course of the charges against him and had not been provided with the assistance of an interpreter. At the trial stage, the domestic courts had denied several of his applications for the taking of further evidence even though such additional evidence could have demonstrated his innocence. The applicant contended that, consequently, the rights of the defence had been restricted to an extent incompatible with the guarantees provided by Article 6 of the Convention.

E. 36

The Court considers that the applicant's complaints may raise an issue under Article 6 § 1 of the Convention as well as under Article 6 § 3 (a) and (d), which, as far as relevant, read as follows: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law... ... 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; ... (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..." 1. The parties submissions (a) The Government

E. 37

The Government pointed out that R.A. had not been heard as a witness at any stage of the proceedings against the applicant and that his testimony in the proceedings against the separately prosecuted P.V. had only briefly been referred to in the Criminal Court's decision of 6 December 2006. In the Government's view it was thus questionable whether R.A.

qualified as a witness within the meaning of Article 6 § 3 (d) of the Convention as interpreted in the Court's case-law.

E. 38

The Government contended that in any event, R.A.'s submissions had not at all been decisive for the applicant's conviction. The FGB which had been the first domestic authority to investigate the circumstances of the case had based its finding of the applicant's guilt in its decision of 2 November 2004 as confirmed by penal order of 3 March 2005 exclusively on the documents seized at the AG's premises and which had formed part of the investigation file as well as on the applicant's own submissions, without referring to R.A.'s testimony in the proceedings against P.V. While it was true that the Basel-Landschaft Criminal Court had briefly referred to R.A.'s witness statements in its judgment of 6 December 2006 it nevertheless followed from this court's assessment that such testimony had not provided any new decisive factual information but had only confirmed the circumstances of the case as already established on the basis of the further available evidence, in particular the documents seized at the AG's premises and the additional corroborating witness statements made at trial.

E. 39

The Government finally maintained that it was not imputable to the domestic authorities that the applicant had not had an opportunity to question R.A. Even though the applicant had been informed already in the FGB's final protocol dated 26 August 2004 of the possibility to apply for the taking of additional evidence, he had not requested that R.A. be examined by the FGB. He had also refrained from making such a request within the scope of his objection lodged against the FGB's decision of 2 November 2004. When the applicant finally applied for R.A. to be examined as witness in the ensuing court proceedings, this proved to be impossible due to the latter's hospitalisation. The Criminal as well as Cantonal Court could therefore not be held responsible for the fact that their attempts to summon R.A. to appear as a witness at trial had been to no avail.

E. 40

Having regard to these considerations, the Government concluded that the criminal proceedings against the applicant as a whole had been fair and there had thus been no violation of Article 6 of the Convention. (b) The applicant

E. 41

The applicant submitted that R.A. had been the prosecution's main witness in the proceedings against him. He emphasised in this respect that it had not only been the incriminating statements made by R.A. when heard as a witness in the proceedings against P.V. on 30 January 2004 that made him a key witness but also the fact that he had been the author of several of the documents seized by the domestic authorities and on which the FGB and the domestic courts had based the applicant's conviction to a decisive extent. He specified that as regards the amount of CHF 4,405 to be paid to the Swiss State as compensation for the proceeds allegedly obtained by the illegal operation of the gaming machines, the written compilations and invoices established by R.A. had even constituted the sole basis for the domestic authorities' underlying calculation.

E. 42

The applicant argued that even though he had contested the veracity of the statements made and the accuracy of the documents drawn up and compiled by R.A., he had never been granted an opportunity to question him and to cast doubt on the witness's credibility. The applicant took the view that the resulting violation of the rights of the defence was imputable to the domestic authorities. He submitted in this context that the fact that he had not requested to confront and question R.A. once he had received the final protocol of the FGB's investigations dated 26 August 2004 was immaterial for the question as to whether his rights under Article 6 § 3 (d) had been respected by the domestic authorities in the proceedings against him.

E. 43

The applicant, also having regard to the further alleged shortcomings in the proceedings as enumerated in his complaints, concluded that the rights of the defence had been restricted to an extent that was irreconcilable with the guarantees contained in Article 6 of the Convention. 2. The Court's assessment

E. 44

As the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1, the Court will examine the applicant's complaints under these provisions taken together (see Rowe and Davis v. the United Kingdom [GC], no. 28901/95 , § 59, ECHR 2000-II).

E. 45

The Court recalls that its primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, Taxquet v. Belgium [GC], no. 926/05 , § 84, ECHR 2010). In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (see Gäfgen v. Germany [GC], no. 22978/05 , § 175, ECHR 2010-....).

E. 46

Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see Lucà v. Italy , no. 33354/96 , § 39, ECHR 2001-II and Solakov v. "the former Yugoslav Republic of Macedonia" , no. 47023/99 , § 57, ECHR 2001-X).

E. 47

In the context of absent witnesses, the Court has set out two considerations in determining whether the admission of statements was compatible with the right to a fair trial. First, it had to be established that there was a good reason for the non-attendance of the witness. Second, even where there was a good reason, where a conviction was based solely or to a decisive extent on statements made by a person whom the accused had had no opportunity

to examine, the rights of the defence might be restricted to an extent incompatible with the guarantees of Article 6 (see Al-Khawaja and Tahery v. the United Kingdom [GC], nos. 26766/05 and 22228/06, §§ 118 to 120, ECHR 2011).

E. 48

The Court observes at the outset that the present application does not concern a witness whose identity or whereabouts are unknown to the accused. While the applicant contended on the occasion of his hearing in the proceedings against the AG on 21 August 2002 that he did not have any recollection of having met R.A. in the past, he maintained before the Cantonal Court that the latter had regularly replaced gaming machines at his club on the AG's behalf and that he had also been a good customer.

E. 49

The Court further notes that it is not disputed that R.A. was not heard as a witness at any stage of the proceedings against the applicant but only in the course of the separately conducted proceedings with respect to the AG's managing director P.V. It is, however, not convinced by the Government's argument that for this reason R.A. does not qualify as witness within the meaning of Article 6 § 3 (d) of the Convention - a term to be given an autonomous interpretation (see, among other authorites, Bönisch v. Austria , 6 May 1985, § 31, Series A no. 92) - in the instant proceedings. The Court would point out in this respect that while it is true that the FGB did not refer to R.A.'s testimony in its decision of 2 November 2004 or its penal order of 3 March 2005, his witness statements were nevertheless taken into consideration by the Basel-Landschaft Criminal Court in its judgment of 6 December 2006 as corroborating the further available evidence against the applicant. R.A.'s testimony was thus in fact introduced into the applicant's trial (see, mutatis mutandis , Windisch v. Austria , 27 September 1990, § 23, Series A no. 186).

E. 50

The Court is unable to share the applicant's view that it was imputable to the domestic authorities that R.A. had not been provided with a possibility to confront R.A. at the pre-trial stage within the course of the administrative criminal proceedings conducted against him by the FGB. It recalls in this context that neither in its final record of 26 August 2004 nor in its decisions of 2 November 2004 and 3 March 2005 finding the applicant guilty of having organised illegal games of chance did the FGB rely on the statements made by R.A. in the separate proceedings against P.V. The FGB exclusively relied on other available means of evidence which it deemed sufficient for the applicant's conviction. The Court notes that under such circumstances Article 37 of the Act on Administrative Criminal Proceedings (see Relevant domestic law above) enables the investigating authority to directly draw up the final record of the investigations conducted, as was done by the FGB in the instant case. Although the final record had informed the applicant of his right to apply for the taking of further evidence, he did not request that R.A. be questioned. While the applicant argues that he did not understand the related instructions in the final record on the ground that he lacked sufficient command of German, the Court cannot ignore that he also failed to make such a request within the scope of his objection against the FGB's decision of 2 November 2004 even though now represented by counsel. The Court is therefore not persuaded by the applicant's argument that he did not have an opportunity to ask for R.A. to be examined at the stage of the administrative criminal proceedings and finds that the absence of such examination does not disclose a lack of diligence on the part of the

domestic authorities (see, mutatis mutandis , Artner v. Austria , 28 August 1992, § 21, Series A no. 242-A, and Mayali v. France , no. 69116/01, § 32, 14 June 2005). 51. The Court further notes in this connection that, even assuming that the applicant did not understand the contents of the final record dated 26 August 2004, he was again informed in sufficient detail of the nature and cause of the accusation against him by the FGB's decision of 2 November 2004 and, represented by counsel, did thus dispose of sufficient elements to prepare his defence and object to his conviction in compliance with Article 6 § 3 (a) of the Convention. 52. Turning to examine whether R.A.'s testimony was the sole or decisive evidence in the ensuing proceedings against the applicant before the domestic courts, the Court observes that the Criminal Court in its judgment dated 6 December 2006 recalled that R.A. had testified having emptied the cash registers of machines installed at the applicants' club on behalf of the AG, that he had signed the related bills dated 26 February, 6 March and 26 April 2000 at the club's premises and in the tenant's presence and that it followed from two of these bills that proceeds had been generated by a gaming machine of the type that had allegedly not been licensed for use at the applicant's club. The Court notes, however, that there is nothing to establish that R.A.'s submissions were material for the applicant's conviction. The Criminal Court had mainly based its finding that the two illegal gaming machines at issue had been installed at the applicant's club for commercial purposes and that the proceedings from their operation had been equally split between the parties on the copies of the related agreements and delivery note dated 13 December 1999 and 9 June 2000 respectively. The various reports comprising compilations of proceeds generated by the machines and of profits allocated to the AG over the period in question which corresponded to the amounts of incoming payments shown on the AG's accounts provided further evidence for the illegal use of the machines and gave an indication of the amount of profits realised. The conclusions drawn by the domestic courts from this documentary evidence were further confirmed by the testimonies given by the FGB officer who had seized one of the gaming machines in issue on 24 October 2001 as well as by the member of the AG's management board, P.V., and its employee A.T., who had all been heard as witnesses at trial. Against this background, the Court has no reason to challenge the domestic courts' finding that even without taking into consideration R.A.'s testimony, the available body of evidence taken together provided a sufficient basis for the applicant's conviction and that, consequently, R.A.'s statements were not decisive for establishing the applicant's guilt. 53. In the Court's view the fact that the Criminal Court at first instance as well as the Cantonal Court in the appellate proceedings had granted the applicant's request to summon R.A. to appear as a witness at his trial does not, as suggested by the applicant, demonstrate that the domestic courts did, in reality, consider R.A. to be a key witness in the proceedings. By contrast, in its decision of 5 October 2006 granting the applicant's request to hear several further witnesses, among them R.A., P.V., M.S. and A.T., and to admit the files in the proceedings against the AG's management as evidence in his own trial, the Criminal Court stated that these additional means of evidence might contribute to the clarification of the circumstances of the case without attaching particular importance to one specific witness or piece of evidence. Furthermore, the Cantonal Court after having been informed that R.A. would not be able to attend the hearing in the appellate proceedings emphasised in its related decision of 27 September 2007 that in view of the fact that an examination of the witness was not necessary for its decision-making, an adjournment of the hearing was not justified. Accordingly, the Court finds that the domestic courts' attempts to accommodate the applicant's motion for the taking of evidence do not put into question

their assessment that a possible testimony by R.A. at trial would not be decisive for establishing his guilt. The Court further observes in this context that the applicant, within the scope of his various applications to hear R.A. as a witness, has not substantiated what value an examination of R.A. would have had for the defence. He did, for instance, not dispute that R.A. had been the author of the documents contained in the investigation files. Having regard to the strength of the residual means of evidence, the applicant has not substantiated that R.A.'s oral testimony at trial could have been determinative of the outcome of the case. 54. As regards the reasons for the failure to have R.A. examined at the occasion of the applicant's trial, the Court notes that it is not contested by the applicant that while the Criminal and the Cantonal Court had made reasonable efforts to secure R.A.'s attendance and had enquired whether his absence was justified, it had been objectively impossible for the trial court to hear him on the occasion of the hearing on 30 October 2007 due to his hospitalisation abroad (compare Al-Khawaja and Tahery , cited above, § 120). The Court finds that in view of the fact that both courts had consistently held that R.A.'s testimony was not material for their establishment of facts, the Cantonal Court's decision not to further adjourn the trial while having regard to the considerable length of the criminal proceedings against the applicant was neither unreasonable nor arbitrary. 55. Concerning the applicant's allegations that the evidence referred to by the domestic courts had not been sufficient to establish his guilt and that the latter had rejected his requests for the hearing of additional witnesses and the taking of further evidence that could have demonstrated his innocence, the Court reiterates that the admissibility of evidence is primarily governed by domestic law and that, as a rule, it is for the national courts to assess the evidence before them. It is also normally for the domestic courts to decide whether it is necessary or advisable to hear a witness, since Article 6 does not grant the accused an unlimited right to secure the appearance of the witness in the court (see S.N. v. Sweden , no. 34209/96 , § 44, ECHR 2002-V). The task of the Court is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see Doorson v. the Netherlands , 26 March 1996, § 67, Reports of Judgments and Decisions 1996-II, and Gossa v. Poland , no. 47986/99, § 52, 9 January 2007). 56. The Court notes in this connection that in the course of his trial the applicant, who was represented by counsel, was able to provide his own version of the events and had an opportunity to point out any incoherence in the statements of the witnesses heard at trial or to disclose any inconsistency of the residual means of evidence referred to by the domestic courts. As regards the Criminal Court's reference to the statements made by R.A. at the pre-trial stage and to the documents produced by him, the Court finds it relevant to note that since the applicant knew R.A. personally, it was open to him to identify any motives the witness might have had for lying and to challenge the accuracy of the documents produced by him in the course of his trial. The reasons advanced by the domestic courts for their conclusion that the applicant's related arguments were refuted by the available evidence and that the additional evidence suggested by the applicant was not material for their assessment of the case do not disclose any sign of arbitrariness. 57. Having regard to the above considerations, the Court is satisfied that the domestic courts were able to conduct a fair and proper assessment of the applicant's case and that the rights of the defence were not restricted to an extent that is incompatible with the guarantees provided by Article 6 of the Convention. In conclusion, it considers that, taken as a whole, the proceedings in issue were fair for the purposes of Article 6 § 1 read in conjunction with § 3 (a) and (d) of the Convention. 58. The Court therefore holds that the application is manifestly ill-founded and must be rejected in

accordance with Article 35 §§ 3 (a) and 4 of the Convention. Entscheid For these reasons, the Court unanimously Declares the application inadmissible. Stanley Naismith Registrar Guido Raimondi President