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

AFFAIRE BUSCARINI ET AUTRES c. SAINT-MARIN

CASE OF BUSCARINI AND OTHERS v. SAN MARINO

(Requête n°/application no. 24645/94)

ARRÊT/JUDGMENT

Strasbourg, 18 février/February 1999

In the case of Buscarini and Others v. San Marino,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr L. FERRARI BRAVO,
Mr L. CAFLISCH,
Mr P. KURIS,
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr B. ZUPANCIC,
Mrs N. VAJIC,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANTÎRU,
Mr E. LEVITS,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,

and also of Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 10 December 1998 and 4 February 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by Mr Cristoforo Buscarini on 10 March 1998, by the Government of San Marino ("the Government") on 16 March 1998 and by the second applicant, Mr Emilio Della Balda, on 3 April 1998, in each instance within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 24645/94) against the Republic of San Marino lodged with the

Notes by the Registry
1.-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.
3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

European Commission of Human Rights ("the Commission") by three San Marinese nationals, Mr Cristoforo Buscarini, Mr Emilio Della Balda and Mr Dario Manzaroli, under former Article 25 on 17 November 1993.

The Government's application referred to former Articles 44 and 48 and to the declaration whereby San Marino recognised the compulsory jurisdiction of the Court (former Article 46); the applicants' applications referred to former Articles 44 and 48 as amended by Protocol No. 9[1], which San Marino had ratified. The object of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 9 of the Convention.

2. On 12 October 1998 Mr Manzaroli stated that he did not wish to take part in the proceedings.

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and Rule 21 of former Rules of Court B[2]) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Registrar, consulted the Agent of the Government, Mr Buscarini, Mr Della Balda and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received Mr Buscarini's memorial on 2 September 1998 and the Government's memorial on 16 October 1998. On 16 October 1998 Mr Della Balda stated that he wished to rely on the first applicant's memorial.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr L. Ferrari Bravo, the judge elected in respect of San Marino (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr. L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5(a)). The other members appointed to complete the Grand Chamber were Mr L. Caflisch, Mr P. Kuris, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupancic, Mrs N. Vajic, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Pantîru, Mr E. Levits, Mr K. Traja and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

Notes by the Registry

1. Protocol No. 9 came into force on 1 October 1994 and was repealed by Protocol No. 11.

2. Rules of Court B, which came into force on 2 October 1994, applied until 31 October 1998 to all cases concerning States bound by Protocol No. 9.

5. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr R. Nicolini, to take part in the proceedings before the Grand Chamber.

6. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 10 December 1998.

There appeared before the Court:

(a) *for the Government*
Mr L.L. DANIELE, *Agent*,
Mr G. CECCOLI, *Co-Agent*;

(b) *for the Commission*
Mr R. NICOLINI, *Delegate*,
Ms M.-T. SCHOEPFER, *Secretary to the Commission*.

The Court heard addresses by Mr Nicolini and Mr Daniele.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

7. The applicants were elected to the General Grand Council (the parliament of the Republic of San Marino) in elections held on 30 May 1993.

8. Shortly afterwards, they requested permission from the Captains-Regent, who act as the heads of government in San Marino, to take the oath required by section 55 of the Elections Act (Law no. 36 of 1958) without making reference to any religious text. The Act in question referred to a decree of 27 June 1909, which laid down the wording of the oath to be taken by members of the Republic's parliament as follows:

> "I, …, swear on the Holy Gospels ever to be faithful to and obey the Constitution of the Republic, to uphold and defend freedom with all my might, ever to observe the Laws and Decrees, whether ancient, modern or yet to be enacted or issued and to nominate and vote for as candidates to the Judiciary and other Public Office only those whom I consider apt, loyal and fit to serve the Republic, without allowing myself to be swayed by any feelings of hatred or love or by any other consideration."

9. In support of their request the applicants referred to Article 4 of the Declaration of Rights of 1974, which guarantees the right to freedom of religion, and Article 9 of the Convention.

10. At the General Grand Council session of 18 June 1993 the applicants took the oath in writing, in the form of words laid down in the decree of 27 June 1909 save for the reference to the Gospels, which they omitted. At the same time, the first applicant drew attention to the obligations undertaken by the Republic of San Marino when it became a party to the European Convention on Human Rights.

11. On 12 July 1993 the Secretariat of the General Grand Council gave an opinion, at the request of the Captains-Regent, on the form of the oath sworn by the applicants, to the effect that it was invalid, and referred the matter to the Council.

12. At its session of 26 July 1993 the General Grand Council adopted a resolution proposed by the Captains-Regent ordering the applicants to retake the oath, this time on the Gospels, on pain of forfeiting their parliamentary seats.

13. The applicants complied with the Council's order and took the oath on the Gospels, albeit complaining that their right to freedom of religion and conscience had been infringed.

14. Subsequently – before ever the applicants applied to the Commission – Law no. 115 of 29 October 1993 ("Law no. 115/1993") introduced a choice for newly elected members of the General Grand Council between the traditional oath and one in which the reference to the Gospels was replaced by the words "on my honour". The traditional wording is still mandatory for other offices, such as that of Captain-Regent or of a member of the government.

PROCEEDINGS BEFORE THE COMMISSION

15. Mr Buscarini, Mr Della Balda and Mr Manzaroli applied to the Commission on 17 November 1995. Relying on Article 9 of the Convention, they complained of an infringement of their right to freedom of religion and conscience.

16. The Commission declared the application (no. 24645/94) admissible on 7 April 1997. In its report of 2 December 1997 (former Article 31 of the Convention), it concluded unanimously that there had been a violation of Article 9. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

17. The Government raised three preliminary objections and asked the Court to declare the application inadmissible or, in the alternative, to dismiss it as ill-founded and devoid of purpose.

18. Mr Buscarini and Mr Della Balda requested the Court to dismiss the Government's objections to admissibility and to find that there had been a breach of Article 9 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

A. The Government's preliminary objections

19. The Government raised three pleas of inadmissibility as they had before the Commission, arguing that the application was an abuse of process, that it had been lodged out of time and that domestic remedies had not been exhausted.

1. Whether the application amounted to an abuse of process

20. The Government asserted that the applicants had improperly made the application for political ends, as was clear from their statements announcing their intention of approaching the Commission. In support of that assertion the Government cited, *inter alia*, the official record of the General Grand Council session of 26 and 27 July 1993 and a number of articles which had appeared in the press after the event, even as late as October 1998.

21. Like the Commission, the Court notes that the documents in the case file show that after taking the oath in its traditional form, Mr Buscarini and Mr Della Balda merely announced their intention of bringing the matter to the attention of "the Strasbourg Court", a move which cannot be regarded as an abuse of the right of individual petition. Accordingly, this objection must be dismissed.

2. Whether the application was lodged out of time

22. The Government submitted that the application form was sent to the Commission after the time-limit laid down in former Article 26 (now Article 35 § 1) of the Convention of six months from the date of the final domestic decision. Further, they argued that, since Mr Buscarini had no

power of attorney from Mr Della Balda and was not a lawyer, he could not validly act on the latter's behalf in Commission proceedings. The Commission rejected the objection, taking the view that the applicants had complied with the six-month time-limit laid down by the Convention.

23. The Court points out that the running of the six-month period is interrupted by the first letter from an applicant summarily setting out the object of the application, unless the letter is followed by a long delay before the application is completed. What is important is that the applicant should be clearly identifiable before that period has expired and should have submitted his or her complaints, at least in substance. Further, it is not required by either the Convention or Rule 36 of the Rules of Court that an applicant should be represented at that stage of the proceedings.

In the instant case the first applicant, in a letter of 17 November 1993 to the Commission, set out the object of the application with precision and stated that he was acting on behalf of the other two applicants as well as in his own name. Two application forms, one signed by the first applicant and one by the second, were received by the Commission on 1 and 18 July 1994; the third applicant formally joined in the application on 24 August 1995. The application was thus lodged by all three applicants within the period laid down by former Article 26 (now Article 35 § 1) of the Convention and was duly completed later.

Consequently, this objection must likewise be dismissed.

3. Whether domestic remedies have been exhausted

24. Arguing that the General Grand Council's resolution requiring the oath to be sworn on the Gospels was a political act, the Government maintained that the applicants should have brought a civil action for redress of the alleged prejudice to them before turning – if the domestic courts held that they had no jurisdiction – to the Commission. According to the Government, such a remedy would have been both accessible and effective, as the domestic judgments that had been produced to the Commission demonstrated.

25. Like the applicants, the Delegate of the Commission emphasised that, even supposing that a claim could as a matter of law have been brought in the civil courts, those courts would have had no choice but to "refer the matter to the General Grand Council, which would then have been a judge in its own cause".

26. The Court reiterates that the rule of exhaustion of domestic remedies referred to in former Article 26 (now Article 35 § 1) of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the

rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, in particular, the Assenov and Others v. Bulgaria judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3286, § 85, and the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2275-76, §§ 51-52).

27. In the instant case the domestic decisions relied on by the Government to show that the civil courts would have had jurisdiction to deal with the matter are irrelevant, since they concern applications for San Marinese nationality and for building permits. While the civil courts have the power to rule on whether the conditions for acquiring citizenship have been fulfilled (as in the first instance) and to award damages to a plaintiff (as in the second), they cannot in any circumstances review and quash political decisions of the General Grand Council.

Consequently, the Court considers that the Government have not demonstrated that the remedy in question is an effective one. It follows that this objection must be dismissed.

28. The Government also stated, both in the Commission proceedings and in their memorial to the Court, that the applicants could have brought proceedings in the Administrative Court or applied to the *Sindacato della Reggenza* (the body with power to review acts of the Captains-Regent). The Commission considered those remedies ineffective on the grounds that, by law, the first of them could not be used to challenge acts of the General Grand Council, and the second likewise did not cover that body's decisions.

The Court concurs in that conclusion.

B. Compliance with Article 9 of the Convention

29. Article 9 of the Convention provides:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

30. Mr Buscarini and Mr Della Balda submitted that the obligation which the General Grand Council imposed on them on 26 July 1993 demonstrated that in the Republic of San Marino at the material time the exercise of a fundamental political right, such as holding parliamentary office, was subject to publicly professing a particular faith, in breach of Article 9.

31. The Commission agreed with that analysis; the Government contested it.

32. The Government maintained that the wording of the oath in question was not religious but, rather, historical and social in significance and based on tradition. The Republic of San Marino had, admittedly, been founded by a man of religion but it was a secular State in which freedom of religion was expressly enshrined in law (Article 4 of the Declaration of Rights of 1974). The form of words in issue had lost its original religious character, as had certain religious feast-days which the State recognised as public holidays.

The act complained of therefore did not amount to a limitation on the applicants' freedom of religion.

33. The applicants and the Commission rejected that assertion.

34. The Court reiterates that: "As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it" (see the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31). That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.

In the instant case, requiring Mr Buscarini and Mr Della Balda to take an oath on the Gospels did indeed constitute a limitation within the meaning of the second paragraph of Article 9, since it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats. Such interference will be contrary to Article 9 unless it is "prescribed by law", pursues one or more of the legitimate aims set out in paragraph 2 and is "necessary in a democratic society".

1. "Prescribed by law"

35. As the Commission noted in its report (paragraph 38), "the interference in question was based on section 55 of the Elections Act, Law no. 36 of 1958, which referred to the decree of 27 June 1909 laying down the wording of the oath to be sworn by members of parliament … Therefore, it was 'prescribed by law' within the meaning of the second paragraph of Article 9 of the Convention". That point was not disputed.

2. Legitimate aim and whether "necessary in a democratic society"

36. The Government emphasised the importance, in any democracy, of the oath taken by elected representatives of the people, which, in their view, was a pledge of loyalty to republican values. Regard being had to the special

character of San Marino, deriving from its history, traditions and social fabric, the reaffirmation of traditional values represented by the taking of the oath was necessary in order to maintain public order.

The history and traditions of San Marino were linked to Christianity, since the State had been founded by a saint; today, however, the oath's religious significance had been replaced by "the need to preserve public order, in the form of social cohesion and the citizens' trust in their traditional institutions".

It would therefore be inappropriate for the Court to criticise the margin of appreciation which San Marino had to have in this matter.

In any event, the Government maintained, the applicants had had no legal interest in pursuing the Strasbourg proceedings since the entry into force of Law no. 115 of 29 October 1993 ("Law no. 115/1993"), which did not require persons elected to the General Grand Council to take the oath on the Gospels.

37. According to Mr Buscarini and Mr Della Balda, the resolution requiring them to take the oath in issue was in the nature of a "premeditated act of coercion" directed at their freedom of conscience and religion. It aimed to humiliate them as persons who, immediately after being elected, had requested that the wording of the oath should be altered so as to conform with, *inter alia*, Article 9 of the Convention.

38. The Court considers it unnecessary in the present case to determine whether the aims referred to by the Government were legitimate within the meaning of the second paragraph of Article 9, since the limitation in question is in any event incompatible with that provision in other respects.

39. The Court notes that at the hearing on 10 December 1998 the Government sought to demonstrate that the Republic of San Marino guaranteed freedom of religion; in support of that submission they cited its founding Statutes of 1600, its Declaration of Rights of 1974, its ratification of the European Convention in 1989 and a whole array of provisions of criminal law, family law, employment law and education law which prohibited any discrimination on the grounds of religion. It is not in doubt that, in general, San Marinese law guarantees freedom of conscience and religion. In the instant case, however, requiring the applicants to take the oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion, a requirement which is not compatible with Article 9 of the Convention.

As the Commission rightly stated in its report, it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs.

40. The limitation complained of accordingly cannot be regarded as "necessary in a democratic society". As to the Government's argument that the application ceased to have any purpose when Law no. 115/1993 was enacted, the Court notes that the oath in issue was taken before the passing of that legislation.

41. In the light of the foregoing, there has been a violation of Article 9 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

43. Mr Buscarini and Mr Della Balda claimed no more than one Italian lira for the damage which they alleged they had suffered as a result of being required to take the oath on the Gospels.

44. The Government did not express a view on this point.

45. Although the applicants did not expressly say so, their claim obviously relates to non-pecuniary damage. Like the Delegate of the Commission, the Court considers that in the circumstances of the case the finding of a violation of Article 9 of the Convention constitutes sufficient just satisfaction under Article 41.

B. Costs and expenses

46. The applicants also sought reimbursement of their costs and expenses but did not specify an amount.

47. The Government did not make any submissions on this point. The Delegate of the Commission wished to leave the matter to the Court's discretion.

48. By Rule 60 § 2 of the Rules of Court, itemised particulars of any claim made under Article 41 of the Convention must be submitted, together with the relevant supporting documents or vouchers, "failing which the Chamber may reject the claim in whole or in part". Since the applicants did not quantify their claim, the Court dismisses it.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;

2. *Holds* that there has been a violation of Article 9 of the Convention;

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

4. *Dismisses* the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 February 1999.

Luzius WILDHABER
President

Maud DE BOER-BUQUICCHIO
Deputy Registrar