

APPLICATION N° 24637/94

Wilfried BUSCH v/LUXEMBOURG

DECISION of 12 April 1996 on the admissibility of the application

Article 6, paragraph 1 of the Convention

- a) *Impartiality of a tribunal is tested on both a subjective and an objective basis, and appearances may be of importance.*
- b) *The applicant's appeal against the decision to refuse him authorisation to practise as an architect was dismissed by a Chamber of the "Conseil d'Etat" (Luxembourg) of which the President was also Legal Adviser to the Institute of Architects*

In this case, no reason to doubt the personal impartiality of the judge, in the absence of any evidence

As for the judge's objective impartiality, the Commission finds that he was involved neither in preparing Directive 85/384/EEC about which the applicant complains nor in transposing it into Luxembourg law and that the "Conseil d'Etat" had no discretion to allow the applicant's appeal

THE FACTS

The applicant is a German national. He was born in 1947 and lives in Strassen in Luxembourg.

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

The applicant is an architect. He graduated from a German technical university in 1973 and has been employed by a Luxembourg firm of architects for twenty-one years. In 1986, 1987 and 1988 the applicant made a number of unsuccessful applications for authorisation to practise independently as an architect in the Grand Duchy of Luxembourg.

As a new Law on the right of establishment was passed on 28 December 1988, the applicant submitted a further application on 12 October 1991, which was rejected by the Minister for the Middle Classes and Tourism (ministre des Classes Moyennes et du Tourisme) on 13 February 1992.

On 11 March 1992 the applicant appealed to the "Conseil d'Etat", claiming that he satisfied the conditions laid down in Community Directive (85/384/EEC) of 10 June 1985 to be allowed to practise as an architect in Luxembourg. The Government's Delegate filed pleadings on 3 February 1993 and the applicant filed pleadings in reply dated 24 September 1993. The public hearing, which the applicant, being represented by his lawyer, did not attend, was held on 21 January 1994.

In a decision of the same date, the "Conseil d'Etat" dismissed the applicant's appeal on the following grounds:

"Whereas it is established that Mr. Busch does not satisfy the national legal criteria relating to professional qualifications laid down in the Law on the right of establishment of 28 December 1988; whereas he submits, nevertheless, that he does satisfy the conditions .. laid down in Council Directive (85/384/EEC) of 10 June 1985;

Whereas Mr. Busch's diploma corresponds to the education and training requirements under Article 11 (a), third indent of the Council Directive of 10 June 1985,

Whereas the Government's Delegate submits that Mr. Busch does not satisfy the conditions laid down in the second paragraph of Article 4 (1) which allow a derogation from the normal conditions contained in Article 4 (1) (a) and (b) provided that the training is supplemented by a four-year period of professional experience in the Federal Republic of Germany sanctioned by a certificate issued by the Institute of Architects on whose list the architect is registered,

Whereas the duties and activities which Mr. Busch has been performing since he started working for the firm of T. in Luxembourg in 1973 and the experience he has gained there are not such as to satisfy the conditions set out in the second subparagraph of Article 4 (1) of Directive 85/384/EEC,

Whereas in view of the explicit and precise wording of the second subparagraph of Article 4 (1) of the Directive and of the strict nature of the derogation from the rule under Article 4 (1) (a) and (b), the second subparagraph of Article 4 (1) does not lend itself to Mr Busch's interpretation, whereas it follows that the Minister for Middle Classes and Tourism was justified in refusing him authorisation to practise as an architect in the Grand Duchy of Luxembourg "

At its session on 21 January 1994, the "Conseil d'Etat" was composed of Mr. Beghin, the President of the Chamber, who was also the Rapporteur in the case, and four judges

Mr. Beghin, who is also a practising lawyer, is legal adviser to the Luxembourg Institute of Architects. In that capacity he took part in a meeting on 8 April 1992 with representatives of the Ministries for National Education and the Middle Classes on Directive 85/384/EEC during which "it was noted that courses of at least three years attended in the 'Fachhochschulen' (department of architecture) in Germany should be supplemented by four years' professional experience in the Federal Republic of Germany sanctioned by the relevant professional body".

It was also following Mr Beghin's address to the Institute's General Assembly of 20 October 1992 that the Institute sent its members two circulars relating to professional conduct. Finally, Mr. Beghin was still legal adviser to the Institute of Architects in 1993 and was a member of the *ad hoc* working group set up to study proposals relating to architects' standard contracts

COMPLAINT

The applicant complains of a lack of impartiality and independence on the part of the "Conseil d'Etat". He submits that the fact that the President of the Chamber and Rapporteur in his case was also Legal Adviser to the Institute of Architects was such as to cast doubt on the impartiality and independence of the court, given that his appeal was against a decision aimed at protecting the Institute from any competition from non-national architects. He invokes Article 6 para. 1 of the Convention

THE LAW

The applicant complains of an alleged lack of impartiality and independence on the part of the "Conseil d'Etat" and invokes Article 6 para. 1 of the Convention, the relevant part of 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 . "

The Commission observes at the outset that there is nothing in the file to indicate that the applicant (or his lawyer) attempted to challenge the President of the "Conseil d'Etat" on grounds of his partiality, despite the fact that he could have done so at the latest at the hearing of 21 January 1994

Admittedly, the applicant was not present at the hearing in question. However, even supposing that the applicant has exhausted domestic remedies in accordance with Article 26 of the Convention, the Commission considers that the application must in any event be rejected on the ground that it is manifestly ill-founded.

The Commission recalls that impartiality has to be tested on a subjective basis, that is, the personal conviction of a given judge in a given case, and also on an objective basis, that is, determining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (*cf*, *inter alia*, Eur. Court H.R., De Cubber judgment 26 October 1984, Series A no. 86, pp. 13-14, para. 24).

In this case, the applicant has failed to prove that the President of the Chamber of the "Conseil d'Etat" was motivated by personal prejudice and neither has he alleged that the four other judges were motivated by any such prejudice. No question therefore arises as to impartiality when tested on a subjective basis.

It must be determined, however, whether, apart from the judge's personal conduct, there are ascertainable facts which may legitimately and objectively give the applicant cause to doubt the judge's impartiality.

On the facts, the applicant's fear of a lack of impartiality was based exclusively on the fact that the presiding judge (i.e. one judge out of five) was also legal adviser to the Institute of Architects and had participated in that capacity in 1992 in meetings with representatives of a number of ministries to discuss the implementation of Directive 85/384/EEC, which the applicant had criticised in his appeal to the "Conseil d'Etat".

The Commission notes that the judge in question was not in any way involved in preparing that Directive nor in transposing it into Luxembourg law by means of the Law on the right of establishment of 28 December 1988. The Directive in question was adopted in 1985 and the second subparagraph of Article 4 (1) provides unambiguously that a diploma obtained in Germany after only three years' training cannot be taken into consideration unless the holder can prove that he has acquired four years' professional experience in Germany, which the applicant was clearly unable to do.

It follows that as regards its evaluation of the merits of the applicant's appeal, the "Conseil d'Etat", as it notes itself in its decision of 21 January 1994, had no discretion whatsoever to allow the applicant's appeal.

The applicant cannot therefore argue that the fact that the President of the Chamber of the "Conseil d'Etat" is also legal adviser to the Institute of Architects and participated in that capacity in meetings held in 1992 and 1993 - that is, more than seven years after the Council of European Communities adopted the said Directive - is such as to justify objective fears regarding the court's impartiality and independence

The application must therefore be declared inadmissible as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.