SCHULER-ZGRAGGEN v. SWITZERLAND

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 14518/89

Margrit SCHULER-ZGRAGGEN

against

SWITZERLAND

REPORT OF THE COMMISSION

(adopted on 7 April 1992)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant, a Swiss citizen born in 1948, is a communal employee and housewife residing at Schattdorf in Switzerland. Before the Commission she is represented by Mr. L. Minelli, a lawyer practising at Forch in Switzerland.

3. The application is directed against Switzerland whose Government were represented by their Agent, Mr. O. Jacot-Guillarmod, Deputy Director of the Federal Office of Justice, and their Deputy Agent, Mr. Ph. Boillat, Head of the European law and International Affairs Section of the Federal Office of Justice.

4. The application concerns the applicant's complaint under Article 6 para. 1 of the Convention that in social security proceedings she had no oral hearing and only insufficient access to the case-file; and under Article 14 of the Convention taken together with Article 6 para. 1 of discrimination on account of her sex in the determination of her claim.

B. The proceedings

5. The application was introduced on 29 December 1988 and registered on 9 January 1989.

6. On 2 April 1990 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application with regard to the issues under Article 6 para. 1 of the Convention concerning access to the case-file.

7. The Government's observations were received by letter dated 26 June 1989 and the applicant's observations were dated 10 September 1990.

8. On 7 December 1990 the Commission decided to invite the parties to a hearing on the admissibility and merits of the applicant's complaints under Article 6 para. 1 of the Convention.

9. The hearing took place on 30 May 1991. The respondent Government were represented by their Agent, Mr. O. Jacot-Guillarmod, by Messrs. R. Spira and A. Lustenberger, judges at the Federal Insurance Court, and by Mr. F. Schürmann of the European Law and International Affairs Section of the Federal Office of Justice. The applicant was represented by her lawyer, Mr. L. Minelli.

10. Following the hearing the Commission declared the application admissible.

11. The text of this decision was on 17 July 1991 communicated to the parties who were invited to submit any additional observations or further evidence which they wished to put before the Commission.

12. The Government submitted additional observations on 30 September 1991, arguing that domestic remedies were not fully exhausted, but the Commission found no basis for applying Article 29 of the Convention.

13. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present report

14. The present report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ

15. The text of this Report was adopted on 7 April 1992 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

16. The purpose of the Report, pursuant to Article 31 of the Convention, is:

i) to establish the facts, and

ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

17. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

18. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

a. Institution of invalidity insurance proceedings

19. In 1973 the applicant was employed by the D. industrial company in Altdorf in Switzerland. From her salary she paid regular contributions to the Federal Invalidity Insurance (Invaliden-versicherung).

20. In spring 1975 the applicant was afflicted by open lung tuberculosis. On 29 April 1976 she applied to the Invalidity Insurance for a pension as, due to her illness, she was unable to work.

21. The competent Compensation Office (Ausgleichskasse) of the Swiss Machine and Metal Industry (Schweizerische Maschinen- und Metallindustrie) decided on 24 September 1976 to grant the applicant

half an invalidity pension for the period from 1 April to 31 October 1976.

22. On 28 September 1978 the D. company gave notice to the applicant on account of her illness, as from 1979 onwards.

23. The applicant filed a further application for a pension to the Invalidity Insurance. Based on two expert opinions, the Compensation Office decided on 25 March 1980 to award the applicant a full invalidity pension retroactively as from 1 May 1978. The Office assumed in particular that the applicant was somatically and mentally unfit for employment.

24. In 1981 and again in 1982 the Insurance reviewed the applicant's situation and, as a result, confirmed the pension.

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

26. Subsequently, the applicant's invalidity pension was reviewed. In 1985 the Invalidity Insurance Commission (IV-Kommission) of the Canton of Uri ordered the applicant's medical examination by the Medical Observation Centre (Medizinische Abklärungsstelle) of the Invalidity Insurance.

27. The Medical Observation Centre then requested Drs. F. and B. to prepare two advisory reports (Konsilien) on the applicant's health, namely a pulmological report and a psychiatric report, respectively. Dr. F. prepared his report on 10 December 1985, Dr. B. prepared his on 24 December 1985.

28. The Medical Observation Centre prepared its report on 14 January 1986. The report summarised the advisory reports of Dr. F. and Dr. B. The advisory report of Dr. B. was also attached to the report of the Medical Observation Centre. In its report the Centre concluded that the applicant would not at all be able to work as an office employee; her ability to do household work amounted to about 60-70%.

29. On 21 March 1986 the Invalidity Insurance Commission terminated, as from 1 May 1986, the applicant's pension which by then amounted to 2,016 SFr per month. The Commission considered that, after the birth of her son, her family circumstances had changed substantially in that she now had new duties in respect of the child. Her health was now also better. The Commission further considered that according to the expert opinion of the Medical Observation Centre the applicant was able to take care of her household and her child to the extent of 60-70%.

b. Proceedings before the Appeal Board

30. On 21 April 1986 the applicant appealed against this decision to the Appeal Board for Old Age, Survivors' and Invalidity Insurance (Rekurskommission für die Alters-, Hinterlassenen- und Invalidenversicherung) of the Canton of Uri, requesting payment of a full invalidity pension, subsidiarily of half a pension. She stated inter alia that according to the Federal Invalidity Insurance Act (Bundesgesetz über die Invalidenversicherung) she was entitled to an invalidity pension as her invalidity amounted to at least 66 2/3%.

31. By letter of 26 May 1986 the applicant, who was at that time not represented by a lawyer, complained to the Invalidity Commission of the Canton of Uri that her request for consultation of the case-file, which the Appeal Board had transmitted to that Commission, had been refused. She again requested the case-file and permission to consult photocopies of certain documents.

32. By letter of 28 July 1986 to the Invalidity Commission the applicant again requested permission to consult the case-file, in particular with regard to "all medical reports, protocols and

laboratory results from 1975-1986" ("alle Arztberichte, Protokolle, Laborauswertungen von 1975-1986"). She also requested photocopies of important documents.

33. On 8 May 1987 the Appeal Board dismissed the appeal. At the outset, it found that the right to consult the case-file did not include the right to take documents away (Herausgabe) nor a right to receive photocopies. It sufficed that the applicant had been granted the opportunity to consult her case-file at the Registry of the Appeal Board. While the applicant had on numerous occasions been asked to do so, she had not used this opportunity.

34. In the Appeal Board's opinion it could not be discarded that the applicant, after the birth of her son, would have limited herself to her household even without becoming an invalid. The Board further found, inter alia with reference to the expert opinion of the Medical Observation Centre, that as a housewife the applicant was not sufficiently disabled to obtain a pension. The Appeal Board considered that increased working activity could be expected from the applicant, if she at all wanted to work under the prevailing family circumstances. The refusal of a pension could help the applicant to resolve the neurotic fixation that she was unable to work.

35. On 11 August 1987 the applicant wrote to the Appeal Board stating that she needed all documents and expert opinions in order to assess the chances of her litigation. She referred to a perfusion scintigram, a lung function test, blood gas analyses and a plethsmograph.

36. By letter of 13 August 1987 the Appeal Board replied with reference to the various medical documents:

<Translation>

> "these constituted the basis for the various medical reports. They are only contained in our case-file to the extent that you are permitted to consult them. We are not therefore in a position to go beyond and allow you to consult further documents."

<German>

> "diese (bildeten) Grundlagen für die jeweiligen Arztberichte ... Sie befinden sich nur im Rahmen des Ihnen gewährten Akteneinsichtsrechts bei unseren Akten. Wir sind daher nicht in der Lage, darüber hinaus Ihnen weitere Unterlagen zur Einsichtnahme vorzulegen."

c. Proceedings before the Federal Insurance Court

37. Against the decision of the Uri Appeal Board the applicant filed on 20 August 1987 an administrative law appeal (Verwaltungs-gerichtsbeschwerde) with the Federal Insurance Court (Eidgenössisches Versicherungsgericht) in which she requested payment of a full pension or, subsidiarily, that the case should be sent back for renewed decision by the previous instance. She also requested permission to consult the entire case-file (vollumfängliches Akteneinsichtsrecht).

38. On 20 October 1987 the Invalidity Insurance Secretariat of the Compensation Office filed its observations to the Federal Insurance Court in which it supported termination of the applicant's invalidity pension. The Federal Social Insurance Office (Bundesamt für Sozialversicherung) filed its observations on 9 November 1987. With reference to a report of its own medical service it proposed dismissal of the applicant's administrative law appeal. This report referred inter alia to the expert opinion of the Medical Observation Centre.

39. By letter of 23 November 1987 the Federal Insurance Court informed the applicant that the entire case-file had been sent to the

Uri Appeal Board which "in the next 14 days will hold all documents ready for consultation" ("in den nächsten 14 Tagen alle Akten zur Einsichtnahme bereit halten wird"). The applicant would thereafter have ten days time to supplement her administrative law appeal.

40. On 30 November 1987 the applicant consulted the case-file at the Uri Appeal Board where she photocopied certain documents. On 1 December 1987 the case-file was sent back to the Federal Insurance Court.

41. By letter of 7 December 1987 Mr. Sch., a lawyer, informed the Federal Insurance Court that he would henceforth represent the applicant. Mr. Sch. also asked the Court to transmit the case-file to him. This the Court did on 11 December 1987.

42. On 11 January 1988 the applicant filed a supplement to her administrative law appeal with the Federal Insurance Court. Therein the applicant noted in particular that the expert opinion of the Medical Observation Centre assumed, with reference to the report of Dr. F., that her lung function was normal. Yet Dr. F.'s report was not in the case-file. The applicant also complained of the arbitrary opinion of the Appeal Board according to which, even if she had not become an invalid, she would on account of the birth of her child limit herself to working in her household.

43. On 21 June 1988 the Federal Insurance Court partly upheld the applicant's administrative law appeal in that it determined that, as from 1 May 1986, the applicant's degree of invalidity amounted to 33.3%. The Court found that, if the conditions of economic hardship were met, the applicant was entitled to half an invalidity pension. As the file contained no information in this respect, the Court sent the case back to the Compensation Office for a new decision based on the considerations of its decision. The Court's decision was served on the applicant on 2 July 1988.

44. In its decision the Federal Insurance Court stated that in the present case its examination was not limited to the violation of Federal law and the transgression or the abuse of appreciation (Überschreiten oder Missbrauch des Ermessens). Rather, it could also examine the appropriateness of the contested decision, and it was not bound by the facts found by the previous instance. The Court was free, if necessary, to go beyond the application of the parties, either to their advantage or disadvantage.

45. With regard to the applicant's complaint that the Appeal Board had not handed over to her all the documents for consultation, the Court found that her complaint was now remedied in that the applicant had been able to express herself before the Court; that the latter freely examined the facts and the law; and that in the proceedings before the Court the applicant had been able to consult the documents.

46. With regard to the pension claim the Court stated:

<Translation>

> "It must be considered, however, that many wives pursue activities away from home until the birth of their first child, though they suspend such activity as long as the children require complete care and education. The present case, too, must proceed from this assumption of general life experience - which must be duly considered for the question of the applicable method of the determination of invalidity ... The child, born on 4 May 1984, was barely two years old at the critical time when the order was contested on 21 March 1986 ... Thus, according to the degree of evidence of predominant probability ..., it must be assumed that the applicant, even without an impairment in her health, would be active solely as a housewife and

mother..."

<German>

"Indessen ist zu beachten, dass viele Ehefrauen bis zur Geburt des ersten Kindes einer ausserhäuslichen Tätigkeit nachgehen, diese aber mindestens solange einstellen, als die Kinder der vollständigen Pflege und Erziehung bedürfen. Von dieser auf der allgemeinen Lebenserfahrung - welche bei der Frage nach der anwendbaren Methode der Invaliditätsbemessung gebührend zu berücksichtigen ist ... - beruhenden Annahme ist auch im vorliegenden Fall auszugehen. Das am 4. Mai 1984 geborene Kind war im massgeblichen Zeitpunkt der angefochtenen Verfügung am 21. März 1986 ... erst knapp zwei Jahre alt, weshalb nach dem Beweisgrad der überwiegenden Wahrscheinlichkeit ... davon auszugehen ist, dass die Beschwerdeführerin auch ohne gesundheitliche Beeinträchtigung nur als Hausfrau und Mutter tätig wäre..."

47. The Federal Insurance Court thus considered it unnecessary to examine the applicant's ability to work in her previous profession. Rather, the Court examined if and to what extent the applicant was restricted in her activity as a housewife. It considered it as sufficient to rely on the expert opinion of the Medical Observation Centre. While the Court regarded it as a certain defect (gewisser Nachteil) that the pulmological report was not in the case-file, it considered that the internist's examination made it possible to answer the question whether since 1980 the applicant had undergone pulmonal changes. Additional medical examinations were hence unnecessary. The Court noted that since 1980 the applicant had not been treated on account of tuberculosis and that in this respect she was fully able to work. The applicant had a neurosis which had meanwhile diminished.

B. Relevant Domestic Law and Practice

a. Swiss social security legislation

48. The Swiss invalidity insurance is governed by the Federal Invalidity Insurance Act of 1959, and by the Federal Old Age and Survivors' Insurance Act (Bundesgesetz über die Alters- und Hinterlassenenversicherung) of 1946. The invalidity insurance is compulsory for all persons residing in Switzerland; persons who are not compulsorily insured, for instance Swiss expatriates, have the possibility voluntarily to be insured (Sections 1 and 2 of the Federal Invalidity Insurance Act).

49. The invalidity insurance is operated by cantonal and professional associations and its operation is supervised by the Confederation (Sections 49-73 of the Federal Old Age and Survivors' Insurance Act; Sections 53-67 of the Federal Invalidity Insurance Act).

50. The invalidity insurance is financed by contributions of the insured and the employer (each paying 1.2% of the insured persons's salary) as well as of the State which currently pays approximately 50% of the entire insurance costs. The insured's contribution is deducted automatically from his salary. There is no upper limit to the contributions of the insured person and the employer. Children, spouses and widows without employment are dispensed from contributions; for other persons without employment, the annual contributions vary between currently 39 and 1,200 SFr (Section 3 of the Federal Invalidity Insurance Act; Section 3 of the Federal Old Age and Survivors' Insurance Act).

51. According to the version of Section 28 para. 1 of the Federal Insurance Act applicable at the relevant time, a person is entitled (droit; Anspruch) to a full pension if his invalidity amounted to at least two thirds. In the case of invalidity of at least 50%, the

person is entitled to half a pension. In hardship cases, half a pension may be granted if the invalidity amounts to one third. At present, Section 28 para. 1 additionally envisages a quarter of a pension if the invalidity amounts to 40%. Section 28 para. 2 states:

<Translation>

> "For the calculation of the invalidity, the salaried income is considered which the insured person could have gained after the invalidity arose, and after conducting any rehabilitation measures, by means of an activity which could reasonably be expected from him, if the situation on the labour market is stable; this income is placed into relation with the salaried income which the person could have gained if he had not become an invalid."

<German>

> "Für die Bemessung der Invalidität wird das Erwerbseinkommen, das der Versicherte nach Eintritt der Invalidität und nach Durchführung allfälliger Eingliederungsmassnahmen durch eine ihm zumutbare Tätigkeit bei ausgeglichener Arbeitsmarktlage erzielen könnte, in Beziehung gesetzt zum Erwerbseinkommen, das er erzielen könnte, wenn er nicht invalid geworden wäre."

52. According to Section 36 et seq. of the Federal Invalidity Act taken together with Section 29 et seq. of the Federal Old Age and Survivors' Insurance Act, the pension is calculated on the basis of the average yearly income of the insured; this is determined by adding all the income in respect of which the insured has paid contributions, and dividing the sum by the number of years in which contributions were paid. The maximum amount afforded in the case of a normal full pension is limited to twice the minimum pension. Payment of contributions can be enforced. The claims expire if they have not been made within five years (Sections 15 and 16 of the Federal Old Age and Survivors' Insurance Act).

b. Law and practice as to procedure

53. The Swiss Federal Court has derived from Article 4 of the Swiss Federal Constitution, which enshrines the principle of equality, the constitutional right in proceedings to consult the case-file. However, there is no right to take the case-file away or to prepare photocopies therefrom; it suffices if the file can be consulted at the seat of the Office concerned and notes can be made (see ATF [Arrêts du Tribunal Fédéral Suisse] 108 Ia 7). More recently, the Federal Court has granted a right to have copies made if they do not cause too much work and too high costs for the authorities (see ATF 112 Ia 377).

54. With regard to the proceedings before the Appeal Board the Federal Invalidity Insurance Act envisages in Section 69 the possibility of an appeal against orders of Compensation Offices and refers in this respect to Sections 84-86 of the Federal Old Age and Survivors' Insurance Act. Section 85 para. 1 of this Act states:

<Translation>

> "The Cantons determine an Appeal Board which is independent of the administration. An already existing Court authority can be determined as such. Persons who have been involved in the preparation or supervision of the insurance may not belong to the Appeal Board or its Secretariat."

<German>

> "Die Kantone bestimmen eine von der Verwaltung unabhängige

kantonale Rekursbehörde. Als solche kann eine bereits bestehende Gerichtsbehörde bezeichnet werden. An der Durchführung der Versicherung oder an der Aufsicht über die Versicherung beteiligte Personen dürfen weder der Rekursbehörde noch ihrem Sekretariat angehören."

55. Para. 2 of Section 85 mentions various requirements of the appeal proceedings, inter alia that they must be simple, speedy and in principle free of charge, and that the Appeal Board determines the facts ex officio. Section 85 para. 2(e) states in particular:

<Translation>

"If it is justified under the circumstances, the parties are to be invited to a hearing. The deliberations of the Appeal Board take place without the presence of the parties."

<Original>

"Rechtfertigen es die Umstände, so sind die Parteien zu einer Verhandlung vorzuladen. Die Beratung der Rekursbehörde hat in Abwesenheit der Parteien stattzufinden."

56. With regard to the administrative law proceedings before the Federal Court and the Federal Insurance Court, Section 112 of the Federal Judiciary Act (Organisationsgesetz) states that in certain cases concerning disciplinary punishments an oral hearing must be held. Para. 2 of Section 112 continues: "In the case of appeals against other orders, the President of the deciding department may order a final hearing with parties' submissions" ("Im Falle von Beschwerden gegen andere Verfügungen kann der Präsident der urteilenden Abteilung eine Schlussverhandlung mit Parteivorträgen anordnen").

57. According to Article 14 para. 2 of the Rules of Procedure (Reglement) of the Federal Insurance Court, the parties have no right to demand an oral hearing. The President may order an oral hearing upon the request of a party or on his own accord.

58. In the proceedings before the Federal Insurance Court, the applicant can also complain of the inadequacy of the previous decision. The Court is not bound by the determination of facts by the previous instance. In its decision the Court is also not bound by the requests of the parties and may decide to their advantage or disadvantage (Section 132 of the Federal Judiciary Act).

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

59. The following complaints were declared admissible:

- that in the proceedings before the Swiss authorities the applicant did not have an oral hearing;

- that in these proceedings the applicant had insufficient access to the case-file and could not consult one particular medical report;

- that the Federal Insurance Court unjustifiably discriminated against her on the ground of her sex when it assumed in its decision of 21 June 1988 that after the birth of her child she would give up work.

B. Points at issue

60. Accordingly, the issues to be determined are:

- whether Article 6 para. 1 (Art. 6-1) of the Convention applied

to the proceedings at issue; and, if so,

- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the lack of an oral hearing;

- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of access to the case-file;

- whether there has been a violation of Article 14 taken together with Article 6 para. 1 (Art. 14+6-1) of the Convention in respect of discrimination on account of the applicant's sex.

C. Applicability of Article 6 para. 1 (Art. 6-1) of the Convention

61. The first issue to be decided is whether Article 6 para. 1 (Art. 6-1) of the Convention applied to the proceedings at issue.

62. Article 6 para. 1 (Art. 6-1) of the Convention states, insofar as relevant:

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

63. The applicant submits that the circumstances of the present case do not differ substantially from those of the Deumeland and Feldbrugge cases (Eur. Court H.R., judgments of 29 May 1986, Series A nos. 99 and 100, respectively). Thus, the insurance is regulated by public law and compulsory; the applicant also refers to the personalised nature of the asserted right, the connection with the contract of employment, and the possibility of voluntary insurance. The applicant submits that the insurance benefits were essential as a basis of existence for the applicant.

64. The respondent Government contend that the present case involves a typical administrative procedure and does not concern the determination of the applicant's "civil rights and obligations" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. Reference is made to the general system of the invalidity insurance in Switzerland (see above Relevant domestic law and practice) and the case-law of the Court in the Feldbrugge and Deumeland cases (Eur. Court H.R., ibid.). In fact, given the double control available in such proceedings, it is unnecessary to apply Article 6 (Art. 6) of the Convention; the application of this provision would slow down proceedings.

65. The Government emphasise that the invalidity insurance is compulsory and is not attached to the employment contract or to a person's fortune. The insurance is governed by the principle of solidarity rather than of equivalence. Thus, apart from a small part of the pension there is no mathematical correspondence between the amount of contribution made and the amount of pension received. In the case of minors, the spouses of insured persons and of widows the pension will not depend on their contributions. In the present case the insurance benefit was calculated on the basis of the applicant's inability to fulfil household duties rather than the inability to earn. As a result, the insurance appertains exclusively to public law. In fact, contrary to normal insurances which operate on the principle of capitalisation, the invalidity insurance is based on the principle of repartition, i.e. the contributions will finance the pension.

66. The Commission has first examined whether there was a dispute concerning a right, as required for the applicability of Article 6 para. 1 (Art. 6-1) of the Convention (see Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 29 et seq., paras. 79 et seq.; Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, series A no. 43, p. 220 et seq., paras. 44 et seq.). It

considers that in the present case the Swiss courts were dealing with a genuine and serious dispute between the applicant and the social security authorities concerning her entitlement to an invalidity pension. Thus, the case involved a dispute over a right within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

67. The next question to be resolved is whether the right at issue, which concerns the area of social security, was a "civil right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

68. The Commission recalls the Convention organs' case-law according to which "the concept of 'civil rights and obligations' cannot be interpreted solely by reference to the domestic law of the respondent State" (see Eur. Court H.R., König judgment of 28 June 1978, Series A no. 27, p. 29 et seq., paras. 88 et seq.). Moreover, Article 6 (Art. 6) covers not only "private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter has been acting as a private person, subject to private law ... Accordingly, ... only the character of the right at issue is relevant" (see Eur. Court H.R., König judgment, ibid., p. 30, para. 90).

69. In the Convention organs' case-law a number of criteria have been developed for deciding whether a given dispute about the entitlement to social security benefits can be regarded as a dispute about civil rights or obligations as protected by Article 6 para. 1 (Art. 6-1) of the Convention, in particular whether a right was a public law right or a private law right. Thus, the criteria for a public law right are: the public law character of the relevant domestic law; the compulsory nature of the insurance; and State assumption of responsibility for social protection. The criteria for a private law right are: the personal and economic nature of the right; the connection with the contract of employment; and affinities of the insurance scheme with insurance governed by ordinary law (see Eur. Court H.R., Feldbrugge judgment, ibid., p. 12 et seq., paras. 28 et seq.; Deumeland judgment, ibid., p. 22 et seq., paras. 62 et seq.).

70. The Commission recalls that in the Feldbrugge and Deumeland judgments the Court concluded on the basis of these principles that Article 6 para. 1 (Art. 6-1) was applicable to the social security proceedings at issue. Thus, it found that the private law features dominated over the public law features, inter alia in view of various affinities of the social security insurances concerned with insurance under ordinary law (see Eur. Court H.R., Feldbrugge judgment, ibid., p. 15 et seq., paras. 39 et seq.; Deumeland judgment, ibid., p. 39, paras. 73 et seq.). In a later case, where the social security benefits were entirely financed by the State, the Commission considered that the public law features predominated and that Article 6 para. 1 (Art. 6-1) of the Convention was inapplicable (see No. 10855/84, Dec. 3.3.88, K. v. the Federal Republic of Germany, D.R. 55 p. 51). Article 6 para. 1 (Art. 6-1) was found to be equally inapplicable in a further case where the insurance system was financed by Government subsidies and charges levied on the employers, and the individuals themselves, apart from self-employed persons, did not contribute to the financing of the system (see No. 11450/85, Dec. 8.3.88, Wallin v. Sweden, D.R. 55 p. 142).

71. Turning to the present case, the Commission observes that the dispute discloses a number of features of public law.

72. The first such feature is the character of the legislation at issue, i.e. the Swiss Invalidity Insurance Act, which forms part of Swiss social security law and which domestic law treats as falling within the sphere of public law. This legislation regulates the framework of Swiss invalidity insurance. The invalidity insurance is operated by cantonal and professional associations, and the Swiss Confederation oversees its operation (see above, para. 49).

73. A second public law feature is the obligation for all persons residing in Switzerland to be insured against invalidity (see above, para. 48).

74. A third feature is the Swiss authorities' assumption of responsibility for ensuring social protection. Thus, the State currently pays approximately 50% of the entire insurance costs (see above, para. 50). Such a feature implies an extension of the public-law domain.

75. On the other hand, the dispute also discloses certain private law features.

76. To begin with, the applicant's right to a pension was certainly a personal, economic and individual right, bringing it close to the private law sphere.

77. The economic nature of a social right with proprietorial character is in the Commission's opinion not contradicted by the existence of broad discretionary powers in the social field. Where a State has opted for creating specific social rights as described above, their character must be taken into account when assessing whether a civil right was at issue within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. The right claimed by the applicant resulted from precisely formulated rules, in particular the Federal Invalidity Insurance Act and the Federal Old Age and Survivors' Insurance Act (see para. 48).

78. A second private law feature is the link of the insurance with the contract of employment. The insurance contributions are deducted from the salary, and the insurance thus forms one of the constituents of the relationship between the applicant and her employer. The Commission nevertheless notes that while the applicant was employed for a certain period of time, and contributions were thus deducted from her salary, also non-salaried persons pay contributions and receive pensions (see above, para. 50).

79. A third feature is the affinities of the Swiss invalidity insurance with ordinary insurance. The insured persons participate in the financing of the insurance. In the case of salaried persons, the contributions are calculated individually on the basis of their salary (see above, para. 50). Finally, the eventual pension is calculated individually on the basis of the average yearly income of the insured person concerned, though the legislation envisages a minimum and a maximum amount of pension (see above, para. 52). Thus, gaps in the contributions may affect the amount of pension granted.

80. The Commission has evaluated these various features. However, it is divided as to its conclusions.

a. Opinion of MM. Frowein, Busuttil, Schermers, Mrs. Thune, Sir Basil Hall, MM. Martinez, Rozakis and Mrs. Liddy

81. In these members' view, there are in the present dispute certain elements of public law. Nevertheless, the elements of private law cannot be overlooked, notably the fact that the insured persons contribute towards the insurance, that the salary determines the amount of contribution, and that for the calculation of pension the total amount of contributions will be considered. Taken together and viewed cumulatively, the features of private law appear predominant. They confer on the asserted entitlement the character of a civil right within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

82. Article 6 para. 1 (Art. 6-1) was thus applicable to the dispute over the applicant's invalidity pension.

b. Opinion of MM. Nørgaard, Trechsel, Ermacora, Jörundsson, Danelius, Almeida Riberio and Pellonpää

83. These members note that the invalidity pension claimed by the applicant is based on Section 28 para. 1 of the Federal Insurance Act according to which a person is entitled to a pension if his or her invalidity reaches a certain degree (see above, para. 51). The obligation does not result from any particular relationship other than that between a citizen and the State in general.

84. The dispute in the present case has few affinities with ordinary insurance. Thus, adherence to the system is compulsory. Persons without employment are either dispensed from contributions or must pay a limited fixed sum (see above, para. 50). The link of the insurance with a contract of employment is also remote. Rather, the invalidity insurance is governed by the principle of solidarity, which serves to protect the most vulnerable members of society.

85. The extension of the notion of "civil rights and obligations" to such disputes would not be consistent with the criteria established in the Court's case-law, based on assessment of the relative importance of features of public and private law. As a result, most disputes concerning such forms of assistance would be covered by the above concept, provided that the right in question was a personal and economic right. In that way, the scope of Article 6 para. 1 (Art. 6-1) of the Convention would be extended well beyond the principles set forth by the Court in the Feldbrugge and Deumeland jugments.

86. In these circumstances, the right claimed by the applicant cannot be regarded as a "civil right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. It follows that this provision is not applicable to the dispute over the applicant's invalidity pension.

D. Compliance with Article 6 para. 1 (Art. 6-1) of the Convention

87. The Commission has next examined the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention, that in the proceedings before the Swiss authorities she did not have an oral hearing, and that she only had insufficient access to the case-file.

a. Lack of an oral hearing

88. The first point to be examined is whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the lack of an oral hearing.

89. The applicant submits that the Federal Insurance Court should on its own accord have granted an oral hearing, as it would have been important to gain a personal impression of her.

90. The Government submit that, according to Section 85 para. 2 of the Federal Old Age and Survivors' Insurance Act a hearing is only granted, "if it is justified under the circumstances". In reality there are practically no hearings in such proceedings. As a general rule, both the Appeal Board and the Federal Insurance Court will consider that the circumstances are not such as to warrant a hearing. This is so in 99.8% of the cases before the Federal Insurance Court. In such a technical area pleadings at an oral hearing would bring nothing, as the decision is essentially based on documents of the file, such as the medical opinions, accounts of contributions etc.

91. The Commission has reached the conclusion that the answer to the question whether there should have been an oral hearing must be in the negative. It expresses this opinion by a majority of ten votes to five. However, the majority of ten members is divided as to the reasoning.

aa) Opinion of MM. Nørgaard, Trechsel, Ermacora, Jörundsson, Danelius, Almeida Ribeiro and Pellonpää

92. These members have already found that the right claimed by the applicant was not a "civil right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention for which reason this provision did not apply to the dispute over the applicant's invalidity pension (see above, para. 86). It follows that no issue arises in respect of the lack of an oral hearing.

bb) Opinion of Mr. Schermers, Mrs. Thune and Mr. Martinez

93. These members consider that Article 6 para. 1 (Art. 6-1) applies to the dispute at issue. However, the lack of an oral hearing in the circumstances of the present case did not amount to a violation of this provision.

94. Article 6 (Art. 6) of the Convention guarantees a certain number of procedural rights. It follows from the case-law of the Court that some of these are absolute in character, while others to a certain extent are subject to limitations or qualifications dependent on the particular facts of the case at issue (see Eur. Court H.R. Deweer judgment of 27 February 1980, Series A no. 35, p. 25 et seq., para. 49; Axen judgment of 8 December 1983, Series A no. 72, p. 12, para. 27; Ekbatani judgment of 26 May 1988, Series A no. 134, p. 13, para. 27). The Court has found that neither the letter nor the spirit of Article 6 (Art. 6) of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in an open court meeting (see Eur. Court H.R., Hakansson and Sturesson judgment of 21 February 1990, Series A no. 171, p. 20, para. 67).

95. The right to be heard within the meaning of Article 6 para. 1 (Art. 6-1) implies above all that a person involved in such proceedings has the full possibility to present arguments and statements supporting his or her claim. It further follows that a person is only actually heard if the courts concerned duly consider the submissions made.

96. In the majority of cases concerning civil rights this implies that the right to be heard includes the right orally to present one's views. Such a possibility must normally be seen to be in the interest of the person concerned. It is not, however, to be overlooked that there are cases and situations where the interest of the individual would be quite sufficiently protected through a court procedure on the basis of written material. In particular reasonings containing detailed technical facts and figures cannot well be conveyed orally.

97. In the present case the question may be asked whether the applicant can be seen as having waived her rights to an oral hearing, as she did not ask for it either before the Appeal Board of the Canton of Uri or before the Federal Insurance Board. According to the applicable legislation the possibility of having an oral hearing existed under Swiss law. These members would however prefer to leave this question open, recalling that practically no oral hearings are held before these courts which took decisions in respect of the applicant.

98. The practice before the Swiss Courts deciding on social security matters in a written procedure complies with the practice in a number of member States. This type of case can appropriately be decided by an independent court on the basis of written material. Such a practice cannot run counter to the principle of fairness outlined in Article 6 (Art. 6).

99. In social security proceedings today an oral hearing can often contribute only little to resolving the issues before domestic courts. As the circumstances of the present case demonstrate, the determination and calculation of an invalidity insurance requires information of a detailed and technical nature as to the medical state and the accounts of contributions of the person concerned. Often the parties submit contradictory information. In fact, if the courts are to comply with the requirement under Article 6 para. 1 (Art. 6-1) of the Convention duly to consider such information, it would in any case be necessary that the parties to such proceedings submit relevant documentation in writing.

100. It must further be considered that oral hearings delay proceedings before a court and make them more costly and often more burdensome for the individual. Finally, if practically all cases before the Federal Insurance Court are decided exclusively on the basis of written submissions in spite of the possibility under Swiss law to ask for an oral hearing, this would indicate that there is generally no strong wish for oral hearings in such cases.

101. In the present case the applicant had all possibilities of putting forward statements in writing, both before the Appeal Board of the Canton of Uri and the Federal Insurance Court, as to her entitlement to an invalidity pension. The courts duly considered her views when reaching their decisions. The applicant has not shown in what respect these possibilities did not suffice. The Swiss authorities therefore complied with their obligation under Article 6 para. 1 (Art. 6-1) of the Convention to hear the applicant.

Conclusion

102. The Commission concludes, by 10 votes to 5, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the lack of an oral hearing.

b. Access to case-file

103. The next point to be examined is whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of access to the case-file.

104. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that, compared to the opposing party, she had insufficient access to the case-file in the proceedings before the Swiss courts. Thus, she could only consult the case-file at the court registry. She also complains that the medical report of Dr. F. was not handed out to her.

105. The applicant submits that social security matters often involve complex facts. She should have been able to present the documents to specialists. Thus, it would have been essential for her to work with the case-file, or at least photocopies thereof, in the same manner as the social security administration which had the case-file in its office. Access to Dr. F.'s report would have enabled her to submit it to her own medical expert for examination.

106. The Government submit that under Article 4 of the Swiss Federal Constitution the parties must have access to all pertinent documents of the proceedings. The applicant first did not use the opportunity of consulting the case-file at the Court Registry. Later, on 30 November 1987 the applicant in fact did consult the case-file, and made photocopies thereof. Subsequently, the applicant's lawyer received the entire case-file. Thus, there was no breach of the principle of equality of arms since the applicant could effectively consult the case-file.

107. The Government further contend that access to a person's medical

case-file is subjected to the limitations in the second sentence of Article 6 para. 1 (Art. 6-1) of the Convention. Moreover, the expert opinion of the Medical Observation Centre, which the applicant could consult, constituted a virtually verbatim synthesis of the essential parts of other reports. Only in exceptional cases are the individual elements leading to the synthesis attached thereto. In fact, both the Appeal Board and the Federal Insurance Court only relied on the expert opinion of the Medical Observation Centre. These authorities did not have Dr. F.'s report at their disposal. The actual assessment of the applicant's medical situation by the national authorities falls outside the scope of control of the Convention organs.

108. The Commission has reached the conclusion that there has been no violation of Article 6 para. 1 (Art. 6-1) in respect of access to the case-file. It expresses this opinion by a majority of thirteen votes to two. However, the majority of thirteen members is divided as to the reasoning.

aa) Opinion of MM. Nørgaard, Trechsel, Ermacora, Jörundsson, Danelius, Almeida Ribeiro and Pellonpää

109. These members have already found that the right claimed by the applicant was not a "civil right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention for which reason this provision did not apply to the dispute over the applicant's invalidity pension (see above, para. 86). It follows that no issue arises in respect of access to the case-file.

bb) Opinion of MM. Frowein, Schermers, Mrs. Thune Sir Basil Hall, MM. Martinez and Rozakis

110. These members regard Article 6 para.1 (Art. 6-1) of the Convention as being applicable to the proceedings at issue, though they consider that the applicant had sufficient access to the case-file.

111. According to the Commission's case-law everyone who is a party to civil proceedings "shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage vis-a-vis his opponent" (see No. 7450/76, Dec. 28.2.77, D.R. 9 p. 108).

112. During the proceedings before the Appeal Board the applicant was offered the possibility to consult the case-file at its Registry, but did not do so (see above, para. 33). In the proceedings before the Federal Insurance Court she was informed on 23 November 1987 that the entire case-file was at her disposal at the Appeal Board; on 30 November 1987 she consulted the case-file and photocopied certain documents (see above, paras. 39, 40). Finally, on 11 December 1987 the case-file was transmitted to the applicant's lawyer (see above, para. 41).

113. Viewing the proceedings as a whole, these members consider that the applicant and later her lawyer were able effectively to consult the case-file throughout the proceedings. The applicant has not shown with regard to any particular document that the obligation to consult it at the Court Registry in fact proved to be an impediment to the fairness of the proceedings.

114. The applicant was not, therefore, placed at a substantial disadvantage compared with the opposing party.

115. Insofar as the applicant complains that she was not shown one

particular medical report of Dr. F., these members note the statement of the Federal Insurance Court in its decision of 21 June 1988 according to which the report was not actually part of the case-file (see above, para. 47). Moreover, Dr. F.'s report was summarised in the report of the Medical Observation Centre of 14 January 1986 to which the applicant had access (see above, para. 28).

Conclusion

116. The Commission concludes, by 13 votes to 2 , that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of access to the case-file.

E. Compliance with Article 14 taken together with Article 6 para. 1 (Art. 14+6-1) of the Convention

117. The final point at issue is whether there has been a violation of Article 14 of the Convention taken together with Article 6 para. 1 (Art. 14+6-1) of the Convention as a result of discrimination on account of the applicant's sex.

118. Article 14 (Art. 14) of the Convention provides, insofar as relevant:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex ..."

119. The Commission recalls that Article 14 (Art. 14) of the Convention only prohibits discrimination with respect to the enjoyment of the rights and freedoms set forth in the Convention.

120. The applicant has invoked Article 14 taken together with Article 6 para. 1 (Art. 14+6-1) of the Convention. She complains of discrimination on the ground of her sex. Thus, the Federal Insurance Court assumed in its decision of 21 June 1988 on the basis of "general life experience" that women with small children will give up salaried work. Such an assumption by the Federal Insurance Court was unwarranted in view of the conclusions of many scientific studies. The Federal Court failed to take evidence on this issue.

121. The Government contend that these issues relate to an appreciation of evidence which falls in principle to the national authorities and cannot concern the Convention organs. The national authorities did not discriminate against the applicant on the ground of her sex. Rather, the criteria established by law to assess the inability to work do not apply to a housewife for which reason other criteria become relevant.

122. The Commission has reached the conclusion that the answer to the question whether there has been a discrimination on account of the applicant's sex must also be in the negative. It expresses this opinion by a majority of nine votes to six. However, the majority of nine members is divided as to the reasoning.

a. Opinion of MM. Nørgaard, Ermacora, Jörundsson, Danelius, Almeida Ribeiro and Pellonpää

123. These members have already found that the right claimed by the applicant was not a "civil right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention for which reason this provision did not apply to the dispute over the applicant's invalidity pension (see above, para. 86). For this reason the applicant cannot rely on Article 14 taken together with Article 6 para. 1 (Art. 14+6-1) of the Convention.

b. Opinion of MM. Busuttil, Martinez and Rozakis

124. In these members' view, it is for a different reason that the applicant cannot rely on Article 14 taken together with Article 6 para. 1 (Art. 14+6-1) of the Convention.

125. These members consider that the right to a fair hearing enshrined in Article 6 para. 1 (Art. 6-1) of the Convention is procedural in character and that the applicant's complaint of discrimination is not one of form but of substance. The applicant does not claim that the Swiss courts discriminated against her in the conduct of the proceedings before them; she complains of considerations of the Federal Insurance Court in its determination of her invalidity pension.

126. The applicant contests the Federal Insurance Court's finding of a predominant probability that she would be active solely as a housewife and mother. This finding was not part of the Court's taking of evidence and as such covered by Article 6 para. 1 (Art. 6-1) but, as pointed out by the Government, constituted an element of the Court's evaluation of the evidence before it. According to the Commission's case-law, the evaluation of evidence "is a matter which necessarily comes within the appreciation of the independent and impartial courts and cannot be reviewed by the Commission unless there is an indication that the judge has drawn grossly unfair or arbitrary conclusions from the facts before him" (No. 7987/77, Dec. 13.12.79, D.R. 18 p. 31 at pp. 45 f.). Maintaining this view these members do not find in the present case that the Federal Insurance Court has drawn "grossly unfair or arbitrary conclusions" from the facts before it.

127. It follows that there is no right under Article 6 para. 1 (Art. 6-1) in respect of which the applicant can rely on Article 14 (Art. 14) of the Convention.

Conclusion

128. The Commission concludes, by 9 votes to 6, that there has been no violation of Article 14 taken together with Article 6 para. 1 (Art. 14+6-1) of the Convention in respect of discrimination on account of the applicant's sex.

F. Recapitulation

129. The Commission concludes, by 10 votes to 5, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the lack of an oral hearing (para. 102).

130. The Commission concludes, by 13 votes to 2, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of access to the case-file (para. 116).

131. The Commission concludes, by 9 votes to 6, that there has been no violation of Article 14 taken together with Article 6 para. 1 (Art. 14+6-1) of the Convention in respect of discrimination on account of the applicant's sex (para. 127).

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

JOINT DISSENTING OPINION OF MR. J.A. FROWEIN AND SIR BASIL HALL

We regret that we disagree with the majority in respect of two issues. While we consider that Article 6 para. 1 of the Convention applied to the dispute at issue, in the circumstances of the present case we reach a different conclusion as regards the necessity of an oral hearing under Article 6 para. 1 of the Convention, and in respect of compliance with Article 14 of the Convention taken together with Article 6 para. 1 of the Convention.

A. Lack of an oral hearing

We agree that the applicant could not have been expected to ask for a hearing. It cannot, therefore, be said that by not asking for a hearing the applicant waived her right to have one.

However, we have noted the applicant's submission that a hearing would have enabled her to give a personal impression of herself. We find that an oral hearing might indeed have shed light on certain aspects of the case dealt with by the various courts, for instance, whether after the birth of her son the applicant would have limited herself to household work; and whether the refusal of a pension would help her resolve her neurotic fixation that she was unable to work (see above, paras. 34, 46).

We consider it unnecessary to examine whether the applicant should have been afforded an oral hearing before both courts or only before one. It suffices to state that in proceedings concerning the determination of a person's civil rights and obligations, such as in the present case, Article 6 para. 1 of the Convention requires at least one such hearing, which the applicant did not have.

In this respect, therefore, there has been a violation of Article 6 para. 1 of the Convention.

B. Compliance with Article 14 taken together with Article 6 para. 1 of the Convention

Article 14 of the Convention only prohibits discrimination with respect to the enjoyment of the rights and freedoms set forth in the Convention. In this respect the applicant has invoked Article 6 para. 1 of the Convention.

We note, however, that the Federal Insurance Court, in its decision of 21 June 1988, regarded the contested statements, namely the predominant probability that the applicant would be active solely as a housewife and mother, as part of the evaluation of evidence (see above, para. 46). The respondent Government submit that this appreciation cannot concern the Convention organs.

According to the Convention organs' case-law, the right to a fair hearing under Article 6 para. 1 of the Convention extends to the taking of evidence. It is true that it is primarily the responsibility of the national courts to assess the evidence before them. However, the task of the Convention organs is to ascertain whether the proceedings viewed as a whole, including the way in which evidence was taken, were fair (see No. 7987/77, Dec. 13.12.79, D.R. 18, 31; Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 25).

In our opinion, the applicant can therefore rely on Article 14 of the Convention taken together with Article 6 para. 1 of the Convention.

Turning to the facts complained of, we note that the Federal Insurance Court, when assessing the evidence as to the applicant's invalidity pension, resorted to general life experience according to which married women ceased their professional activities after the

birth of a child and stayed at home as long as the child required complete care and education. In our opinion, had the applicant been a man who had recently become a father, the Court would indubitably not have assumed such a probability, and would therefore have assessed the evidence differently. The applicant can therefore claim that she experienced a difference of treatment on account of her sex.

For the purposes of Article 14 of the Convention a difference of treatment is discriminatory if it has no objective and reasonable justification. The Contracting States enjoy a certain margin of appreciation in assessing whether differences in otherwise similar situations justify a different treatment in law. However, the scope of this margin varies according to the circumstances of the case. In this respect, the Convention organs will bear in mind that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see Eur. Court H.R., Inze judgment of 28 October 1987, Series A no. 126, p. 18, para. 41).

It must further be considered that the advancement of the equality of the sexes is a major goal in Europe today (Eur. Court H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 38, para. 78). This is shown by the many relevant texts adopted in the Council of Europe, recently for instance Resolution 855 (1986) of the Parliamentary Assembly on equality between men and women. The Recommendation notes, inter alia, "the obstacles to equality between men and women ... in stereotyped attitudes" (para. 3) and it recalls "that equality can only be achieved by changing the roles of both women and men, and that to this end a new and more even division of labour and responsibilities between women and men must be brought about" (para.5).

In the present case the Federal Insurance Court justified its conclusion solely by reference to general life experience. Neither did it corroborate this conclusion with scientific research, nor did it compare it with any views maintained by the applicant concerning her own situation.

In our opinion, the Federal Insurance Court proceeded, in its appreciation of evidence, from a conception of the role of sexes which, insofar as expressed in such a general and sweeping manner, appears outdated and has no objective and reasonable justification, as would be required by Article 14 of the Convention.

In this respect, therefore, there has been a violation of Article 14 of the Convention taken together with Article 6 para. 1 of the Convention in respect of a discrimination on account of the applicant's sex.

DISSENTING OPINION OF MR. S. TRECHSEL

Although I am of the opinion that Article 6 does not apply to the dispute between the applicant and the Federal Invalidity Insurance, I have voted in favour of finding a violation of Article 14 in combination with Article 6.

At first sight, this may look contradictory. The Court, however, in the case "relating to certain aspects of the laws on the use of languages in education in Belgium", judgment on the merits of 23 July 1968, Series A no. 6, p. 33, para. 9, has proposed an extensive application of Article 14. It stated that although Article 6 "does not compel States to institute a system of appeal courts, ... it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason".

The present case is not entirely covered by the example as, in the view of the minority of the Commission to which I belong, Article 6 does not apply to the proceedings in question. Consequently, the application would be inadmissible as being incompatible rationale

materiae with the Convention. On that assumption, due to its accessory character, Article 14 does not apply either.

Where a member of the Commission has come to the conclusion that a specific guarantee is not applicable to the facts at issue, he or she will vote against admissibility. If the majority of the Commission nevertheless declares the case admissible, members having been in the minority will logically conclude that there has been no violation. It might even be more appropriate to abstain, but this is excluded by Rule 18 (3) of the Commission's Rules of Procedure.

Finally, it is also possible, in my view, for a member who is in the minority to incline to the view of the majority and express an opinion as to whether the Convention has been violated on the basis set by the majority of the Commission.

I adopted this attitude in my vote on the issue of discrimination. Following Mr. Frowein and Sir Basil Hall, I therefore found a violation of Article 14 in conjunction with Article 6.

Unfortunately, while there is widespread consent, if not unanimity, in the rejection of any discrimination based on sex, in practice many residues of such discrimination survive. I consider the approach of the Federal Insurance Court, according to which it may generally be presumed that women with small children will give up salaried work, to be such a residue. In my view, it is one of the important tasks of this Commission's view to contribute to the elimination of all forms of discrimination based on sex.

DISSENTING OPINION OF MRS. J. LIDDY

I agree with the dissenting opinion of Mr. Frowein and Sir Basil Hall concerning violations arising out of the lack of an oral hearing and discrimination on account of the applicant's sex.

Furthermore, I consider that there has been a violation of Article 6 para. 1 in respect of the access to the pulmological opinion of Dr. F.

The Invalidity Insurance Commission ordered the applicant's examination by the Medical Observations Centre (para. 26 of the Report). On receipt of the Centre's Report it was open to the Invalidity Insurance Commission to seek the full text of the Report of Dr. F., which was summarised by the Centre. The applicant sought all medical reports both from the Invalidity Insurance Commission (para. 32 of the Report) and from the Appeal Board (para. 35 of the Report) without success. It would have been extremely important to the applicant to have access to the medical records in order to seek a full rather than half-pension. Indeed the Federal Insurance Court regarded it as a certain defect that the pulmological report was not in the case-file.

I consider that the applicant was at a disadvantage vis à vis the other party, the Invalidity Insurance Commission, in that she, unlike that body, had no right of access to such an important document. The fact that the Report was not actually part of the case-file has influenced the majority of the Commission to find no violation of Article 6 para. 1 in this respect (para. 100 of the Report) but in my opinion this consideration does not resolve the fact that there was no equality of arms between the parties.

DISSENTING OPINION OF MR. E. BUSUTTIL

I have had the benefit of reading the dissenting opinions in this

case of Mr. Frowein and Sir Basil Hall, on the one hand and of Mrs. Liddy on the other.

I agree with the reasoning of Mr. Frowein and Sir Basil Hall concerning the necessity of an oral hearing and like them come to the conclusion that here has been a violation of Article 6 para. 1 of the Convention in this respect.

Similarly, I am of the opinion that there has been a further violation of Article 6 para. 1 not only because of inadequate access to the case-file by the applicant in the circumstances of the instant case but also because, as Mrs. Liddy rightly argues, the principle of equality of arms is here called into question in that the applicant, unlike the Invalidity Insurance Commission, had no right of access to the unabridged medical report of Dr. F. which she particularly wanted to consult.

DISSENTING OPINION OF MR. C.L. ROZAKIS

I agree with the dissenting opinion of Mr. Frowein and Sir Basil Hall in so far as they conclude that there has been a violation of Article 6 para. 1 of the Convention in view of the fact that the applicant did not have an oral hearing.

DISSENTING OPINION OF MRS. G.H. THUNE

I agree with the dissenting opinion of Mr. Frowein and Sir Basil Hall in so far as they conclude that there has been a violation of Article 14 of the Convention taken together with Article 6 in respect of discrimination on account of the applicant's sex.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
29 December 1988	Introduction of the application
9 January 1989	Registration of the application
Examination of Admissibility	
2 April 1990	Commission's decision to invite the Government to submit observations on the admissibility and merits of the application
26 June 1990	Government's observations
10 September 1990	Applicant's observations in reply
7 December 1990	Commission's decision to hold an oral hearing
30 May 1991	Oral hearing on admissibility and merits, Commission's decision to declare the application in part admissible and in part inadmissible

Examination of the merits

12 October 1991	Commission's consideration of the state of proceedings
18 February 1992	Commission's deliberations on the merits and final vote
30 March 1992	Commission's deliberations on the merits
7 April 1992	Adoption of the Report