

APPLICATION N° 25147/94

Rosanna SCHALLER VOLPI v/SWITZERLAND

DECISION of 28 February 1996 on the admissibility of the application

Article 6, paragraph 1 of the Convention

- a) *Question whether a dispute concerns the determination of civil rights and obligations must be decided by reference to the substantive content and effects of the right concerned*
- b) *In relation to acts of an administrative authority, the applicability of this provision depends in particular on their direct effect and not on the indirect or fortuitous effect on the civil rights and obligations of the person concerned*

Article 8, paragraph 1 of the Convention *The storing in a police register of information relating to an individual's private life, coupled with a refusal to allow the individual concerned an opportunity to refute it, constitutes an interference with the exercise of the right to respect for private life*

Article 8, paragraph 2 of the Convention *The storing in a police register of information relating to an individual's private life*

Interference in accordance with legislative provisions (Ordinance of the Swiss Federal Council of 5 March 1990) which are sufficiently precise and accessible and define the scope of the authorities' discretion with sufficient clarity to protect the individual against arbitrary decisions

Interference considered, on the facts, as necessary in a democratic society in the interests of national security The concept of necessity implies that the interference corresponds to a pressing social need and is proportionate to the aim pursued Balance to be struck between protection of national security and protection of the individual's private life Margin of appreciation of the national authorities

Article 13 of the Convention *The right recognised by this provision may be exercised only in respect of an arguable claim within the meaning of the case-law of the Convention organs.*

THE FACTS

The applicant has dual Italian and Swiss nationality. She was born in 1940 and lives in Geneva.

She was represented before the Commission by her husband, Mr. Rudolf Schaller, a lawyer practising in Geneva.

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

A. *The particular circumstances of the case*

The applicant suspected that between 1975 and 1988 she had been under covert surveillance by the Swiss Federal Police. On 16 February 1990 she requested to see the contents of the file compiled on her during the surveillance.

On 30 July 1991, the Registrar (préposé spécial) issued a decision authorising the applicant to see a photocopy of her file. Sections of the file were illegible as they had been struck through in black. Under the heading "V-kat" was a symbol representing explosives. On 31 August 1991 the applicant requested the Ombudsman to intervene to enable her to see the full contents of her file.

On 22 January 1992, following the Ombudsman's intervention, the Registrar let the applicant see certain confidential data and explained to her that the symbol in question could indicate a link with the Italian Communist Party or, alternatively, with offences involving the use of explosives. He also informed the applicant that a section of the information appearing on the file had to be kept secret in order to protect the interests of the State. The Ordinance of 5 October 1990 on the Handling of Confederation Documents Compiled in order to Protect the Interests of the State provides that data concerning persons who have worked on the files must remain secret and that data concerning foreign intelligence and security services must be kept secret under reciprocal agreements.

On 24 February 1992 the applicant appealed to the Federal Council against the Registrar's decision to keep certain information secret.

The Federal Council dismissed her appeal on 19 January 1994 finding that the Registrar had correctly applied the Ordinance of 5 October 1990 and that no information directly concerning the applicant had been kept secret

B *Relevant domestic law*

The Federal Council Ordinance of 5 March 1990 on the Handling of Confederation Documents Compiled in order to Protect the Interests of the State lays down rules for the consultation of documents relating to the protection of interests of state and how to deal with documents which are no longer of any use.

Article 5 of the Ordinance provides

"The Registrar shall permit applicants to consult the files relating to them by sending them a photocopy thereof.

He shall conceal any data relating to persons who have worked on the files or to foreign intelligence or security services ..."

The procedure designed to ensure that the fundamental individual human rights of persons on whom such rules exist are protected is set out in Article 14, which reads as follows:

"A person who claims that his request to consult his files has not been dealt with in accordance with this Ordinance may apply to the Ombudsman within 30 days

If the Ombudsman considers that the Ordinance has been complied with, he shall notify the applicant accordingly. The applicant may then appeal to the Federal Council within 30 days from receipt of this opinion

If the Ombudsman considers that the Ordinance has been breached, he shall notify the Registrar and the applicant accordingly. The Registrar shall then issue a fresh decision which is itself susceptible to appeal."

These provisions were complemented by the Federal Decree, issued by the Federal Assembly on 9 October 1992, on the Consultation of Documents held by the Office of the Confederation State Council. In addition to the procedure provided for under the Ordinance of 5 October 1990, Article 9 of the Decree provides that an appeal lies from any decision of the Registrar to the Federal Department of Justice and Police

COMPLAINTS

1. The applicant invokes Articles 8, 10 and 11 of the Convention, complaining that she was under covert surveillance by the federal police between 1975 and 1988. She

argues that the surveillance operations carried out by the police constitute an unjustified interference with her private life and her freedom of expression and association

2 The applicant invokes Article 8 of the Convention, complaining that the authorities refused to let her see the full contents of her file

3 The applicant complains that Swiss law does not provide for any remedy before an independent and impartial tribunal which would allow her to enforce her right to see the full contents of the file compiled by the police. She argues that the bodies which gave judgment in her case are neither impartial nor independent as they are government bodies which make their decisions on grounds of expediency. Consequently, she had neither an effective remedy within the meaning of Article 13 of the Convention nor a fair hearing within the meaning of Article 6 para 1 of the Convention. The applicant also invokes the latter provision to complain of the length of the proceedings before the administrative authorities.

THE LAW

1 The applicant invokes Articles 8, 10 and 11 of the Convention, complaining that she was under covert surveillance by the federal police between 1975 and 1988. She claims that the police surveillance operations constitute an unjustified interference with her private life and her freedom of expression and association.

However, the issue before the Commission is not to decide whether the facts alleged by the applicant reveal the appearance of a violation of the provisions being invoked. Article 26 of the Convention provides that the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The Commission notes that the applicant discovered that she had been under surveillance following the decision issued by the Registrar on 30 July 1991 authorising her to see a photocopy of her file and notes that the present application was introduced on 18 July 1994, i.e. more than six months later.

It follows that this part of the application is out of time and must be rejected pursuant to Articles 26 and 27 para 3 of the Convention.

2 The applicant complains that the authorities' refusal to let her see the full contents of her file constitutes an interference with her right to respect for her private life under Article 8 of the Convention, which reads: in so far as relevant

"1. Everyone has the right to respect for his private ... life ...

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."

The Commission recalls that the storage and release of information relating to a person's private life, coupled with a refusal to allow the person concerned an opportunity to refute it, amounts to an interference with the right to respect for private life (see Eur. Court H.R., *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 22, para. 48).

It is therefore necessary to examine whether this interference was justified under Article 8 para. 2 of the Convention.

Under the terms of this provision of the Convention, the interference must be "in accordance with the law" and "necessary in a democratic society" to achieve one of the aims referred to therein.

As regards the first of these requirements, the Commission notes that the prohibition on releasing certain information from files is contained in the Federal Council Ordinance of 5 March 1990 on the Handling of Confederation Documents Compiled in order to Protect the Interests of the State, which was issued by the Swiss Federal Council under its constitutional power to issue Regulations.

Article 5 para. 2 of the Ordinance provides that the Registrar "shall conceal any data relating to persons who have worked on the files or to foreign intelligence or security services".

These legislative provisions are sufficiently precise and accessible to ordinary citizens and set out with sufficient clarity the scope of the Registrar's discretion.

The Commission is of the view that this Ordinance must be seen as a "law" within the meaning of Article 8 para. 2. Hence, the Commission considers that the interference with the applicant's right to respect for her private life was "in accordance with the law".

The next issue is whether the interference pursued a legitimate aim.

The Commission notes that the interference was intended to ensure the protection of "national security" within the meaning of Article 8 para. 2, as is clear from the wording of the Ordinance of 5 March 1990. Therefore it pursues one of the aims referred to in paragraph 2 of Article 8.

Finally, the Commission must examine whether the decision taken under the Ordinance of 5 March 1990 was, in the applicant's case, "necessary ... in the interests of national security".

The concept of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *Leander* judgment *op cit.* p. 22, para. 55).

It is, therefore, necessary to weigh the respondent State's interest in protecting its national security against the extent of the interference with the applicant's right to respect for his private life.

In the present case, the refusal to make full disclosure of the contents of the file was justified, as the national authorities have said, by the obligation to maintain secrecy where there are commitments to foreign intelligence and security services.

The Commission recognises that it is in the first instance for the national authorities to judge whether a given interference was necessary and that, in so doing, those authorities have a relatively wide margin of appreciation in the field with which the present case is concerned. As the Commission has already stated in the *Leander* case, state security is a "very sensitive area in which the States must be given a wide discretion in designing the appropriate systems to protect their national security" (*Leander v. Sweden*, Comm. Report, 17.5.85, para. 68, Eur. Court H.R., Series A no. 116, p. 43).

However, the States' decisions remain subject to review by the Convention organs (see, for example, Eur. Court H.R., *Handyside v. United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 23, para. 49).

The Commission must verify whether there are adequate and sufficient guarantees against the abuses which may be engendered by a system of covert surveillance coupled with restricted disclosure of the files compiled during the surveillance.

The Commission observes that Article 6 of the Ordinance of 5 March 1990 allows the applicant to request a further explanation of the restrictions on disclosure. Further, Article 12 provides for the Federal Council to appoint a Registrar to authorise disclosure of the documents and the conditions under which they may be consulted. In order to ensure that the Ordinance is complied with, Articles 13 and 14 provide for an Ombudsman to be appointed and for the possibility of an appeal to the Federal Council.

The Commission considers that the guarantees provided for in the Ordinance of 5 March 1990 are sufficient to prevent potential abuse.

Consequently, the interference of which the applicant complains can be considered as proportionate and therefore "necessary in a democratic society in the interests of national security" as required by the second paragraph of Article 8.

The Commission considers that the applicant's complaint is therefore manifestly ill-founded. It follows that this part of the application must be rejected pursuant to Article 27 para. 2 of the Convention.

3. The applicant complains that she was not given a fair hearing before the Swiss administrative authorities and that she did not have an effective remedy, given that the bodies which gave judgment in her case were government bodies and were therefore neither impartial nor independent. She alleges that the Government have violated Articles 6 para. 1 and 13 of the Convention.

The relevant part of Article 6 provides:

"In the determination of his civil rights and obligations ... , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The first issue to be determined by the Commission is whether this provision is applicable to this case.

The Commission recalls that, according to its case-law, the question whether a dispute concerns the determination of civil rights and obligations must be decided by reference to the substantive content and effects of the right concerned (No 7151/75 and No. 7152/75, Dec 5 3.79, D R. 15 p. 15). In relation to acts of an administrative authority, the applicability of Article 6 para. 1 depends in particular on their direct effect and not on the indirect or fortuitous effects on the civil rights and obligations of the person concerned (No. 7598/76, Kaplan v United Kingdom, Comm Report 17 7 80, D R 21 p. 5)

The Commission considers that, on the facts, the administrative proceedings before the Federal Council brought by the applicant following the Registrar's refusal to let her see the full contents of her files did not have a direct effect on her civil rights within the meaning of Article 6 para. 1. The information she sought, which contained the names of persons working for the foreign intelligence and security service, cannot be considered to be documents or information containing personal details on the applicant (see No 14497/89, Dec. 14 10 91, unpublished).

It follows that this part of the application must be rejected pursuant to Article 27 para 2 as incompatible *ratione materiae* with the provisions of the Convention

The final issue to be determined by the Commission concerns the alleged violation of Article 13 owing to the lack of any effective remedy against the refusal to let the applicant see the full contents of the files compiled on her

Article 13 of the Convention provides that

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity "

The Commission recalls that for Article 13 to apply, the claim that a provision of the Convention has been breached must be an arguable one (see, for example, *Boyle and Rice v United Kingdom*, Comm Report 7 5 86, para 74, Eur Court H R , Series A no 131, p 40)

The Commission refers to its finding that the refusal by the authorities to let the applicant see the full contents of her files does not constitute a disproportionate interference with her right to respect for her private life and concludes that the applicant does not have an arguable claim

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE