CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF BALMER-SCHAFROTH AND OTHERS v. SWITZERLAND

(67\1996\686\876)

JUDGMENT

STRASBOURG

26 August 1997

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67, B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher (place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

The Netherlands: B.V. Juridische Boekhandel & Antiquariaat A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC 's-Gravenhage)

SUMMARY[1]

Judgment delivered by a Grand Chamber

Switzerland – extension by Swiss Federal Council of licence to operate nuclear power station (Federal Act on the Peaceful Use of Nuclear Energy)

I. PRELIMINARY OBJECTION (applicants not victims)

Fact that Federal Council had declared admissible the objection the applicants wished to raise before a tribunal justified regarding them as victims.

Conclusion: objection dismissed (unanimously).

II. ARTICLE 6 OF THE CONVENTION

A. Government's preliminary objection (failure to exhaust domestic remedies)

In view of conclusion on applicability, not necessary to decide exhaustion of remedies issue.

Conclusion: unnecessary to give a ruling (unanimously).

B. Applicability

Right on which applicants had relied in substance – to have their physical integrity adequately protected from risks entailed by use of nuclear energy – was recognised in Swiss law.

Inasmuch as it sought to review whether statutory requirements had been complied with, Federal Council's decision had been more akin to a judicial act than to a general policy decision.

No doubt that the dispute had been genuine and serious.

Applicants had not established a direct link between the operating conditions of the power station and their right to protection of their physical integrity, as they had failed to show that they were personally exposed to a serious, specific and imminent danger – effects of measures which Federal Council could have ordered in the instant case hypothetical – neither dangers nor remedies had been established with a degree of probability that would have made outcome of proceedings directly decisive for right relied on by applicants – connection between that right and Federal Council's decision too tenuous and remote.

Conclusion: Article 6 not applicable (twelve votes to eight).

1. This summary by the registry does not bind the Court.

III. ARTICLE 13 OF THE CONVENTION

Same conclusion.

Conclusion: Article 13 not applicable (twelve votes to eight).

COURT'S CASE-LAW REFERRED TO

23.6.1981, Le Compte, Van Leuven and De Meyere v. Belgium; 26.6.1986, Van Marle and Others v. the Netherlands; 21.9.1994, Fayed v. the United Kingdom; 28.9.1995, Masson and Van Zon v. the Netherlands; 25.6.1996, Amuur v. France

In the case of Balmer-Schafroth and Others v. Switzerland[1],

The European Court of Human Rights, sitting, in accordance with Rule 53 of Rules of Court B[2], as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr J. MAKARCZYK,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr U. LÕHMUS,
Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 22 February and 27 June 1997,

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

PROCEDURE

1. The case was referred to the Court by the Government of the Swiss Confederation ("the Government") on 21 May 1996 and by the European Commission of Human Rights ("the Commission") on 28 May 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the

Notes by the Registrar

1. The case is numbered 67/1996/686/876. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 22110/93) against Switzerland lodged with the Commission under Article 25 on 14 June 1993 by ten Swiss nationals, Mrs Ursula Balmer-Schafroth, Mr Ueli Balmer-Schafroth, Mrs Luise Baumann-Büchi, Mrs Madeleine Pfander, Mr Daniel Pfander, Mrs Ursula Python-Hugener, Mr Gianni Python, Mrs Vreni Remund, Mrs Ursula Wanner and Mr Rainer Zur Linde.

The Government's application referred to Articles 32 and 48 of the Convention; the Commission's request referred to Articles 44 and 48 and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46). The object of the application and of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 and 13 of the Convention.

2. On 7 June 1996 the applicants designated the lawyer who would represent them (Rule 31 of Rules of Court B).

3. The Chamber to be constituted included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 10 June 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr B. Walsh, Mr I. Foighel, Mr A.N. Loizou, Mr A.B. Baka, Mr G. Mifsud Bonnici and Mr J. Makarczyk (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 15 November 1996 and the applicants' memorial on 18 November.

5. On 13 December 1996 the Chamber decided, in view, *inter alia*, of a request made by the Government in their memorial, to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 53). In accordance with Rule 53 § 2 (a) and (b), the Grand Chamber included as *ex officio* members the President and the Vice-President of the Court (Mr Ryssdal and Mr Bernhardt) together with the full members and the three substitutes of the original Chamber, the latter being Mr K. Jungwiert, Mr N. Valticos and Mr E. Levits. On 20 January 1997 the names of the additional eight judges were drawn by lot by the President, in the presence of the Registrar, namely Mr L.-E. Pettiti, Mr C. Russo, Mr A. Spielmann, Sir John Freeland, Mr M.A. Lopes Rocha, Mr P. Jambrek, Mr U. Lõhmus and Mr T. Pantiru. Mr Pantiru was unable to take part in the further consideration of the case (Rule 24 § 1).

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 February 1997. The Court had held a preparatory meeting beforehand. Before the hearing the applicants sent, with the Government's agreement, additional documentation to the Court.

There appeared before the Court:

(a) *for the Government*
Mr P. BOILLAT, Deputy Director, Head of the
International Affairs Division,
Federal Office of Justice, *Agent*,
Mr F. SCHÜRMANN, Head of the Human Rights
and Council of Europe Section,
Federal Office of Justice,
Mr P. KOCH, Legal Administrator, Legal Department,
Federal Energy Office,
Mr T. CLÉMENT, Legal Officer, Human Rights
and Council of Europe Section,
Federal Office of Justice, *Advisers*;

(b) *for the Commission*
Mr A. WEITZEL, *Delegate*;

(c) *for the applicants*
Mr R. WEIBEL, of the Berne Bar, *Counsel*.

The Court heard addresses by Mr Weitzel, Mr Weibel and Mr Boillat.

On 21 April 1997 the applicants forwarded a decision of the French *Conseil d'Etat* delivered on 28 February 1997 with their comments, to which the Government replied on 15 May 1997. In view of the fact that that decision, which was public, had been delivered after the hearing, the Court gave leave for it to be included in the case file.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. The applicants live in the villages of Wilteroltigen, Deltigen and Gümmenen, situated in containment zone no. 1 (*Alarmzone 1*) within a

radius of between four and five kilometres from the nuclear power station at Mühleberg (Canton of Berne). They either own or rent their homes.

A. The application for an operating licence

8. On 9 November 1990 the company which had operated the power station since 1971, the Bernische Kraftwerke AG ("the operating company"), applied to the Swiss Federal Council (the government) for an extension of its operating licence for an indefinite period and for permission to increase production by 10%. The application was published in the Official Gazette of 4 December 1990 together with a notice inviting persons satisfying the requirements laid down by section 48 of the Federal Administrative Proceedings Act (see paragraph 15 below) to file an objection.

9. More than 28,000 objections in all were sent to the Federal Energy Office, 21,000 of which came from Germany and Austria.

In their objection of 4 March 1991, to which several expert opinions were attached, the applicants requested the Federal Council to refuse an extension of the operating licence and to order the immediate and permanent closure of the nuclear power station. Relying in particular on section 5 (1) and (the former) section 10 (1) of the Nuclear Energy Act (see paragraph 12 below), they maintained that the power station did not meet current safety standards on account of serious and irremediable construction defects and that, owing to its condition, the risk of an accident occurring was greater than usual. In addition, they asked the authorities to obtain further data and in the meantime take certain provisional measures. With regard to the fact that under the applicable law the Federal Council would consider the application for an operating licence as an authority of both first and last instance, they pointed out that its decision could give rise to an application based on Article 6 § 1 of the Convention since it affected their civil rights.

10. On 3 September 1991 and 23 June 1992 the Federal Department of Transport, Communications and Energy rejected the requests for interim measures and for gathering the additional data.

B. The Federal Council's decision

11. On 14 December 1992 the Federal Council dismissed all the objections as being unfounded and, subject to compliance with various specified safeguards, granted an operating licence until 31 December 2002 and authorised a 10% increase in production. In its decision it relied on an expert report by the Central Office for Nuclear Safety, an independent report prepared at the request of the Federal Energy Office on the effects of the power station on the nearby river and opinions of the Nuclear

Technology and Safety Measures Section of the Federal Energy Office, the Federal Commission for the Safety of Nuclear Power Installations and the cantonal authorities.

The Federal Council found firstly that the objectors living in containment zone no. 1 were entitled to take part in the proceedings, unlike the objectors who lived further away from the power station, mainly in Germany and Austria.

It then recapitulated the factors which, under section 5 of the Nuclear Energy Act (see paragraph 12 below), justified refusing an operating licence or granting it subject to conditions and stated that applicants who satisfied all the statutory requirements were entitled to an operating licence.

It went on to note that although power stations built twenty years earlier certainly no longer met current technical standards, they could nonetheless be maintained and modernised so that they could continue to operate quite safely. In order to satisfy itself that this was so in the instance under review, the Federal Council considered each of the objections in turn. It found them to be unfounded.

With regard to the complaint based on the right to life protected by the Constitution, the Federal Council drew attention to the position under the Federal Court's case-law, whereby only deliberate infringements could constitute a breach of that right. That did not apply to the operation of a nuclear power station, at least so long as appropriate technical and operating procedures were adopted to prevent such an infringement and so long as these could reasonably be considered to provide a level of protection comparable to that existing in other generally accepted technical installations.

II. RELEVANT DOMESTIC LAW

A. The Federal Act on the Peaceful Use of Nuclear Energy

12. Under section 4 (1) (a) of the Federal Act of 23 December 1959 on the Peaceful Use of Nuclear Energy (“the Nuclear Energy Act”), a licence from the Confederation is required for the construction and operation of nuclear installations and for any changes in the purpose, nature or scale of such installations. Section 5 (1) provides that a licence must be refused or granted subject to appropriate conditions or obligations if that is necessary in order, in particular, to protect people, the property of others or important

rights. Section 6 provides that the Federal Council or a body designated by it decides licence applications. No appeal lies against its decisions.

13. Under the Federal Court's case-law, the safety of nuclear power stations can only be considered by the Confederation as part of its licensing procedures (Judgments of the Federal Court (*ATF*), vol. 119 Ia, p. 402).

B. The Federal Judicature Act

14. Section 97 of the Federal Judicature Act of 16 December 1943 provides that the Federal Court hears, as a final court of appeal, administrative-law appeals against decisions of the federal authorities. However, by section 99 (e), as worded at the material time, no appeal lay against the grant of a licence for technical installations to be brought into service.

C. The Federal Administrative Proceedings Act

15. Section 44 of the Federal Administrative Proceedings Act of 20 December 1968 lays down the principle that administrative decisions are appealable. By section 46, however, an appeal is inadmissible if it is made against a decision against which an administrative-law appeal lies to the Federal Court. Under section 48 (a) a person has *locus standi* to appeal if he is affected by the decision and has an interest worthy of protection in having the decision set aside or varied.

D. The Civil Code

16. The relevant provisions of the Civil Code read as follows:

Article 679

"Any person who sustains or is exposed to damage because an owner abuses his right may bring an action against that owner requiring him to restore the previous position or to take preventive measures, without prejudice to any damages."

Article 684

"1. When exercising their right, especially when carrying on industrial processes, owners are required to refrain from acting in a manner detrimental to neighbouring properties.

2. The following, in particular, are prohibited: emissions of smoke or soot, offensive smells, noises, and vibrations which are harmful and exceed the limits of the tolerance which neighbours must show to each other having regard to local custom and the situation and type of the buildings."

E. The Federal Expropriation Act

17. By virtue of section 1 of the Federal Expropriation Act of 20 June 1930, expropriations may be carried out "for the purposes of works that are in the interest of the Confederation or of a substantial area of the country and for any other public-interest aim recognised by federal law".

Section 5 (1) provides: "The following may be expropriated: rights *in rem* over land, rights arising from land ownership that concern relations between owners and occupiers of adjacent premises and the rights *in personam* of tenants or farmers of the property to be expropriated."

18. With regard to the latter provision, the Federal Court has held:

> "Actions brought under Articles 679 and 684 to 686 [of the Civil Code] ... are included among the rights which may be expropriated under section 5 ... If the emissions or other allegedly adverse effects result from the construction, in accordance with the applicable law, of a building in the public interest for which land has been expropriated, or are the consequence of using the building for its intended purpose, no private-law action lies for the purpose of obtaining an injunction or compensation. A claim for compensation for expropriation replaces the cause of action under private law and must be made to the expropriations judge, who has jurisdiction not only to assess compensation but also to rule on whether the right ... exists. An expropriating authority's refusal to commence proceedings may be challenged, at last instance, by means of an administrative-law appeal to the Federal Court." (*ATF*, vol. 116 Ib, p. 253)

In another judgment the Federal Court held:

> "By virtue of section 5 ..., rights arising from land ownership that concern relations between owners and occupiers of adjacent premises may be expropriated and be forfeited or restricted, temporarily or permanently, provided that the proportionality principle is complied with ..." (*ATF*, vol. 119 Ib, p. 341)

19. Section 5 of the Act has applied in the case of people living near very busy main roads who were concerned about pollution from exhaust fumes (*ATF*, vol. 118 Ib, p. 205). Under the Federal Court's case-law, compensation is awarded if the nuisance was not foreseeable and resulted in substantial damage and if the owner suffered special loss (loc. cit., p. 205). In order to assess foreseeability, it is necessary to determine whether the owner could reasonably have known of the future nuisance when he became the owner of the property (*ATF*, vol. 111 Ib, p. 234).

PROCEEDINGS BEFORE THE COMMISSION

20. In their application of 14 June 1993 to the Commission (no. 22110/93) the applicants alleged a violation of Article 6 § 1 of the

Convention in that they had not had access to a "tribunal" within the meaning of that provision and that the procedure followed by the Federal Council had not been fair. They also alleged a breach of Article 13 in that they had not had an effective remedy enabling them to complain of a violation of Articles 2 and 8 before a national authority.

21. The Commission declared the application admissible on 18 October 1995. In its report of 18 April 1996 (Article 31), it expressed the opinion that there had been a violation of Article 6 § 1 (sixteen votes to twelve) and that no separate issue arose under Article 13 (twenty-seven votes to one). The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

22. In the conclusion of their memorial the Government requested the Court to "hold that Switzerland ha[d] not violated the European Convention on Human Rights in respect of the facts which had led to the application brought against Switzerland by Mrs Balmer-Schafroth and nine others".

23. In their memorial the applicants requested the Court to find a violation of Articles 6 and 13 of the Convention and asked for Switzerland to be given an opportunity to put right that violation by reopening the proceedings.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION THAT THE APPLICANTS WERE NOT VICTIMS

24. In their first preliminary objection the Government argued that the applicants were not victims, because the consequences of the violations they complained of were too remote to affect them directly and personally.

25. The Court notes that on 29 February 1996, following the Commission's decision of 4 December 1995 whereby it declared inadmissible the application in the case of Noël Narvii Tauira and Others v. France (no. 28204/95, Decisions and Reports 83-B, pp. 112 et seq.), the Government (unsuccessfully) invited the Commission to apply Article 29 of the Convention in the present case on the ground that the applicants were

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* - 1997), but a copy of the Commission's report is available from the registry.

not victims. The Court therefore has jurisdiction to entertain this preliminary objection.

26. Under the Court's case-law, for the purposes of Article 25 the word "victim" means the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice, which is relevant only in the context of Article 50 (see, among other authorities, the Amuur v. France judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36).

In the instant case, the fact that the Federal Council declared admissible the objections the applicants wish to raise before a tribunal (see paragraph 11 above) justifies regarding them as victims. The first preliminary objection must therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

27. The applicants alleged a violation of Article 6 § 1 of the Convention, which provides:

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

As only the Federal Council had jurisdiction to consider the application for an extension of the operating licence for Mühleberg power station, the applicants had not been able to secure a ruling by a tribunal on their objections to the extension.

The Commission agreed in substance with that submission, whereas the Government contested it.

A. The Government's preliminary objection of failure to exhaust domestic remedies

28. The Government raised a preliminary objection of failure to exhaust domestic remedies. The applicants had not availed themselves of certain remedies which would have led to a ruling on their complaints by a tribunal in accordance with Article 6 § 1.

29. In view of its conclusion on the applicability of Article 6 § 1 (see paragraph 40 below), the Court does not consider it necessary to decide this issue.

B. Applicability of Article 6 § 1

30. The Government submitted that Article 6 § 1 was not applicable in the instant case. Inasmuch as the applicants' complaints were that their physical integrity was in jeopardy, they did not concern "civil rights and obligations" within the meaning of that provision.

31. The applicants pointed out that they had been parties in the proceedings before the Federal Council and as such had enjoyed the same rights as the operating company. The company's economic rights had been at stake in those proceedings, which therefore clearly came within the ambit of Article 6 § 1.

32. Under the Court's case-law, for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation"* in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question. As the Court has consistently held, mere tenuous connections or remote consequences are not sufficient to bring Article 6 § 1 into play (see the following judgments: Le Compte, Van Leuven and De Meyere v. Belgium, 23 June 1981, Series A no. 43, p. 21, § 47; Fayed v. the United Kingdom, 21 September 1994, Series A no. 294-B, p. 46, § 56; and Masson and Van Zon v. the Netherlands, 28 September 1995, Series A no. 327-A, p. 17, § 44).

33. The Court notes in the first place that the objection of 4 March 1991 shows that the applicants opposed the application for an extension of the operating licence because of the risks which they maintained such an extension entailed for the life and health of the local population, to which they belonged. At no stage in the proceedings had they claimed to have suffered any loss, economic or other, for which they intended to seek compensation (see paragraph 9 above). The right on which the applicants relied in substance before the Federal Council was the right to have their physical integrity adequately protected from the risks entailed by the use of nuclear energy.

34. The Court considers that this right is recognised in Swiss law, as is apparent in particular from section 5 (1) of the Nuclear Energy Act – to which both the applicants and the Federal Council expressly referred – and from the constitutional right to life, on which the Federal Council commented in its decision (see paragraphs 9, 11 and 12 above).

35. The Government, however, referring to the Van Marle and Others v. the Netherlands judgment of 26 June 1986 (Series A no. 101), maintained that the right concerned had not been the subject of a "genuine and serious

dispute", as it was not reviewable by the courts. Firstly, it was clear from the Federal Council's decision that what was in issue was scarcely of a legal nature but was, on the other hand, highly technical. Secondly, even supposing that the courts had the necessary knowledge and time to hear the case, the moral and political responsibility for the decision nonetheless lay with the political authorities alone as, for example, had also been the case with the acceptance of the nuclear moratorium by the Swiss people and legislature on 23 September 1990. That was why the proceedings in the instant case had taken place before the Federal Council. If, on the other hand, every decision capable of affecting a person's pecuniary interests had, in the last instance, to be taken by a court, democratic political debate would become meaningless.

36. The applicants argued that judicial evaluation of technical issues was part of the courts' ordinary daily work in cases concerning buildings, the environment or sites where hazardous materials were produced. In such cases, it was the court's duty to seek the assistance of an impartial expert to assess whether a particular risk was inevitable or, on the contrary, could be avoided or at least lessened by appropriate technical measures.

37. The Court notes that the objection of 4 March 1991 was directed at the application for an extension of the licence to operate Mühleberg power station. Although, as the Government indicated, the decision to be taken necessarily had to be based on technical data of great complexity – a fact which does not in itself prevent Article 6 being applicable – the only purpose of the data was to enable the Federal Council to verify whether the conditions laid down by law for the grant of an extension had been met.

That is indeed how the Federal Council proceeded. Thus in point 2 of its decision of 14 December 1992, in which it considered the conditions for the grant of the licence, the Federal Council recapitulated the factors which, under section 5 of the Nuclear Energy Act (see paragraph 12 above), justified refusing an operating licence or granting it on terms; it went on to add that an applicant who satisfied all the statutory requirements was entitled to an operating licence (see paragraph 11 above). In point 4 of its decision, relating to the continued operation of the power station, it said that it would simultaneously consider the merits of the objections, including the demands made in them, and ascertain whether the substantive conditions for the grant of an extension had been satisfied. Inasmuch as it sought to review whether the statutory requirements had been complied with, the Federal Council's decision was therefore more akin to a judicial act than to a general policy decision such as the nuclear moratorium in 1990.

38. Moreover, in the light of the above considerations and the fact that the Federal Council declared the applicants' objection admissible, there can be no doubt that the dispute was genuine and serious.

39. It therefore remains to be determined whether the outcome of the proceedings in issue was directly decisive for the right asserted by the applicants and in particular whether the link between the Federal Council's decision and the applicants' right to adequate protection of their physical integrity was sufficiently close to bring Article 6 § 1 into play, and was not too tenuous or remote.

40. It will be recalled that the applicants asked the Federal Council to refuse to extend the operating licence on the ground that, in their submission, Mühleberg power station had serious and irremediable construction defects, it did not satisfy current safety standards and its condition entailed a greater than usual risk of accident (see paragraph 9 above). They endeavoured to prove the existence of the alleged technical deficiencies and the need to lessen the resulting danger to the population and the environment in general by every available means. However, they did not for all that establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical. Consequently, neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants. In the Court's view, the connection between the Federal Council's decision and the right invoked by the applicants was too tenuous and remote.

Article 6 § 1 is accordingly not applicable in the instant case.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

41. The applicants maintained that the alleged lack of access to a court was also contrary to Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

42. Having already found that Article 6 of the Convention does not apply in the present case (see paragraph 40 above), the Court reaches the same conclusion with respect to Article 13.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection that the applicants were not victims;
2. *Holds* unanimously that it is unnecessary to rule on the Government's preliminary objection of failure to exhaust domestic remedies;
3. *Holds* by twelve votes to eight that Article 6 § 1 of the Convention is not applicable in the instant case;
4. *Holds* by twelve votes to eight that Article 13 of the Convention is not applicable in the instant case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 August 1997.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Pettiti, joined by Mr Gölcüklü, Mr Walsh, Mr Russo, Mr Valticos, Mr Lopes Rocha and Mr Jambrek;

(b) dissenting opinion of Mr Foighel.

Initialled: R. R.
Initialled: H. P.

DISSENTING OPINION OF JUDGE PETTITI, JOINED BY JUDGES GÖLCÜKLÜ, WALSH, RUSSO, VALTICOS, LOPES ROCHA AND JAMBREK

(T*ranslation*)

I voted with the minority in favour of finding that Article 6 of the Convention is applicable and would have found what, in the light of the Court's settled case-law, appears to be a clear violation of Article 6.

The Court has always held that where the rights of persons in need of protection from danger or harm are called into question and contested, any victim or potential victim is entitled to an effective remedy before an independent and impartial tribunal. However, in their reasoning in paragraph 40 of the judgment the majority confine themselves to finding:

> "… [the applicants] did not for all that establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical. Consequently, neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants. In the Court's view, the connection between the Federal Council's decision and the right invoked by the applicants was too tenuous and remote."

The issue in the present case was the danger that might arise if the safety measures provided for in the specifications of a public-works contract extending an operating licence for a nuclear power station were not properly checked. Nuclear power is a domain in which the dangers, uncontained by national borders, are both major and enduring; it need only be remembered that in 1997 western Europe continues to be affected by fallout from the Chernobyl accident.

The applicants' application did not impugn the "prerogative act" by which the Federal Council of the Swiss Confederation had chosen a nuclear power strategy, but the lack of any means of securing a review of the safety of the operating conditions when the operating licence was renewed.

It has been consistently noted in commentaries on the case-law on Article 6[1] that:

1. See in particular M.-A. Eissen, *Jurisprudence relative à l'article 6 de la Convention*, Council of Europe, Strasbourg, 1985; J.-C. Soyer and M. de Salvia, "Article 6", in. Decaux, Imbert and Pettiti (eds.), *Commentaire article par article de la Convention européenne des Droits de l'Homme*, Economica, Paris, 1995.

(1) where the right in issue concerns an aspect that is decisive for the dispute and its consequences, Article 6 is applicable;

(2) if Article 6 is applicable, there must be access to the courts, so that appropriate proceedings may be brought before a judicial authority, and an effective remedy; and

(3) the executive of a State is not a judicial authority and does not constitute an independent and impartial administrative or judicial tribunal.

The majority have, as it were, skipped the first, second and third points and do not even explain in what respect the connection was too tenuous and hypothetical or why the applicants had to show *a priori* that the danger was imminent.

Yet it was not disputed that the Federal Council was a "government executive", not a court. Even the Federal Council did not find the connection too tenuous.

It was not disputed that in their memorial the applicants pointed to a danger giving rise to pecuniary and non-pecuniary damage. In particular, they submitted:

> "With regard to dealing with minor and more serious incidents, the authorities have, as a precaution, distributed iodine tablets to the people living in the immediate vicinity, that is to say containment zone no. 1, including the applicants. If they take these tablets immediately in the event of an emergency, the adjoining residents directly affected can reduce the absorption of radioactivity through the respiratory tract (blocking effect) during the evacuation period. The population of the wider area surrounding the power station will only be given the iodine tablets if an incident actually occurs, because the authorities assume that in the event of a minor or major malfunction, there will be sufficient time to distribute them to the rest of the population. That indicates that accident scenarios are being contemplated that will affect only the people living in the immediate vicinity. In the event of a major nuclear accident, this measure would facilitate the evacuation of these people. In both cases, therefore, the inhabitants in the immediate vicinity are more seriously affected than the rest of the population: the danger arises earlier, the warning time is shorter, evacuation must start sooner and be effected more quickly, etc."

The applicants were not even afforded the opportunity of establishing before a court how serious the danger was and how great the resulting risk to them.

For Article 6 to be applicable, an applicant does not need to prove at the outset that a risk exists or what its consequences are; it suffices if the dispute is genuine and serious and there is a likelihood of risk and damage. It may suffice for finding a violation that there is proof of a link and of the potential danger (see the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, on the question of who is a potential victim). With regard both to applicability and to the existence of a remedy that is effective and accessible, the Court has always been firm on this point, even in disputes concerning minor interests, thus enabling decisions to be

reviewed by independent and impartial tribunals satisfying the requirements of Article 6. People are entitled to adequate judicial review.

The majority have not drawn any distinction between the prerogative act (a term they have not used expressly, but which is implicit), that is to say the original political decision to use nuclear energy, and the decisions relating to licences, public-works contracts and specifications, which are not sovereign attributes of the State and cannot escape judicial scrutiny.

What applies to the supervision of quarries, motorways and waste-disposal sites applies *a fortiori* to nuclear energy and the operation of power stations required to comply with safety standards. If there is a field in which blind trust cannot be placed in the executive, it is nuclear power, because reasons of State, the demands of government, the interests concerned and pressure from lobbyists are more pressing than in other spheres. George Washington said that governments, like fire, are dangerous servants and fearsome masters. In the past (1939–45), as in the present, we have been only too aware of the shortcomings of which authorities and operators have been capable, regardless of people's rights. That is why, in order to protect democracy, it was sought through the European Convention to establish machinery to review any administrative acts capable of causing injustice to the individual.

It has been held that anyone alleging a violation of the rights protected by the Convention is entitled to an effective remedy if the claim is arguable[1]. Admittedly, the State has complete discretion in organising the appeal system, making the arrangements for holding public inquiries, and providing for towns, local authorities and residents to take part, but supervision cannot be wholly left to the executive alone. The judiciary must be able to determine whether installations meet the requirements set out in the specifications.

The Court's case-law on whether the outcome of proceedings is decisive for civil rights is uniform and settled (see, in particular, the aforementioned study by M.-A. Eissen and the judgments in the cases of Benthem v. the Netherlands, 23 October 1985, Series A no. 97; Pudas v. Sweden, 27 October 1987, Series A no. 125-A; Bodén v. Sweden, 27 October 1987, Series A no. 125-B; Zander v. Sweden, 25 November 1993, Series A no. 279-B; Fayed v. the United Kingdom, 21 September 1994, Series A no. 294-B; and Süßmann v. Germany, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV; and the use of standard phrases such as: "The outcome of the dispute was directly decisive for the applicants'

1. See, in particular, the judgments in the cases of Klass and Others cited above; Boyle and Rice v. the United Kingdom, 27 April 1988, Series A no. 131; Plattform "Ärzte für das Leben" v. Austria, 21 June 1988, Series A no. 139; and Katikaridis and Others v. Greece, 15 November 1996, *Reports of Judgments and Decisions* 1996-V.

entitlement …", "The applicant could plausibly and arguably maintain …" and "The objections lodged by the applicant [against] the Government … gave rise to a '*contestation*' (dispute) over one of his 'civil rights'").

Those cases concerned only minor disputes over planning permission, the grant of licences and the terms on which they were operated and policed; they were on a wholly different scale from the problem of the dangers posed by incidents at nuclear power stations.

It will be recalled that the governments of several countries issued untrue statements following incidents at certain power stations, playing down the seriousness of the incidents and the risk of contamination harmful to health[1].

Even though, in the instant case, the danger of such transgressions was not *a priori* established, the fact remains that the Federal Council cannot be considered an independent and impartial tribunal; it is not comparable to a Supreme Administrative Court.

The majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle[2] and the principle of conservation of the common heritage. United Nations Resolution no. 840 of 3 November 1985 on the abuse of power was adopted as part of the same concern. Where the protection of persons in the context of the environment and installations posing a threat to human safety is concerned, all States must adhere to those principles.

I cannot agree with the majority view that the Federal Council's decision "was … more akin to a judicial act than to a general policy decision …" (paragraph 37). By its very nature the Federal Council is not a judicial body for the purposes of the Convention.

The Court's assessment of the tenuousness of the connection and of the absence of imminent danger is, in my opinion, unfounded. Does the local population first have to be irradiated before being entitled to exercise a remedy?

1. V. Maurutz, "*Les contre-experts du nucléaire*", *Le Monde,* 19 June 1997.
2. M. Déjeant-Pons, *Le droit de l'homme à l'environnement et la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, *Liber amicorum* Marc-André Eissen, 1995, pp. 79 et seq.; C. Lepage Jessua, "*L'impact de la Convention et de la Cour européennes des Droits de l'Homme sur l'évolution du droit de l'environnement*", report for the Commission of the European Communities.

In common with other international institutions, the Council of Europe, in its Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, stressed the special hazards of certain installations, which need to be obviated by new international-law measures and through the exercise of effective remedies.

The aforementioned report by Mrs Lepage Jessua (a former Minister of the Environment) points to the same needs and does so precisely on the basis of the case-law of the European Court, which she backs up with an extensive bibliography and a list of documents published by the European Parliament (pages 85–86 of the report). The minority were mindful of this body of legal opinion, which strengthened their view that there had been a violation of Article 6 (doc. Cour (97) 269).

When assessing the impact of the applicants' arguments based on the fact that Swiss municipalities had made applications to French administrative courts (doc. Cour (97) 201), the Swiss Government sought in their reply to maintain that the *Conseil d'Etat*'s powers were limited to reviewing whether the correct procedures had been followed in law, quite independently of the merits. On the contrary, the administrative courts have powers of review in this sphere equivalent to those they have in proceedings in which their full jurisdiction is invoked; when an application is made for judicial review, the court's powers extend to the merits (judgment of the Judicial Assembly of the *Conseil d'Etat* of 27 March 1997). Even the Creys-Malville judgment (28 February 1997) cited by the Swiss Government (like a 1991 judgment in which an expert report on safety conditions was taken into account) was delivered in connection with the Government's proposed change of use (research centre), so – contrary to what was argued by the Swiss Government – the procedural question concealed the substantive issue, namely the operation of the power station.

A finding that Article 6 was applicable and had been infringed was all the more necessary, to my mind, because European comparative law shows that the national legal systems of member States such as Belgium, France, Italy, Spain, Austria, Germany, etc., possess a whole array of review machinery for dealing with disputes of this type.

In some cases ordinary appeals or administrative appeals up to the Supreme Administrative Court have even resulted in the closure of power stations (Austria) or refusal of permission to reopen them (France, Superphénix).

It can be said that the national law of European States has raised the "standard" of court protection to a very high level and that the "standard" of the protection afforded by the European Convention on Human Rights cannot be lower.

With regard to Article 13, the majority say merely: "Having already found that Article 6 of the Convention does not apply …, the Court reaches the same conclusion with respect to Article 13" (paragraph 42).

Yet the majority's reasoning on Article 6 was not transposable to Article 13.

In any event, in my opinion, the Court should, as in the case of Klass and Others cited above, have given practical effect to Article 13, taking into account both the violation of Article 6 and the lack of a remedy for the purposes of the Convention and Article 13. I therefore also voted in favour of finding that Article applicable.

The case of Balmer-Schafroth and Others is not an isolated one. The fact that it has been referred to the European Court will certainly prompt additions to the already considerable volume of legal opinion on this subject.

Together with my colleagues in the minority, I would have preferred it to be the judgment of the European Court that caused international law for the protection of the individual to progress in this field by reinforcing the "precautionary principle" and full judicial remedies to protect the rights of individuals against the imprudence of authorities.

DISSENTING OPINION OF JUDGE FOIGHEL

I agree in principle with the dissenting opinion of Judge Pettiti. I do however, wish to stress the following, which explains why I have voted with the minority.

The majority have not drawn any distinction between, on the one hand, the prerogative act of the government – that it is to say the political decision to use nuclear energy and to grant or renew an operating licence within the framework of the law – and, on the other hand, the question whether the conditions and obligations laid down by law as the framework within which the government is entitled to grant or renew a licence have been complied with (see paragraph 12).

While Article 6 is not applicable to questions falling within the government's sovereign prerogative, there is nothing in the Convention or in the Court's case-law which excludes judicial review of the question whether a government has complied with the conditions and obligations laid down by law.

It is my understanding that the applicants were careful to limit their claim to a right to judicial review of this latter question and, because that right to review was denied them, I find that Article 6 has been violated.