

EGMR 19189/91

Hudoc Ch, FR

Quelle: https://mcp.opencaselaw.ch/entscheid/hudoc_ch_19189_91

FR: CourEDH 19189/91

IT: CorteEDU 19189/91

Regeste

Inadmissible

Erwägungen

E. 1

The applicant complains under Article 7 para. 1 of the Convention that in the admonitions issued there was no indication as to the penal consequences if he failed to pay. The applicant refers here to Section 37 para. 2 of the Ordinance on the Old Age and Survivors' Insurance. It is in the applicant's opinion incomprehensible that, according to the Federal Court, such an indication must be given only for purposes of the execution of the amounts due (Betreibungsfolgen) and not in respect of criminal offences. Also under Article 7 para. 1 of the Convention the applicant complains that neither Section 87 para. 3 of the Old Age and Survivors' Insurance Act nor the subsequent interpretation by the Federal Court make it clear which conduct is punishable. The applicant queries whether it should merely be the failure to pay the amount, or whether it is sufficient if the employer at any time disposes of the amounts due. It is in particular unclear at what moment the employer must dispose of the amounts due.

E. 2

The applicant further complains that the Federal Court gave Section 87 para. 3 of the Federal Old Age and Survivors' Insurance Act a completely new meaning. Originally the mere failure to pay was punished; according to the new case-law an alienation occurs if the assets are used for other purposes. As he could not expect such a change of case-law he should have had the opportunity before the Federal Court to defend himself. The applicant relies on Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention which state, insofar as relevant: "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing"

E. 3

Everyone charged with a criminal offence has the following minimum rights: ... b. to have adequate time and facilities for the preparation of his defence ..." It is true that, as the applicant submits, the Federal Court in its decision of 10 April 1991 found that in order to be punished under Section 87 para. 3 of the Federal Old Age and Survivors' Insurance Act it no longer sufficed if the amounts were not paid; it was necessary, in addition, that the employer had used the amounts for other purposes. However, the Commission need not examine whether Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) enshrine in principle the right to be granted an opportunity to comment in court proceedings on a possible change of case-law, since this part of the application is in any event inadmissible for the following reason. The Commission notes that the applicant was charged with a breach of Section 87

para. 3, namely that as an employer he had deducted amounts from the salaries of the employees; and that he had alienated these amounts from the foreseen purpose. In various admonitions the applicant had been set time-limits to pay the amounts due. In respect of this accusation the applicant was able fully to prepare his defence before the Swiss courts. He was free to explain inter alia the reasons why he had not paid in the amounts due. He was moreover free to do so in respect of any moment after the amounts had been deducted from the employees' salaries, and until the last possible moment set in the time-limit for payment. Thus, the applicant's defence was able to cover all issues relating to the amounts concerned during the entire period of time when they were due. The applicant has not shown in what respect this possible scope and depth of the defence available to him nevertheless proved to be insufficient in view of the clarification of the Federal Court of Section 87 para. 3 of the Federal Old Age and Survivors' Insurance Act. It follows that the remainder of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. For these reasons, the Commission unanimously **DECLARES THE APPLICATION INADMISSIBLE**. Secretary to the First Chamber President of the First Chamber (M.F. BUQUICCHIO) (A. WEITZEL)

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