COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF SCHULER-ZGRAGGEN v. SWITZERLAND

(Application no. 14518/89)

JUDGMENT

STRASBOURG

24 June 1993

In the case of Schuler-Zgraggen v. Switzerland[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. GÖLCÜKLÜ,
Mr B. WALSH,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 30 January and 28 May 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 25 May and 5 August 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 14518/89) against the Swiss Confederation lodged with the Commission under Article 25 (art. 25) by a Swiss national, Mrs Margrit Schuler-Zgraggen, on 29 December 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the

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[*] The case is numbered 17/1992/362/436. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1), taken alone or together with Article 14 (art. 14+6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 29 May 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr B. Walsh, Mr C. Russo, Mr A. Spielmann, Mr I. Foighel, Mr A.N. Loizou, Mr M.A. Lopes Rocha and Mr B. Repik (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). From 1 January 1993 onwards Mr F. Gölcüklü, substitute judge, replaced Mr Repik, whose term of office had ended with the dissolution of the Czech and Slovak Federal Republic (Articles 38 and 65 para. 3 of the Convention and Rules 22 para. 1 and 24 para. 1) (art. 38, art. 65-3).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Deputy Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's and the applicant's memorials on 2 and 4 November 1992 respectively. On 3 December the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 31 August 1992 the President had given the applicant leave to use the German language (Rule 27 para. 3).

5. On 18 December the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 January 1993. The Court had held a preparatory meeting beforehand. Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 para. 5, second sub-paragraph).

There appeared before the Court:

- for the Government

Mr O. JACOT-GUILLARMOD, Assistant Director
of the Federal Office of Justice, *Agent*,
Mr R. SPIRA, Judge of the Federal Insurance Court,
Mr F. SCHÜRMANN, Deputy Head
of the European Law and International Affairs Section, Federal

Office of Justice, *Counsel*;
- for the Commission
Mr F. MARTINEZ, *Delegate*;
- for the applicant
Mr L. MINELLI, Rechtsanwalt, *Counsel*.

The Court heard addresses by Mr Jacot-Guillarmod and Mr Spira for the Government, Mr Martinez for the Commission and Mr Minelli for the applicant, as well as replies to its questions.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mrs Margrit Schuler-Zgraggen, a Swiss national born in 1948, was married in 1972. She lives at Schattdorf in the Canton of Uri.

A. Granting of an invalidity pension

8. In 1973 she began to work for the industrial firm of D. at Altdorf (Canton of Uri). Her employer regularly deducted contributions to the federal invalidity-insurance scheme from her wages (see paragraph 33 below).

9. In the spring of 1975 she contracted open pulmonary tuberculosis.

On 29 April 1976 she applied for a pension on the grounds of incapacity for work due to her illness.

The Compensation Office (Ausgleichskasse) of the Swiss Machine and Metal Industry (Schweizerische Maschinen- und Metallindustrie) decided on 24 September 1976 to grant her half an invalidity pension for the period from 1 April to 31 October 1976.

10. On 28 September 1978 the D. company dismissed the applicant with effect from 1 January 1979 on account of her illness.

11. After Mrs Schuler-Zgraggen had made a further application for a pension, the Compensation Office determined on 25 March 1980 that she was physically and mentally unfit for work and decided to pay her a full pension with effect from 1 May 1978.

In 1981 and 1982 the invalidity-insurance authorities reviewed her case and confirmed the award of a pension.

12. On 4 May 1984 the applicant gave birth to a son.

B. The proceedings before the Invalidity Insurance Board of the Canton of Uri

1. The medical examinations

13. In 1985 the Invalidity Insurance Board (IV-Kommission) of the Canton of Uri asked Mrs Schuler-Zgraggen to undergo an examination at the invalidity-insurance authorities' medical centre (Medizinische Abklärungsstelle der Invalidenversicherung) in Lucerne.

14. The medical centre asked Drs F. and B. for two reports (Konsilien) on the applicant's health - one on the state of her lungs and the other a psychiatric report - and these were sent in on 10 and 24 December 1985 respectively. The centre prepared a summary on 14 January 1986, to which it attached Dr B.'s report; it concluded that the applicant was wholly unfit for clerical work and assessed her fitness for household work at 60-70%.

2. The decision of 21 March 1986

15. On 21 March 1986 the Invalidity Insurance Board cancelled, with effect from 1 May 1986, Mrs Schuler-Zgraggen's pension, then amounting to 2,016 Swiss francs (CHF) a month, as her family circumstances had radically changed with the birth of her child, her health had improved, and she was 60-70% able to look after her home and her child.

C. The proceedings before the Canton of Uri Appeals Board for Old Age, Survivors' and Invalidity Insurance

1. The appeal and the applications for access to and handing over of documents

16. On 21 April 1986 Mrs Schuler-Zgraggen lodged an appeal (Beschwerde) with the Canton of Uri Appeals Board for Old Age, Survivors' and Invalidity Insurance (Rekurskommission für die Alters-, Hinterlassenen- und Invalidenversicherung - "the Appeals Board"). She claimed a full invalidity pension or, failing that, a half-pension, arguing, in particular, that the Federal Invalidity Insurance Act conferred on her the right to a pension so long as she was at least 66.66% incapacitated. So as to continue receiving her pension, she also asked the Board to order that her appeal should have suspensive effect.

17. The Board dismissed the latter application on 7 May.

18. On 22 May Mrs Schuler-Zgraggen dispensed with the services of her counsel.

19. On 26 May she went to the Invalidity Insurance Board's headquarters to inspect her medical file, which had been sent there by the Appeals Board, but she was not allowed to see it.

On the same day she wrote to the Invalidity Insurance Board to complain about this and to demand to be able to see the file or at least a photocopy of certain important documents.

In a letter of 28 July 1986 to the same board she again sought permission to inspect the file, in particular "all the medical reports, records of examinations and results of laboratory tests from 1975 to 1986", and the handing over of vital documents.

2. The decision of 8 May 1987

20. The Appeals Board dismissed the appeal on 8 May 1987.

In the first place, the right to inspect the file did not imply a right to take documents away or to have photocopies made of them. It sufficed that the appellant had had an opportunity to study her file at the Appeals Board registry; she had not availed herself of that opportunity, despite numerous invitations to do so.

In the second place, it could not be discounted that even if the appellant had been fit, she would have been content with looking after her home once her child had been born. At all events, having regard in particular to the examinations carried out by the medical centre, the invalidity in question was not enough, in the case of a mother and housewife, to make her eligible for a pension. Mrs Schuler-Zgraggen was in a position to be more active if she really wished to work despite her new family circumstances. The refusal to pay a pension could help her recover from her neurotic obsession with being unable to work.

3. The subsequent proceedings

21. On 11 August 1987 Mrs Schuler-Zgraggen wrote to the Appeals Board. She said she needed all the documents and expert reports in order to assess the prospects of succeeding in her legal action. She referred to a perfusion scintigram, a lung-function test, blood-gas analyses and a plethysmogram.

22. In a letter of 13 August the Appeals Board replied as follows:

> "... [T]hese documents provided the basis for the various medical reports. They are in our file only because of the right of inspection granted to you. We are therefore unable to make further documents available to you."

D. The proceedings in the Federal Insurance Court

1. The administrative-law appeal

23. On 20 August 1987 Mrs Schuler-Zgraggen lodged an administrative-law appeal with the Federal Insurance Court against the decision of the Appeals Board. She applied for a full pension or, in the alternative, an order remitting the case to the authority of first instance. She also sought leave to inspect the whole of her file (vollumfängliches Akteneinsichtsrecht).

24. The Federal Insurance Court received observations from the Compensation Office's invalidity-insurance department on 20 October 1987 and from the Federal Social Insurance Office on 9 November. The Compensation Office submitted that the invalidity pension should cease; the Federal Social Insurance Office argued that the appeal should be dismissed, relying on a report by its own medical service, which referred in particular to the examination carried out by the medical centre.

25. In a letter of 23 November 1987 the Federal Court informed the applicant that her complete file had been sent to the Appeals Board, which "within the next fourteen days [would] make all the documents available [to her] for inspection". She would then have a further ten days in which to supplement her administrative-law appeal submissions.

26. On 30 November 1987 Mrs Schuler-Zgraggen inspected her file and photocopied a number of documents. On 1 December the file was returned to the Federal Insurance Court.

27. Mr Schleifer, a lawyer, wrote to the Federal Court on 7 December to inform it that he would henceforth be representing the applicant and to ask for the case file to be forwarded to him; this was done on 11 December.

28. On 11 January 1988 Mrs Schuler-Zgraggen filed supplementary pleadings in support of her appeal. They included a complaint that the medical centre took it for granted in its expert opinion that her lungs functioned normally, relying on the report of Dr F., which was not in the file however. She also criticised the arbitrariness of the Appeals Board's opinion that even if she had been fit, she would have devoted herself to household tasks because of the birth of her child.

2. The judgment of 21 June 1988

29. The Federal Insurance Court gave judgment on 21 June 1988, holding that since 1 May Mrs Schuler-Zgraggen had been 33.33% incapacitated and was therefore eligible for a half-pension if she was in financial difficulties, and that as there was no evidence before it on this point, the case should be remitted to the Compensation Office.

In such a case the court's function was not limited to reviewing compliance with federal law and ascertaining that judicial discretion had not

been exceeded or misused; it could also review the appropriateness of the impugned decision, and was bound neither by the facts found by the court below nor by the parties' claims.

The applicant had succeeded in her complaint that the Appeals Board had failed to produce all the documents for inspection; she had been able to argue her case in the Federal Court, whose file she had had an opportunity to examine and which had considered the facts and the law with complete freedom.

As to the pension claim, the court said:

> "Regard must ... be had to the fact that many married women go out to work until their first child is born, but give up their jobs for as long as the children need full-time care and upbringing. This assumption based on experience of everyday life - experience which must be duly taken into account in determining the method to be applied for assessing incapacity ... - must be the starting-point in the present case. At the time the contested decision was taken, on 21 March 1986 ..., the child, who was born on 4 May 1984, was just under two years old, and accordingly, on the balance of probabilities (nach dem Beweisgrad der überwiegenden Wahrscheinlichkeit)..., it must be assumed that the applicant, even if her health had not been impaired, would have been occupied only as a housewife and mother."

In the court's view, this made it unnecessary to examine whether Mrs Schuler-Zgraggen was fit to work in her previous employment; the question was rather one of determining to what extent, if at all, she had been restricted in her activities as a mother and housewife. Here it was sufficient to rely on the expert opinion produced by the medical centre. The fact that the lung specialist's report was missing from the file was a defect (ein gewisser Mangel), but the examination carried out by the specialist in internal medicine made it possible to answer the question whether after 1980 there had been any change in the state of the applicant's lungs. After that date the applicant had no longer been treated for tuberculosis and in that respect was perfectly fit to work. As to her neurosis, it had much diminished in the meantime; and a handicap resulting from her back problems could in theory be assessed at 25% at most.

30. On 17 July 1989 the Compensation Office decided that Mrs Schuler-Zgraggen could not claim a half-pension since her income in 1986, 1987 and 1988 had greatly exceeded the maxima applicable in those years to "cases of hardship" (see paragraph 35 below).

The applicant did not appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Invalidity insurance

31. Invalidity insurance is governed by two federal statutes - the Old Age and Survivors' Insurance Act of 20 December 1949 ("OASIA") and the Invalidity Insurance Act of 19 June 1959 ("IIA").

1. The insured

32. Invalidity insurance is compulsory for all persons resident in Switzerland (section 1 OASIA). Certain other people may contribute on a voluntary basis, notably Swiss nationals living abroad (section 2 OASIA).

2. Administration

33. Invalidity insurance is managed by cantonal and occupational associations under the supervision of the Confederation (sections 49-73 OASIA and sections 53-67 IIA).

3. Financing

34. At the present time invalidity insurance is financed partly from employers' and insured persons' contributions and partly from contributions by the State, in roughly equal proportions.

There is no ceiling on contributions. Those paid by the insured are automatically deducted from earnings. Children, wives and widows of insured persons are exempted if not working, whereas others not gainfully employed pay from 43 to 1,200 Swiss francs a year (section 3 IIA and section 3 OASIA).

4. The pensions

35. Section 28 IIA deals with the assessment of incapacity.

Provision is made in subsection 1 for pensions to be graduated in proportion to the degree of incapacity: a full pension is granted where incapacity is at least 66.66% and a half-pension where it is less than 50%. At the material time, 33.33% incapacity entitled a person to a half-pension only "in cases of hardship"; today incapacity must be at least 40% for a person to be eligible for a quarter-pension.

Subsection 2 provides:

> "For the assessment of incapacity, the income which the insured person could earn after becoming incapacitated and after taking any appropriate rehabilitation measures from work that could reasonably be expected of him in a stable labour market is compared with the income he could have earned if he had not been incapacitated."

The amount of the pension is based on the insured's annual average income, which is calculated by dividing the total income taken as a basis for assessing contributions by the number of contribution years (sections 36 et seq. IIA, taken together with sections 29 et seq. OASIA). For full ordinary pensions the maximum amount is double the minimum amount.

Contributions are enforceable and the right to claim them is subject to a limitation period of five years (sections 15 and 16 OASIA).

B. Appeal procedure

1. Access to the file

36. The Federal Court has derived from Article 4 of the Federal Constitution, which enshrines the principle of equality, an individual's right to inspect his case file lodged with a judicial body.

The right in question means being given an opportunity to have access to the official documents and to take notes but not to take the file away or to demand that copies should be made and handed over (judgment of 31 March 1982, Judgments of the Swiss Federal Court (ATF), vol. 108, part Ia, pp. 5-9).

On this last point the Federal Court has, however, accepted that individuals may ask for copies, provided that this does not entail an excessive amount of work or substantial expense for the authority concerned (judgment of 4 September 1986, ATF, vol. 112, part Ia, pp. 377-381).

2. Hearings

(a) Before appellate bodies

37. Section 85(2)(e) OASIA, first sentence, provides: "If the circumstances so warrant, the parties shall be summoned to a hearing."

(b) In the Federal Insurance Court

38. Under Rule 14 para. 2 of the Federal Insurance Court's Rules of Procedure,

> "The parties shall not have a right to demand a hearing in appeal proceedings. By agreement with the division, the presiding judge may order a hearing to be held, on an application by one of the parties or of his own motion. The parties may inspect the file before the hearing ..."

PROCEEDINGS BEFORE THE COMMISSION

39. Mrs Schuler-Zgraggen applied to the Commission on 29 December 1988. She complained, firstly, that her right to a fair trial (Article 6 para. 1 of the Convention) (art. 6-1) had been infringed in that she had had insufficient access to the file of the Appeals Board and there had been no hearing in the Federal Insurance Court. She also claimed that the assumption made by that court, that she would have given up working even if she had not had health problems, amounted to discrimination on the ground of sex (Article 14 taken together with Article 6 para. 1) (art. 14+6-1).

40. The Commission declared the application (no. 14518/89) admissible on 30 May 1991. In its report of 7 April 1992 (made under Article 31) (art. 31), the Commission expressed the opinion that

(a) there had been no breach of Article 6 para. 1 (art. 6-1) either on account of the failure to hold a hearing (by ten votes to five) or in respect of access to the file (by thirteen votes to two); and

(b) there had been no breach of Article 14 taken together with Article 6 para. 1 (art. 14+6-1) (by nine votes to six).

The full text of the Commission's opinion and of the six dissenting opinions contained in the report is reproduced as an annex to this judgment[*]

FINAL SUBMISSIONS TO THE COURT

41. In their memorial the Government requested the Court to

"hold that in the present case (in so far as Article 6 para. 1 (art. 6-1) of the Convention is applicable and the applicant, with reference to a specific complaint, is a victim and, with reference to another complaint, has exhausted domestic remedies) there has not been a violation of Article 6 para. 1 (art. 6-1) of the Convention or of any other of its provisions".

42. Counsel for the applicant asked the Court to

(a) "continue along the path it took in the Feldbrugge and Deumeland cases and to rule that the rights claimed by the applicant in the present case likewise are mainly civil ones, falling within the ambit of Article 6 para. 1 (art. 6-1) of the Convention";

(b) "hold that there has been a breach of Article 6 para. 1 (art. 6-1) with respect to the right to an adversarial hearing"; and

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[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 263 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

(c) "hold that there has been a breach by the Federal Insurance Court of Article 14 taken together with Article 6 para. 1 (art. 14+6-1) of the Convention".

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 PARA. 1 (art. 6-1)

43. Mrs Schuler-Zgraggen claimed to be the victim of breaches of Article 6 para. 1 (art. 6-1), which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

A. Applicability of Article 6 para. 1 (art. 6-1)

44. It was common ground between the applicant and the Commission that this provision applied in the instant case.

45. The Government maintained the contrary as, in their submission, the case had public-law features which clearly predominated. Firstly, the claimed right did not derive from a contract of employment, since affiliation was compulsory for the self-employed and the unemployed too. Secondly, award of the pension depended exclusively on the degree of incapacity, no account being taken either of the insured's income or wealth or of the payment of contributions. Thirdly, the Swiss system was strikingly distinctive, in particular in that the financing of it was based on the principles of pay as you go, solidarity and partly drawing on tax revenues.

46. The Court is here once again confronted with the issue of the applicability of Article 6 para. 1 (art. 6-1) to social-security disputes. The question arose earlier in the cases of Feldbrugge v. the Netherlands and Deumeland v. Germany, in which it gave judgment on 29 May 1986 (Series A nos. 99 and 100). At that time the Court noted that there was great diversity in the legislation and practice of the member States of the Council of Europe as regards the nature of the entitlement to insurance benefits under social-security schemes. Nevertheless, the development in the law that was initiated by those judgments and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6 para. 1 (art. 6-1) does apply in the field of social insurance, including even welfare assistance (see the Salesi v. Italy judgment of 26 February 1993, Series A no. 257-E, pp. 59-60, para. 19).

As in the two cases decided in 1986, State intervention is not sufficient to establish that Article 6 para. 1 (art. 6-1) is inapplicable; other considerations

argue in favour of the applicability of Article 6 para. 1 (art. 6-1) in the instant case. The most important of these lies in the fact that despite the public-law features pointed out by the Government, the applicant was not only affected in her relations with the administrative authorities as such but also suffered an interference with her means of subsistence; she was claiming an individual, economic right flowing from specific rules laid down in a federal statute (see paragraph 35 above).

In sum, the Court sees no convincing reason to distinguish between Mrs Schuler-Zgraggen's right to an invalidity pension and the rights to social-insurance benefits asserted by Mrs Feldbrugge and Mr Deumeland.

Article 6 para. 1 (art. 6-1) therefore applies in the instant case.

B. Compliance with Article 6 para. 1 (art. 6-1)

1. Access to the Appeals Board's file

47. Mrs Schuler-Zgraggen complained in the first place of insufficient access to the Appeals Board's file.

(a) The Government's preliminary objection

48. As they had done before the Commission, the Government raised an objection of inadmissibility based on lack of victim status, arguing that the applicant had not availed herself of the opportunity of examining the file at the Appeals Board's registry.

49. The Court notes that the applicant's complaint relates not so much to inspecting the file as to having the documents in it handed over or, at any rate, securing photocopies of them. The objection must therefore be dismissed.

(b) Merits of the complaint

50. In Mrs Schuler-Zgraggen's submission, the facts of her case - as often in the social-security field - were complex, and this made it necessary for her to submit documents to specialists. She should therefore have been granted the same facilities as the administrative departments, on whose premises the file was permanently held. Furthermore, she had never had access to Dr F.'s report on her lungs, so that she had been unable to submit it to her own expert.

51. The Government disputed this submission. In the proceedings before the Appeals Board the applicant had not availed herself of the opportunity to inspect part of the file and take notes. In the Federal Insurance Court she had had access to all the documents - as had her lawyer, who had received them not long afterwards - and had photocopied some of them. As to Dr F.'s report, it was not strictly speaking part of the file, as the

Federal Insurance Court moreover noted in its judgment of 21 June 1988; in addition, it was summarised in the medical centre's report of 14 January 1986, which the applicant had seen. In short, the principle of equality of arms had not been contravened in any way.

52. The Court finds that the proceedings before the Appeals Board did not enable Mrs Schuler-Zgraggen to have a complete, detailed picture of the particulars supplied to the Board. It considers, however, that the Federal Insurance Court remedied this shortcoming by requesting the Board to make all the documents available to the applicant - who was able, among other things, to make copies - and then forwarding the file to the applicant's lawyer (see, as the most recent authority, mutatis mutandis, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, paras. 34-39). It also notes that neither the Appeals Board nor the Federal Insurance Court had Dr F.'s report before it.

Since, taken as a whole, the impugned proceedings were therefore fair, there has not been a breach of Article 6 para. 1 (art. 6-1) in this respect.

2. Federal Insurance Court hearing

53. Mrs Schuler-Zgraggen also complained that there had been no hearing before the Federal Insurance Court.

(a) The Government's preliminary objection

54. In the Government's submission, the applicant had not exhausted domestic remedies, as she had failed to apply to the Federal Insurance Court for the proceedings to be oral and public. Admittedly, that court rarely held hearings, but it did not follow that such an application would have been bound to fail.

55. In respect of this preliminary objection there is an estoppel, as the Government only raised it before the Commission after the decision on admissibility, whereas nothing prevented them from doing so earlier (see, as the most recent authority and mutatis mutandis, the Pine Valley Developments Ltd and Others v. Ireland judgment of 29 November 1991, Series A no. 222, p. 21, para. 45).

(b) Merits of the complaint

56. Mrs Schuler-Zgraggen submitted that the Federal Insurance Court should have ordered a hearing so as to form its own opinion of her and ensure that she had a fair trial.

57. The Government considered, on the contrary, that in certain fields purely written court proceedings did not in any way prejudice the interests of the litigant. They emphasised a number of aspects. Firstly, the traditional characteristics of social-security disputes made oral presentation of arguments in which technical points and numerous figures were adduced

difficult. Secondly, in the cases brought before it the Federal Insurance Court was free to review the facts and the law, and this made it more akin to an ordinary court of appeal. This was particularly so in administrative-law appeals, as here the Federal Court could rule on the appropriateness of the impugned decision and was not bound either by the cantonal authority's findings of fact or by the submissions of the parties. Thirdly, the number of judgments - approximately 1,200 a year - would drop dramatically if public, oral proceedings were to be the rule; in such an event, the lengthening of the proceedings would seriously jeopardise access to the supreme court.

58. The Court reiterates that the public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6 (art. 6-1). Admittedly, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, but any such waiver must be made in an unequivocal manner and must not run counter to any important public interest (see, among other authorities, the Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171-A, p. 20, para. 66).

In the instant case the Federal Insurance Court's Rules of Procedure provided in express terms for the possibility of a hearing "on an application by one of the parties or of [the presiding judge's] own motion" (Rule 14 para. 2 - see paragraph 38 above). As the proceedings in that court generally take place without a public hearing, Mrs Schuler-Zgraggen could be expected to apply for one if she attached importance to it. She did not do so, however. It may reasonably be considered, therefore, that she unequivocally waived her right to a public hearing in the Federal Insurance Court.

Above all, it does not appear that the dispute raised issues of public importance such as to make a hearing necessary. Since it was highly technical, it was better dealt with in writing than in oral argument; furthermore, its private, medical nature would no doubt have deterred the applicant from seeking to have the public present.

Lastly, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to "the particular diligence required in social-security cases" (see the Deumeland v. Germany judgment previously cited, p. 30, para. 90) and could ultimately prevent compliance with the "reasonable time" requirement of Article 6 para. 1 (art. 6-1) (see, mutatis mutandis, the Boddaert v. Belgium judgment of 12 October 1992, Series A no. 235-D, pp. 82-83, para. 39).

There has accordingly been no breach of Article 6 para. 1 (art. 6-1) in respect of the oral and public nature of the proceedings.

3. Independence of the medical experts

59. At the hearing before the Court, counsel for Mrs Schuler-Zgraggen called in question the independence of doctors bound by a long-term contract to a social-security institution, on the ground that they received from that institution the greater part of their income.

60. This was a new complaint; it had not been raised before the Commission and does not relate to the facts the Commission found within the limits of its decision on admissibility. That being so, the Court has no jurisdiction to consider it (see, as the most recent authority and mutatis mutandis, the Olsson v. Sweden (No. 2) judgment of 27 November 1992, Series A no. 250, pp. 30-31, para. 75).

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 6 PARA. 1 (art. 14+6-1)

61. Mrs Schuler-Zgraggen said, lastly, that in the exercise of her right to a fair trial she had suffered discrimination on the ground of sex. She relied on Article 14 (art. 14), which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The Government's preliminary objection

62. As they had done before the Commission, the Government raised an objection of inadmissibility based on failure to exhaust domestic remedies. The applicant, they submitted, had done no more than characterise the wording used by the Appeals Board as "arbitrary" and had therefore not made to the Federal Insurance Court a precise complaint relating to discrimination in the exercise of a right secured by the Convention.

63. The Court adopts the Commission's reasoning. Firstly, Mrs Schuler-Zgraggen objected to the terms of the Federal Insurance Court's judgment of 21 June 1988, against which no appeal lay. Secondly, in her administrative-law appeal she had already criticised the (similar) assumption made by the Appeals Board in its decision of 8 May 1987. The objection is therefore unfounded.

B. Merits of the complaint

64. According to the applicant, the Federal Insurance Court based its judgment on an "assumption based on experience of everyday life", namely that many married women give up their jobs when their first child is born

and resume it only later (see paragraph 29 above). It inferred from this that Mrs Schuler-Zgraggen would have given up work even if she had not had health problems. The applicant considered that if she had been a man, the Federal Insurance Court would never have made such an assumption, which was contradicted by numerous scientific studies.

65. The Government argued that Article 6 para. 1 (art. 6-1) and thus, indirectly, Article 14 (art. 14) were not applicable, as the complaint was concerned with the taking of evidence, a sphere which essentially came within the State authorities' competence.

66. The Court reiterates that the admissibility of evidence is governed primarily by the rules of domestic law, and that it is normally for the national courts to assess the evidence before them. The Court's task under the Convention is to ascertain whether the proceedings, considered as a whole, including the way in which the evidence was submitted, were fair (see, as the most recent authority and, mutatis mutandis, the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, para. 43, and the Edwards v. the United Kingdom judgment previously cited, pp. 34-35, para. 34).

67. In this instance, the Federal Insurance Court adopted in its entirety the Appeals Board's assumption that women gave up work when they gave birth to a child. It did not attempt to probe the validity of that assumption itself by weighing arguments to the contrary.

As worded in the Federal Court's judgment, the assumption cannot be regarded - as asserted by the Government - as an incidental remark, clumsily drafted but of negligible effect. On the contrary, it constitutes the sole basis for the reasoning, thus being decisive, and introduces a difference of treatment based on the ground of sex only.

The advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 77, p. 38, para. 78). The Court discerns no such reason in the instant case. It therefore concludes that for want of any reasonable and objective justification, there has been a breach of Article 14 taken together with Article 6 para. 1 (art. 14+6-1).

III. APPLICATION OF ARTICLE 50 (art. 50)

68. Under Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or

measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Non-pecuniary damage

69. Mrs Schuler-Zgraggen claimed that she had sustained non-pecuniary damage, which she did not quantify, and sought payment of a provisional sum of CHF 22,500 for the length of the proceedings before the Convention institutions.

70. The Government submitted that the publication of a judgment in which a violation was found would satisfy the requirements of Article 50 (art. 50). The Delegate of the Commission did not express any view.

71. The Court considers that the applicant may have suffered non-pecuniary damage but that this judgment provides her with sufficient satisfaction for it.

2. Pecuniary damage

72. Mrs Schuler-Zgraggen also complained that she had lost the benefit of a full invalidity pension on account of proceedings incompatible with Articles 6 para. 1 and 14 (art. 6-1, art. 14). She did not, however, claim any specific sum.

73. The Government pointed out that since 15 February 1992 Swiss law had enabled a victim of a violation found by the Court, or by the Committee of Ministers of the Council of Europe, to apply for a reopening of the impugned proceedings. They therefore considered that the question was not ready for decision.

74. This is also the view of the Court. The question must accordingly be reserved and the further procedure must be fixed, due regard being had to the possibility of an agreement between the respondent State and the applicant (Rule 54 paras. 1 and 4 of the Rules of Court).

B. Costs and expenses

75. Mrs Schuler-Zgraggen sought CHF 7,130.90 in respect of costs and expenses for the proceedings before the national judicial bodies (Mr Derrer: CHF 300; Mr Stöckli: CHF 2,694.20; Mr Wehrli: 2,936.70; own expenses: CHF 1,200). She also claimed CHF 14,285.70 for the proceedings before the Convention institutions, not including the expenses incurred by attending two hearings before the European Court, the one on 26 January 1993 and the one for delivery of the judgment.

The Government found the claim excessive. The applicant had not incurred any legal costs before the cantonal authorities or the Federal Insurance Court, and before the Invalidity Insurance Board - at which stage she was assisted by three lawyers - she had not raised any complaint based on the Convention. A lump sum of CHF 5,000 would amply cover all the costs and expenses incurred in Switzerland and at Strasbourg.

The Delegate of the Commission considered that the expenses incurred in the proceedings before the Appeals Board were not concerned with remedying a breach of the Convention and he invited the Court to apply its case-law on expenses incurred in the proceedings before the Strasbourg institutions.

76. Making its assessment on an equitable basis as required by Article 50 (art. 50) and having regard to the criteria which it applies in this field, the Court awards the applicant CHF 7,500 under this head as matters stand.

FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 6 para. 1 (art. 6-1) applied in the case;

2. Dismisses unanimously the Government's preliminary objections;

3. Holds unanimously that it has no jurisdiction to entertain the complaint concerning the independence of the medical experts;

4. Holds by eight votes to one that there has been no breach of Article 6 para. 1 (art. 6-1);

5. Holds by eight votes to one that there has been a breach of Article 14 taken together with Article 6 para. 1 (art. 14+6-1);

6. Holds unanimously that this judgment in itself constitutes sufficient just satisfaction as to the alleged non-pecuniary damage;

7. Holds as matters stand, by eight votes to one, that the Confederation is to pay the applicant, within three months, 7,500 (seven thousand five hundred) Swiss francs in respect of costs and expenses;

8. Holds by eight votes to one that the question of the application of Article 50 (art. 50) is not ready for decision as regards pecuniary damage;
   accordingly,
   (a) reserves the said question in that respect;

(b) invites the Government and the applicant to submit, within the forthcoming six months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;
(c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 June 1993.

Rudolf BERNHARDT
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinions of Mr Gölcüklü and Mr Walsh are annexed to this judgment.

R.B.
M.-A. E.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ CONCERNING ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 6 PARA. 1 (art. 14+6-1)

(Translation)

To my great regret, I cannot share the majority's opinion as to the application of Article 14 taken together with Article 6 para. 1 (art. 14+6-1) of the Convention.

On this particular point the applicant criticised the Federal Insurance Court's ruling on the decisive issue, namely for having reached the conclusion - based, according to the reasons it gave, on experience of life - that during the period in question (after the birth of her child) her activities would very probably have been limited to the role of mother in the matrimonial home if her health had been good.

This complaint of discrimination against her on the ground of sex, directed at a point of fact, is an issue of substance, whereas Article 6 para. 1 (art. 6-1) establishing the principle of a fair trial, being procedural in nature, relates only to formal issues.

In sum, what the applicant was challenging in the instant case was the reasons put forward by the Federal Insurance Court when it ruled on her appeal and not the fact of having suffered discrimination in the course of the proceedings in the national courts on account of belonging to the female sex; nor was any principle or standard of a fair trial infringed in regard to her.

I therefore conclude that there has been no breach of Article 14 taken together with Article 6 para. 1 (art. 14+6-1) on the ground of sex discrimination against the applicant.

PARTLY DISSENTING OPINION OF JUDGE WALSH

1. In my opinion there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention, concerning access to the Appeals Board's file. That must necessarily include documents which should have been in it - namely, the pulmological report, which in fact was not in the file. That document was within the procurement of the Appeals Board and its non-availability to the applicant put her at a disadvantage.

2. I am also of the opinion that there was a breach of Article 6 para. 1 (art. 6-1) by reason of the absence of an oral hearing in accordance with that Article (art. 6-1). The Rules of Procedure of the Federal Insurance Court provide for an oral hearing either on the application of the party or on the motion of the presiding judge. The Convention requires such a hearing unless the parties agree to waive it. The position is similar with regard to the public nature of the hearing: see Le Compte, Van Leuven and De Meyere v. Belgium[*]. No such agreement was secured from the applicant. Indeed it is not established that she was ever made aware of the possibility. I do not agree with the view of the majority of the Court (at paragraph 58 of the judgment) that because the applicant did not request an oral and public hearing she had "unequivocally waived her right ...". Article 6 (art. 6) throws no burden on an applicant to request a public hearing. Her civil rights were in issue. I cannot agree with the inference contained in the third sub-paragraph of paragraph 58 of the Court's judgment. The fact that a matter that is highly technical, even if this was so which is questionable, may induce the parties to agree to avoid the type of hearing envisaged by Article 6 para. 1 (art. 6-1) is not a ground for denying such a hearing, particularly when the applicant had not so agreed.

Furthermore the fact that the dispute does not appear to raise "issues of public importance" is not a condition precedent to the operation of Article 6 para. 1 (art. 6-1). The dispute was undeniably important to the applicant and she is the party whose protection was envisaged by that provision of the Convention. The private citizen is thus enabled to pierce the bureaucratic veil or curtain. The fact that her private right was created by public law made the application of Article 6 para. 1 (art. 6-1) all the more important. That such application may be thought to be inconvenient for the "demands of efficiency" by the bureaucracy can scarcely be regarded as a justification for ignoring the requirements of the Article (art. 6-1).

3. I agree with the Court's findings in respect of Article 6 taken with Article 14 (art. 14+6).

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[*] Note by the registry: 23 June 1981, Series A no. 43.