JUDGMENT OF THE COURT
7 November 1985 *

In Case 53/84

Stanley George Adams, represented by Jennifer Horne, of the Middle Temple and Gray's Inn, Barrister, with an address for service in Luxembourg at the Chambers of E. Arendt, 34B rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by John Temple Lang, Legal Adviser, and K. Banks, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for the damage which the Commission allegedly caused to the applicant by failing to ensure that Switzerland, in criminal proceedings against the applicant in that country, respected *inter alia* the provisions of the Free Trade Agreement concluded between the Community and Switzerland,

THE COURT

composed of: Lord Mackenzie Stuart, President, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 11 July 1985,

gives the following

* Language of the Case: English.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 29 February 1984 Stanley George Adams brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for the damage which he claims to have suffered as a result of the Commission's failure to refer to the Joint Committee set up under the Free Trade Agreement concluded between the European Economic Community and the Swiss Confederation on 22 July 1972 (which is annexed to Regulation (EEC) No 2840/72 of the Council of 19 December 1972, Official Journal, English Special Edition 1972 (31 December), p. 190, hereinafter referred to as 'the Agreement') in connection with measures taken against him by the Swiss authorities. In addition, the applicant asks the Court to declare that the Commission should give notice of its withdrawal from the Free Trade Agreement if it is not successful, within a reasonable time, in convincing the Confederation to interpret correctly and respect international law as contained in that Agreement.

2 Before bringing this action the applicant had, on 18 July 1983, lodged an application, also pursuant to Article 178 and the second paragraph of Article 215 of the Treaty, which was registered under Case 145/83. The purpose of that first action was to obtain compensation for the damage which the applicant claimed to have suffered as the result of the acts and omissions of the Commission and its servants, regarding, in the first place, the disclosure of information and documents which made it possible to identify the applicant as the source of information supplied to the Commission concerning certain anti-competitive practices engaged in by his former employer, the Swiss company Hofmann-La Roche, and which led *inter alia* to his arrest, detention and conviction in Switzerland and, secondly, the Commission's failure to advise the applicant that he had the right to petition the European Commission of Human Rights in connection with those proceedings. That action was the subject of a judgment delivered on this day ordering the Commission to pay compensation to the extent of one half of the damage suffered by the applicant as a result of the fact that he was identified as the source of the above-mentioned information, but for the rest dismissing the application.

3 Since that the two actions are founded essentially on the same facts, it is appropriate to refer to the account of those facts contained in the judgment in Case 145/83.

4 The Court decided that for the time being the scope of the procedure should be limited to the question of the admissibility of the action and of the existence of a basis for liability. It must, however, be added that the damage for which the applicant claims compensation is described in the same manner in the two actions.

The claim for damages

5 In support of his claim for damages, the applicant points out in particular that the Free Trade Agreement is intended, *inter alia*, 'to provide fair conditions of competition for trade between the Contracting Parties' (Article 1 (b)) and that the Contracting Parties must refrain 'from any measure likely to jeopardize the fulfilment of the objectives of the Agreement' and must take 'any general or specific measures required to fulfil their obligations under the Agreement' (Article 22 (1) and (2)). The applicant adds that with regard to competition those obligations are defined in Article 23 (1), according to which 'abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof' is incompatible with the proper functioning of the Agreement in so far as it may affect trade between the Community and Switzerland.

6 The applicant further notes, on the one hand, that the Community stated in its declaration annexed to the Free Trade Agreement that it would assess any practices contrary to Article 23 on the basis of criteria arising from the application of, *inter alia*, Article 86 of the EEC Treaty, and, on the other hand, that the Court found, in its judgment of 13 February 1979 (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461) that the practices exposed by the applicant were contrary to Article 86.

7 In the applicant's view it follows that Switzerland was under a duty to amend the provisions of its penal code regarding the disclosure of confidential business information or, at least, to apply them in such a way that the applicant's action in reporting such unlawful practices to the Commission did not constitute a punishable offence.

8 In the applicant's view, by instituting criminal proceedings against him, Switzerland acted in breach of that obligation and it also infringed international law and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. The Commission ought therefore to have brought the matter before the Joint Committee pursuant to Article 27 of the Agreement, according to which either Contracting Party may refer a matter to the Joint Committee if it considers that a given practice is incompatible with the proper functioning of the Agreement within the meaning of Article 23 (1), and which provides that in the absence of agreement the Contracting Party concerned may adopt any safeguard measures it considers necessary to deal with the serious difficulties resulting from the practices in question. By referring Switzerland's infringements of the Agreement to the Committee, the Commission could have imposed sanctions on Switzerland, provided a possible remedy and, at the very least, certainly have repaired the damage caused to the applicant. If necessary, the Commission and the Council should have withdrawn from the Agreement. Inasmuch as it failed to take such measures, the Commission is guilty of an omission capable of giving rise to its liability *vis-à-vis* the applicant.

9 In his reply the applicant also claims that the Commission failed to provide legal representation for him before the Swiss courts in order to present to those courts his case under international law, the Free Trade Agreement and the abovementioned Convention of Human Rights. By providing that representation, the Commission could have prevented or minimized loss and damage to the applicant.

10 In the applicant's view his action for damages is not barred under Article 43 of the Protocol on the Statute of the Court of Justice of the EEC, in view of the fact that the five-year limitation period laid down in that provision could begin to run only from the date of the exhaustion of the applicant's remedies in Switzerland, namely 17 February 1982, when the Bundesgericht [Swiss Federal Supreme Court] dismissed his application to re-open the criminal proceedings.

11 The Commission raises an objection of inadmissibility. In its view, in so far as this action duplicates that in Case 145/83, it is inadmissible under the principle of *lis pendens*. In so far as this action is based on fresh issues which were not relied upon in Case 145/83 all the relevant matters of fact on which they are based were

known to the applicant when his first action was brought and they should therefore have been raised in Case 145/83. By bringing a second action, the applicant is in fact seeking to circumvent the Rules of Procedure.

12 In addition, the Commission points out that for any claim for damages under Article 215 of the EEC Treaty it is necessary to prove an illegal act by a Community institution which constitutes a serious breach of a superior rule of law for the protection of individuals. In its view, in the case before the Court the applicant has in no way indicated the legal basis of his claims; nor has he stated how the Commission's conduct could have constituted a failure to fulfil a duty owed to him, capable of having caused him injury. The Commission denies that an individual may claim damages from the Community on the ground that it failed to protect him against action taken by a non-member country on its own territory. Moreover, the Commission contends that the manner of conducting external relations is not subject to review by the Court, since the question as to what would have been the most vigorous and most appropriate diplomatic action is not one to which a legal answer can be given.

13 Finally the Commission stresses that any act or omission on its part upon which the applicant seeks to rely must have occurred before the date of the applicant's conviction by the Basle Criminal Court, namely 1 July 1976. It follows that the claim in this case is in any event barred by virtue of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC.

14 As regards the submission concerning the alleged failure on the part of the Commission to provide legal representation for the applicant before the Swiss courts, it must be borne in mind that, as is clear from the judgment in Case 145/83, the Commission paid all the costs of the proceedings, including the fees of the Swiss lawyers who assisted the applicant in the criminal courts. The applicant has not stated how the Commission could have provided further legal representation for him before the Swiss courts. That submission is therefore not supported by the facts.

15 As regards the submission that the Commission should have referred the matter to the Joint Committee set up under the Free Trade Agreement, it must be stated in the first place that a duty to take such a step could in any event be owed to the

applicant only if Switzerland had infringed the provisions of that Agreement in relation to the applicant. The provisions of the Agreement cited by the applicant are intended to provide fair conditions of competition for trade between the Contracting Parties and concern the means of putting an end to the abuse of a dominant position by one or more undertakings where such abuse is likely to affect that trade. It follows that the decision whether or not to refer the matter to the Joint Committee may not be taken except for purposes which have to do exclusively with general interests of the Community, following an assessment which is essentially political and which cannot be challenged before the Court by an individual.

16 It must be concluded that the applicant has not established the existence of a duty on the part of the Commission to refer to the Joint Committee the matter of the criminal proceedings instituted against him in Switzerland and that, accordingly, his submission has no foundation in law.

17 The claim for damages must therefore be dismissed as unfounded, and it is not necessary to rule on the objections that it is inadmissible and time-barred.

The claim seeking a declaration from the Court

18 As regards the second claim, it is sufficient to state that it is manifestly outside the jurisdiction of the Court in the context of a proceedings brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty and that therefore it must be dismissed as inadmissible.

19 It follows that the application must be dismissed in its entirety.

Costs

20 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in his submissions, he must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the applicant to pay the costs.

Mackenzie Stuart		Everling	Bahlmann	Joliet
Bosco	Koopmans	Due	Galmot	O'Higgins

Delivered in open court in Luxembourg on 7 November 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President