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Bundesgericht (BGE), 2014-10-07, 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. Équité d'une procédure en matière d'aménagement d'un chemin pédestre. Le droit à un procès équitable ne garantit pas l'accès à toutes les pièces en possession des autorités publiques. Il appartient aux juridictions internes d'administrer les preuves, la tâche de la Cour se limitant à examiner si la procédure dans son ensemble, y compris la manière dont les preuves ont été prises en compte, a été équitable. En l'espèce, le tribunal administratif du canton de Schwyz a fait plusieurs investigations pour retrouver les documents de 1984 concernant la construction des chemins pédestres, puis faute d'avoir pu les obtenir les a déclarés non pertinents; le Tribunal fédéral a confirmé cette décision et précisé que des raisons objectives imposaient de déplacer le sentier de randonnée sur la rive droite de la rivière Alp. La Cour considère que les instances nationales n'ont pas agi arbitrairement en considérant que que les documents requis par les requérants n'étaient pas décisifs pour l'issue de la procédure (ch. 27 - 33). Conclusion: requête déclarée irrecevable. DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 8 CEDH. Allégation de nuisances en raison de l'irrespect d'un moratoire sur un droit de passage relatif à un chemin pédestre passant sur la propriété des requérants. Bonne foi. Les requérants n'ont pas invoqué ce grief devant le Tribunal fédéral, de sorte qu'ils n'ont pas épuisé les voies de droit internes. En outre, l'art. 8 CEDH ne contient pas en soi un droit autonome à être traité conformément aux règles de la bonne foi par les autorités (ch. 40 - 44). Conclusion: requête déclarée irrecevable. Inhaltsangabe des BJ (4. Quartalsbericht 2014) Recht auf ein faires Verfahren (Art. 6 Abs. 1 EMRK); Recht auf Achtung des Privat- und Familienlebens (Art. 8 EMRK); Wegrecht. Der Fall betrifft den Bau eines Pilgerwegs über das Grundstück der Beschwerdeführer. Die Beschwerdeführer erachten Art. 6 Abs. 1 und Art. 8 EMRK als verletzt, weil die innerstaatlichen Behörden weder ihrem Gesuch, die Unterlagen aus dem Jahr 1984 zum Bau des strittigen Weges vorzulegen, Folge geleistet noch eine Notiz vom 3. Juli 2006 beachtet haben. Letzteres würde zu Lärmbelästigungen durch Wanderer und ihre Hunde führen. Für den Gerichtshof war die Einschätzung der innerstaatlichen Gerichte nicht willkürlich, dass die von den Beschwerdeführern ersuchten Unterlagen für das Resultat der innerstaatlichen Verfahren nicht entscheidend seien. Er qualifizierte die Rüge gestützt auf Art. 6 Abs. 1 EMRK folglich als offensichtlich unbegründet. Bezüglich der behaupteten Lärmbelästigung befand der Gerichtshof, dass die Beschwerdeführer den innerstaatlichen Instanzenzug nicht erschöpft haben. Hinsichtlich der Beachtung der Notiz beziehungsweise des guten Glaubens der Beschwerdeführer befand der Gerichtshof, dass diese Rüge unvereinbar ratione materiae mit den Bestimmungen der Konvention sei. Unzulässig (einstimmig).

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Erwägungen

E. 1

Background to the case 6. The facts of the case, as submitted by the applicants, may be summarised as follows. 7. In the canton of Schwyz, the Way of St James (Jakobsweg), a network of medieval pilgrimage routes leading through several European countries to Santiago de Compostela in the northwest of Spain, runs from Einsiedeln via Alpthal to the city of Schwyz. 8. In the past years, the approximately 1.5 kilometre long route between Chriegmatt and Gämstobelbach ran along the main road on a paved sidewalk on the left side of the river Alp. 9. In July 1984, heavy storms caused severe damages in the region. The banks of the river Alp had to be lined and the surroundings to be reconstructed. Considered to be urgency measures these works were done without any formal authorisation procedure. 10. In 2003, the authorities of the canton of Schwyz intimated their intention to move this route of the Way of St James to the right side of the river Alp, on a forest path intersecting the applicants' property for 7 metres (on the south-western side) and 17 metres (on the north-western part) respectively. Moreover, the forest road leads through a low-level moor of national importance (inventory no. 3154), which is constitutionally protected (see paragraph 17 below). 11. On 1 July 2006, the applicants, their children, representatives of the district council and the district administration, as well as the director of the cantonal office for forests, hunting and fishing, inspected the site. The applicants declared that they would not tolerate the new path through their property, owing to several unfriendly confrontations with hikers and the littering by hikers and their dogs. On 3 July 2006, the director of the cantonal office for forests, hunting and fishing, who was hierarchically subordinate to the department of economy of the canton of Schwyz, signed a memorandum (Aktennotiz). This memorandum stated that the relevant legislation would allow the compulsory acquisition of the easement (Wegrecht), if it could not be acquired on a voluntary basis by the canton; however, taking into account the applicants' health and well-being, renunciation was declared and it was decided not to enforce the easement ("Auf

die rechtliche Durchsetzung des Wegrechts [...] wird verzichtet."). In return, the applicants declared that they would tolerate "until further notice" the Iron Bike Race, which takes place once a year, through their property. 2. The procedure before the cantonal department of environment 12. By the beginning of 2009, the department of environment of the canton of Schwyz decided to transfer the Way of St James to the right side of the river Alp. The explanatory report of the land use zoning plan, published for public consultation between 29 October and 29 November 2010, stated that it was difficult to understand why the pilgrims and hikers should walk on a not very appealing paved sidewalk when there was a shady and idyllic forest gravel walk on the other side of the river. The applicants' objection was dismissed by the cantonal department of environment on 19 January 2011. The department explained that throughout recent years, the municipality of Alpthal, the district of Schwyz and the Swiss Association for Hiking Trails had tried in vain to find an adequate solution with the Steiner-Fässler family. Recently, the applicants had explicitly refused further talks with regard to a friendly settlement. The decision held, inter alia , that the two portions of land where the path intersected the property of the applicants were classified as forest areas; these are, by law, publicly accessible (see paragraph 18 below). Furthermore, the memorandum of 3 July 2006 had no binding force for the department of environment: the assurance had been issued by an authority which did not have competence and, after the assurance, the applicants had not made any irreversible disposition in respect to their property. Therefore, the principle of good faith had not been violated (see paragraph 16 below). 3. The appeal to the cantonal council and the administrative court 13. On 31 May 2011, the council of the canton of Schwyz (the cantonal government) dismissed the applicants' appeal. On reviewing the facts, the council observed that the applicants' house was 70 metres away from the gravel walk and only two small portions of the land of the applicants were intersected by the path. Therefore, the council found the interference in the applicants' property to be marginal and tolerable. It admitted that the memorandum of 3 July 2006 might constitute a basis for legitimate expectations. However, the council added that owing to the preponderant public interest in a "safe and appealing" Way of St James, the legitimate expectations of the applicants were not protected. 14. On 21 September 2011, the administrative court of the canton of Schwyz dismissed the applicants' appeal, basing its decision on the same grounds as the administrative authority. The applicants' request to have access to, inter alia , the construction permit of 1984 demonstrating that the original Way of St James had historically always run on the left side of the river Alp and that the forest path on the right side of the river was constructed in 1984 was not granted. The administrative court explained that owing to severe storms in 1984 the banks of the river Alp had had to be lined. In order to find out the exact historical route of the Way of St James, the court made several inquiries. On 10 August 2011, it asked the department of environment of the canton of Schwyz for further information. The department, however, was not able to clarify the situation. The department submitted that the relocation of the path on the sidewalk was being done without any formal procedure. According to a letter of the office for cultural landscapes of 21 May 2005, it could be presumed that the pilgrims used to walk on the right side of the river Alp (i.e. on the forest path). Based on that evidence, the court observed that the situation remained unclear. It further noted that the severe storms in 1984 had required a swift reconstruction of the affected area, including the lining of the river banks. In the present case, the court held that the exact historical route of the Way of St James was not decisive since, after the storms, no historical substance was left and the path could be relocated to the other side of the river Alp without any loss in

quality. The court concluded that after all the judicial fact-finding it had undertaken the request of the applicants was not pertinent and had therefore to be refused. 4. The appeal before the Federal Supreme Court 15. By a judgment of 22 August 2012, notified to the parties on 11 September 2012, the Federal Supreme Court dismissed the applicants' appeal. The request of the applicants to receive the construction permit of 1984 was not granted for lack of pertinence to the case. Furthermore, the Federal Supreme Court found that, according to the Federal Hiking Trail Act, historical trails are only to be included in the network of hiking trails if it is possible to do so ("nach Möglichkeit" ; see paragraph 19 below). With regard to the memorandum of 3 July 2006, the court held that regardless of whether the applicants should have recognised the lack of competence of the director of the cantonal office for forests, hunting and fishing to issue an assurance, the agreement between the applicants and the authorities could be freely revoked (for example, the memorandum explicitly set out that the applicants were willing to tolerate "until further notice" the Iron Bike Race through their property). Furthermore, the Federal Supreme Court held that the applicants had not suffered any disadvantage from relying upon the memorandum. B. Relevant domestic law and practice 16. Article 9 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (Classified Compilation of Federal Laws no. 101) protects the individual against arbitrary conduct and contains the principle of good faith. It reads: "Everyone has the right to be treated by the state authorities in good faith (...)." According to the case law of the Federal Supreme Court (see, inter alia , the leading case 129 I 161, 170 [X. v. City of Chur]), Article 9 of the Federal Constitution confers on every person the right to rely in good faith on assurances issued by authorities, if four conditions are met: (A) a basis for good faith (Vertrauensgrundlage), i.e. a conduct of the administration (for example an assurance) raising a certain expectation in the individual; (B) a legitimate expectation (berechtigtes Vertrauen), i.e. that the person who claims a right from the protection of good faith was entitled to trust on that basis, whereby the assurance of the authority must not be abstract, but related to a given issue; (C) a disposition made in good faith (Vertrauensbetätigung), i.e. that the concerned person has made, based on the conduct of the administration, a disadvantageous disposition, which cannot be undone; and (D) the absence of preponderant public interests. 17. Article 78(5) of the Federal Constitution reads as follows: "Moors and wetlands of special beauty and national importance shall be preserved. No constructions may be erected on them and no changes may be made to the land, except for the construction of facilities that serve the protection of the moors or wetlands or their continued use for agricultural purposes." 18. Article 699 of the Swiss Civil Code of 10 December 1907 (Classified Compilation of Federal Laws no. 210) reads as follows: "1 Any person has the right to enter woodlands and meadows and to gather wild berries, funghi and the like to the extent permitted by local custom except where the competent authority enacts specific limited prohibitions in the interests of conservation.

E. 2

Hiking trails shall be conveniently connected between each other. Other paths, parts of sidewalks and less frequented roads may serve as coupling links. Historical trails are if possible to be included [into the network of hiking trails].

E. 3

The network of hiking trails shall especially encompass areas suitable for recreation, quaint landscapes (scenic views, river borders etc.), cultural attractions, public transport stops as well as touristic facilities." "Article 7 Replacement 1 (...) 2 Hiking trails are to be replaced

in particular: a.-c. (...) d. if their pavement is - on longer distances - unsuitable for pedestrians. (...)” 20. Article 6 of the Federal Hiking Trails Ordinance of 26 November 1986 (Classified Compilation of Federal Laws no. 704.1) defines which pavements are not suitable for hiking trails: "Unsuitable in the sense of Article 7(2)d of the Federal Hiking Trail Act are namely all pavements consisting of bitumen, tar or concrete." 21. Article 13(3) of the Ordinance of the Canton of Schwyz on the Federal Hiking Trails Act of 18 May 2004 (Classified Compilation of the Laws of the Canton of Schwyz no. 443.210) reads as follows: "Rights can be expropriated according to the cantonal expropriation provisions if they cannot be acquired free-hand." COMPLAINTS 22. The applicants complained under Article 6 § 1 of the Convention that the Swiss authorities and courts refused to provide the evidence relating to the construction of both the paved sidewalk and the gravel walk in 1984 after severe storms had taken place. 23. The applicants further complained under Article 8 of the Convention that the Swiss authorities and courts did not respect their right to home and in particular that they were not willing to grant protection to the memorandum of 3 July 2006. Erwägungen THE LAW A. Alleged violation of Article 6 § 1 of the Convention 24. The applicants complained that the Swiss authorities and courts had not been willing to provide them with the relevant documents of 1984 relating to the construction of the hiking path. Therefore, they were hindered in their access to evidence in order to prove their case. They relied on Article 6 § 1 of the Convention, which reads as follows: "In the determination of his civil rights (...), everyone is entitled to a fair and public hearing (...) by an independent and impartial tribunal established by law. (...)" 25. Regarding the factual basis, the Government emphasised that the relevant documents of 1984 did not exist. Due to adverse weather conditions, the river basin and its immediate vicinity needed to be reconstructed urgently and without any authorisation procedure. According to the Government, construction permits were generally prescribed by law only in 1987. The Government also submitted that, owing to the resistance on the part of the applicants against authorities and hikers, the hiking path had been moved to the left side only in 2001. 26. The Government argued that the applicants had suffered no significant disadvantage. They further held that the complaint was of a fourth-instance nature. 27. The Court considers that it is not necessary to examine the arguments put forward by the Government with respect to admissibility in detail, as the complaints pertaining to Article 6 are in any event manifestly ill-founded for the following reasons. 28. In its case-law the Court has repeatedly held that for Article 6 § 1 in its "civil limb" to be applicable, there must be a dispute over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law (see, among others, *Joos v. Switzerland*, no. 43245/07, § 16, 15 November 2012). As to whether the right in issue was a civil right, Article 6 § 1 is applicable if there is a close link between the proceedings brought by the applicants and the consequences of their outcome for the applicants' property (*Ortenberg v. Austria*, 25 November 1994, § 28, Series A no. 295-B). Accordingly, the present dispute falls under Article 6 § 1 in its civil limb. 29. The Court further reiterates that the right to a fair trial in civil cases does not guarantee access to all potential evidence in the possession of public authorities. It is, as a rule, for the national courts to assess the evidence before them, the Court's task being to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see, *inter alia*, *Elsholz v. Germany* [GC], no. 25735/94, § 66, ECHR 2000-VIII). The Court is therefore not evaluating isolated procedural defects *per se*, unless crucial aspects of the proceedings are at stake. 30. Turning to the present circumstances, the Court notes that the

administrative court of the canton of Schwyz made several inquiries as regards the documents of 1984 relating to the construction of both the paved sidewalk and the gravel walk. The administrative court contacted the department of environment of the canton of Schwyz, which was not able to produce the relevant documents, and the office for cultural landscape, which was equally not able to clarify the situation. In its conclusion, the administrative court held that, for various reasons, the documents were in any case not pertinent (see paragraph 14 above). The Federal Supreme Court upheld the reasoning of the administrative court and further specified that objective reasons existed to relocate the hiking path to the right side of the river Alp. 31. Taking into account the materials which were presented to the Court, the assessment of the national courts according to which the documents requested by the applicants could not have been decisive for the outcome of the domestic proceedings (see paragraph 15 above) does not appear to be arbitrary. 32. In conclusion, while being mindful of the importance of access to evidence, the Court considers, having regard to the foregoing, that the national authorities did not act arbitrarily in not further pursuing their investigation into the existence of documents of 1984 relating to the construction of both the paved sidewalk and the gravel walk. 33. Accordingly, the applicants' complaint under Article 6 of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. B. Alleged violation of Article 8 of the Convention 34. The applicants complained under Article 8 of the Convention that the Swiss authorities and courts had violated their right to respect for their home and that they had not respected the memorandum of 3 July 2006. According to the applicants, this failure to respect the memorandum would cause further nuisance from hikers and their dogs. 35. Article 8 of the Convention reads as follows: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." 36. The Government contested that argument. They pointed out that the hiking path would only be compatible with Swiss law, if it ran along the right side of the river since the pavement on the left was unsuitable as a hiking trail (see paragraph 15 above). 37. Concerning the interests of the applicants, the Government added that the applicants would not suffer from any nuisance which could affect their rights under Article 8 of the Convention. Furthermore, several measures had been proposed to the applicants to mitigate the alleged interferences. Finally, the Government took the view that, based on the memorandum, the applicants had not made any disadvantageous disposition, which cannot be undone. 38. The Government argued that the applicants had suffered no significant disadvantage. They further submitted that domestic remedies had not been exhausted, that the complaints were incompatible *ratione materiae* with the Convention and that they had not invoked Article 8 of the Convention in their initial application to the Court. 39. The Court considers that, at this stage, it is not necessary to examine each argument put forward by the Government with respect to admissibility in detail, as the complaints pertaining to Article 8 are in any event inadmissible for the following reasons. 1. Regarding the nuisance complaint 40. The Court recalls that according to Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged

against them before those allegations are submitted to the Court (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95 , § 37, ECHR 1999-I). 41. As regards the applicants' substantive complaint under Article 8 of the Convention, it does not appear that they raised this either expressly or in substance before the Federal Supreme Court (*Vilnes and Others v. Norway* , nos. 52806/09 and 22703/10 , § 259, 5 December 2013). 42. Having regard to the foregoing, the Court finds that the applicants have failed to exhaust domestic remedies with respect to the substantive limb of Article 8 of the Convention, for which reason the complaint under this heading must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention. 2. Regarding the complaint on good faith 43. The Court stresses that it has always given importance to good faith, particularly in certain areas of its case-law (such as under Article 1 of Protocol No. 1 in relation to the concept of "legitimate expectations" of obtaining the effective enjoyment of a property right, see, inter alia , *Depalle v. France* [GC], no. 34044/02 , § 63, 29 March 2010). In the present context, however, the Court points out that Article 8 of the Convention does not contain - as such - an autonomous right to be treated by the authorities in good faith such as guaranteed under the Swiss Constitution (see paragraph 16 above). 44. The Court therefore holds that the applicants' complaint regarding good faith, based on Article 8 of the Convention, is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3. *Entscheid* For these reasons, the Court unanimously Declares the application inadmissible. Stanley Naismith Registrar Guido Raimondi President

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