

Pending cases against Switzerland

Application Number	English Case Title	Date of Judgment	Date of Definitive Judgment	Meeting Number	Meeting Section
41773/98	SCAVUZZO-HAGER AND OTHERS v. Switzerland	07/02/2006	07/05/2006	1020	4.1
55705/00	MC HUGO v. Switzerland	21/09/2006	21/12/2006	1020	4.2
58757/00	JAGGI v. Switzerland	13/07/2006	13/10/2006	1020	4.1
3688/04	WEBER v. Switzerland	26/07/2007	26/10/2007	1020	2
7548/04	BIANCHI v. Switzerland	22/06/2006	22/09/2006	1020	4.2
10577/04	KESSLER v. Switzerland	26/07/2007	26/10/2007	1020	2
17073/04	KAISER v. Switzerland	15/03/2007	15/06/2007	1020	3.A, 5.3A

Cases against Switzerland the examination of which has been closed in principle on the basis of the execution information received and awaiting the preparation of a final resolution

Application Number	English Case Title	Date of Judgment	Date of Definitive Judgment	Meeting Number	Meeting Section
27462/95	G.B. v. Switzerland	30/11/2000	01/03/2001	1020	6.2
27798/95	AMANN v. Switzerland	16/02/2000	16/02/2000	1020	6.2
28256/95	M.B. v. Switzerland	30/11/2000	01/03/2001	1020	6.2
31827/96	J.B. v. Switzerland	03/05/2001	03/08/2001	1020	6.2
33499/96	ZIEGLER v. Switzerland	21/02/2002	21/05/2002	1020	6.2
33958/96	WETTSTEIN v. Switzerland	21/12/2000	21/03/2001	1020	6.2
43874/98	LINNEKOGEL v. Switzerland	01/03/2005	01/06/2005	1020	6.2
53146/99	HURTER v. Switzerland	15/12/2005	20/02/2006	1020	6.2
54273/00	BOULTIF v. Switzerland	02/08/2001	02/11/2001	1020	6.2

55894/00	FUCHSER v. Switzerland	13/07/2006	13/10/2006	1020	6.2
73604/01	MONNAT v. Switzerland	21/09/2006	21/12/2006	1020	6.2
77551/01	DAMMANN v. Switzerland	25/04/2005	25/07/2005	1020	6.2
17671/02	RESSEGATTI v. Switzerland	13/07/2006	13/10/2006	1020	6.2

Pending cases against Switzerland

1013 (December 2007) section 4.1

41773/98 Scavuzzo-Hager and others, judgment of 07/02/2006, final on 07/05/2006

The case concerns the failure to conduct an effective investigation into the death of P., a relative of the applicants who died in police custody in July 1994 from complications brought on by an overdose of cocaine taken before his arrest (violation of Article 2).

The European Court in particular found that the authorities failed to ask the experts to determine whether the force used by police, though not lethal in itself, nevertheless caused or at least hastened P's death. Furthermore, the precise method by which P. was restrained had not established, the two police officers who had arrested him never having been questioned (see §83 of the judgment). In addition, the requirement of the investigators' hierarchical, institutional and practical independence was not met as the same two police officers who arrested the deceased conducted the initial phase of the investigations into his death (§ 82).

Individual measures: In accordance with the Committee of Ministers' well-established practice, the respondent state has a continuing obligation to conduct effective investigations, *a fortiori* in case of a finding of a violation of Article 2 (see in particular Interim Resolution ResDH(2005)20 in the case of McKerr and others against the United Kingdom).

- *Information was requested on measures taken or envisaged to remedy the shortcomings identified by the European Court, possibly through a new investigation.*
- *The Swiss authorities provided information on this issue. This information is being examined by the Secretariat.*

General measures (No examination envisaged):

- *Information provided by the Swiss authorities (February 2007):* Already before the judgment of the European Court, the right of an applicant to an effective and in-depth official investigation in which he must be sufficiently and effectively involved has been explicitly incorporated into Swiss law by a judgment of the Federal Court of 06/10/2005 (1P.440/2005), available under <http://www.bger.ch/index/jurisdiction> demonstrating the direct effect of the European Court's judgments.

On 29/03/2006, the judgment of the European Court was sent out to the judicial and police directorates of the Cantons. Furthermore, the judgment was published in *Verwaltungspraxis der Bundesbehörden* (Digest of Confederal Administrative Case-law), VPB 70.105, available via <http://www.vpb.admin.ch/deutsch/doc/70/70.105.html> and mentioned in the yearly report of the Federal Council on the activities of Switzerland in the Council of Europe in 2006.

- *Assessment: underway.*

The Deputies decided to resume consideration of this item at the 1020th meeting (4-6 March 2008) (DH), for the examination of individual and general measures.

1007 (October 2007) section 4.2

55705/00 McHugo, judgment of 21/09/2006, final on 21/12/2006

The case concerns the excessive length of criminal proceedings (from August 1987 to December 1998, *i.e.* more than of 11 years) (violation of Article 6§1). The applicant was eventually acquitted in 1998 but was awarded no monetary compensation by the domestic courts.

Individual measures: The European Court awarded the applicant just satisfaction in respect of non-pecuniary damage.

General measures: The European Court noted that Swiss law provides a remedy to complain about excessive length of proceedings, including the possibility for the courts to take the length of the proceedings into consideration in respect of the sentence if passed and of awarding monetary compensation if a causal link is demonstrated (§ 24 of the judgment).

• *Information provided by the Swiss authorities (10/08/2007):*

Article 437 of the draft Code of Criminal Procedure provides that

“1. Accused who are wholly or partly acquitted or in respect of whom an order dropping proceedings has been issued, are entitled to:

- a. compensation for expenses incurred in the reasonable exercise of their procedural rights;
- b. compensation for pecuniary damage sustained on account of their compulsory participation in the criminal proceedings;
- c. reparation for non-pecuniary damage sustained on account of a particularly serious undermining of their personality, in particular in case of deprivation of liberty.”

Article 438 provides that

“Criminal authorities may reduce or refuse compensation for non-pecuniary damage:

- a. where the accused is illegally or by mistake at the origin of the opening of the proceeding or render them more difficult by his conduct ;
- b. where the plaintiff is condemned to pay compensation to the accused, or
- c. where the expenses of the accused are insignificant.

2. In appeal proceedings, compensation or reparation for non-pecuniary damage may also be reduced if the conditions set in Article 435, 2, are fulfilled: i.e. “when the party who lodged the appeal obtained a decision more favourable, he may support the expenses if:

- a. the elements leading to a favourable decision were only produced in the appeal proceeding;
- b. the modification of the decision is not important.”

Parliament should approve this draft law in October 2007. Entry into force will nonetheless need some work in the Cantons and is thus scheduled for 01/01/2010.

• *Assessment:* *The Secretariat would like to know whether, in the opinion of the authorities, an individual in a similar situation to that of the applicant would receive compensation by the domestic courts on the basis of these provisions.*

In September 2006, the European Court's judgment was sent out to the authorities directly concerned. It was published in *Verwaltungspraxis der Bundesbehörden* (Digest of Confederal Administrative Case-law), VPB 70.113, available at <http://www.vpb.admin.ch/deutsch/doc/70/70.113.html> and will be mentioned in the annual report of the Federal Council on the activities of Switzerland in the Council of Europe.

The Deputies decided to resume consideration of this item at the latest at their 1020th meeting (4-6 March 2008) (DH), in the light of additional information to be provided concerning general measures.

1013 (December 2007) section 4.1

58757/00 Jäggi, judgment of 13/07/2006, final on 13/10/2006

The case concerns a violation of the right of the applicant, a Swiss national born in 1939, to respect for his private life due to the refusal of Swiss courts to authorise him to obtain DNA evidence from the remains of a person believed to be his father to establish certainty in discovering his parentage (violation of Article 8).

A paternity action against the alleged father of the applicant, A.H., brought on behalf of the applicant shortly before his birth by a state-appointed adviser was dismissed at first instance in 1948. The applicant, throughout his life tried to obtain reliable information as to whether A.H. was his father. During his lifetime A.H. always refused to submit to tests to establish his paternity. In 1997, the applicant, paying the fees, renewed the lease for A.H.'s tomb until 2016. In 1999, the applicant unsuccessfully sought the revision of the 1948 judgment, requesting a DNA test on the remains of A.H.

The European Court stated that an individual's interest in discovering his parentage does not disappear with age and that the protection of legal certainty alone is not a sufficient ground to deprive the applicant of his right to discover his parentage. Furthermore, in opposing the DNA test, A.H.'s family did not invoke any religious or philosophical reasons against this relatively unintrusive measure nor would such a testing constitute an interference with the right to private life of the deceased within the meaning of Article 8. Moreover, the right to rest in peace enjoyed limited protection as without the extension of the lease by the applicant, the body of A.H. would have been exhumed already in 1997.

Individual measures: In the proceedings before the European Court the applicant requested that the Court hold that he is entitled to revision procedures before the competent domestic authorities. The Court noted that the respondent state is free, under the supervision of the Committee of Ministers, to choose the means of fulfilling its obligation under Article 46 of the Convention insofar as they are compatible with the conclusions of the judgment. The respondent state informed the Secretariat that on 03/01/2007 the applicant had lodged an application for review with the Federal Court.

• *Development:* on 19/10/2007 the Secretariat received a copy of the decision of the Federal Court delivered on 30/07/2007 and is currently examining it.

General measures: In July 2006, the judgment of the European Court was sent out to the authorities directly concerned, and brought to the attention of the Cantons via a circular in November 2006. Furthermore, the judgment was published in *Verwaltungspraxis der Bundesbehörden* (Digest of Confederal Administrative Case-law), VPB 70.116, available via <http://www.vpb.admin.ch/deutsch/doc/70/70.116.html> and it will be mentioned in the yearly report of the Federal Council on the activities of Switzerland in the Council of Europe in 2006. In view of these measures taken and the direct effect of the Convention in Switzerland, it may be assumed that the requirements of Article 8 and the European Court's case-law will be taken into account in the future, thus preventing new, similar violations.

The Deputies decided to resume consideration of this item at their 1020th meeting (4-6 March 2008) (DH), for examination of the individual measures.

1013 (December 2007) section 4.1

7548/04 Bianchi, judgment of 22/06/2006, final on 22/09/2006

The case concerns a violation of the applicant's right to family life due to the inadequacy of measures taken by the Swiss authorities in implementation of an order for the return of his son under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

i) the circumstances

The applicant, an Italian national, married E.H. in Italy on 26/06/1998. They decided to live in Italy and a son was born to them on 28/11/1999. They separated in June 2002 and the mother left for Switzerland with the child without authorisation. Divorce proceedings were initiated in Italy on 25/07/2002. In February 2003, the Civil Court in Pistoia (Italy) awarded custody of the child to the applicant, who offered to share custody with the mother and also offered mediation, which the mother refused. In view of what had happened in June 2002, the applicant turned to the Swiss authorities in September 2002 to have his child returned, relying on the 1980 Hague Convention. Following a decision by the Swiss Federal Court of April 2003, ordering that the child be returned to Italy by 15 May at the latest, the mother and returned to Italy with her child. In December 2003 the applicant handed the child over to the mother for a scheduled access visit, and she once more abducted the child to Switzerland. The applicant again applied to the Swiss authorities under the Hague Convention, asking that his child be returned to Italy. On 7/01/2004, the Willisau District Court ordered the child to be kept in Switzerland until a final decision on his return had been taken and without granting the applicant visiting rights. The two sets of criminal proceedings were then stayed pending the outcome of the proceedings for return of the child. In April 2004, the Willisau District Court granted the applicant visiting rights of four hours a week, to take place at a neutral venue and in the presence of a representative of the supervisory authority or a police officer and a municipal welfare officer. A report by the supervisory authority states that the nine meetings between the applicant and his child between April and July 2004 had proceeded satisfactorily and that the applicant had complied with all the conditions laid down by the District Court. In July 2004 the Canton of Lucerne Higher Court, ruling on an appeal lodged by the applicant against the decision of the Willisau court rejecting his application to have the child returned to Italy, ordered that the child be returned by 31 July 2004 at the latest, if necessary with the help of the police. This decision was confirmed in October 2004 by the Swiss Federal Court.

On 10/08/2004, the Willisau prefecture instructed the cantonal police to establish the circumstances of the abduction and question the mother. A few days later, the mother contacted the police officer in charge of the case and said that she would come in for questioning provided that she was not retained in custody. She turned up alone and refused to divulge the whereabouts of the child, saying that she could be contacted at any time through her lawyer. After questioning her, the police office released her. Since September 2004, the Swiss authorities have made numerous attempts to trace the child and the mother.

ii) The Court's assessment

The European Court, after pointing out that the removal or retention of a child is considered unlawful under Article 3 of The Hague Convention, expressed doubts as to whether the decision by the Willisau District Court ordering the child to be kept in Switzerland pending the outcome of the proceedings on his possible return to Italy had been correct, given that it had to some extent endorsed the situation created by the illegal action by the child's mother. The Court also entertained doubts as to whether the decision of the District Court to conduct a fresh investigation of the case had been appropriate, given that it had already examined the case and that it had been determined by the Swiss Federal Court only a few months earlier and that no mention had been made of any fundamental change in the circumstances. The Court also said that it was not convinced that the attitude of the said court was compatible with the object and the purpose of the Hague Convention, which was to ensure the "immediate return" of children (§ 92). Nor was it convinced that the lapse of time between the lodging of the application for the return of the child and the court's ruling (almost four months) was compatible with the Hague Convention, which required the judicial and administrative authorities to act "expeditiously" in proceedings for the return of children. Moreover, for the entire duration of the proceedings pending before it, the Willisau court did not offer the applicant favourable terms of access of a kind which might have enabled him to maintain his ties with his child (§§ 93-94-96). As regards the police, the Court found it surprising that the officers in charge had allowed the mother to leave after questioning without handing over the child, despite the fact that she had already abducted him (§ 98). While noting the various attempts made by the Swiss authorities as from September 2004 to trace the child and the mother, the Court nevertheless considered that their attitude, during the period between the child's abduction in December 2003 and their last contact with his mother on 15 August 2004 had, on the whole, been somewhat lax and as such incompatible with the object and purpose of the Hague Convention and with its wording, which was particularly clear and rigorous. This passive attitude had caused a complete break-off in contact between father and son, which was liable to result in growing alienation between them and this could not be said to be in the child's best interests. Accordingly, the Court could not consider that the applicant's right to respect for his family life had been protected in an effective manner.

Individual measures:

- **Latest information:** Towards the end of October 2007 the Italian police and judicial authorities, acting in co-operation with the Swiss authorities, succeeded in finding the secret hiding place of L.H. and her children, including the applicant's son, in Mozambique. According to the information initially received by the police, mother and children had previously lived for two years on the island of São Tomé. On 26/10/2007 the mother was expelled from Mozambique for being in possession of forged travel documents but of no residence permit. A senior Mozambican police officer accompanied the mother, with her children, to Italy, where she was detained. Following a decision by the Pistoia Court, the applicant and his son are now together.

- **Action taken by the Swiss authorities:** The following action was taken:

- **by the courts:** 1) in September 2004, the Willisau District Court issued an international arrest warrant against the mother on the grounds of child abduction; 2) In January 2006, the mother applied to the Willisau Civil Court for divorce and custody of the child. She justified her failure to appear in person by sending in a doctor's certificate issued in the Dominican Republic, with photos showing that she was expecting another child. In June 2007, the Court dismissed her application, holding that the reasons she had given for not appearing in person were unjustified.

- **by the police and the administrative authorities:**

- 1) in June 2005, a "wanted" notice was sent out for the mother and the child, with the promise of a substantial reward;

- 2) Pictures and a description of mother and child have been placed on the Internet and in the "wanted" section of several Swiss and German police websites (<http://www.kapo.lu.ch>, <http://www.polizei.bayern.de>);

- 3) Various other enquiries are being made and have been intensified over the past few months.

- **Measures taken in Italy:**

- 1) In March 2005, the Pistoia District Court issued an international arrest warrant against the mother on the grounds of child abduction; 2) In June 2006 Pistoia Civil Court delivered its judgment, confirming the separation of the married couple and awarding effective custody of the child to the applicant and weekly visiting rights to the mother; 3) The Pistoia public prosecutor's department has asked the Swiss authorities for judicial and police assistance in finding the mother and the child.

- **Mediation proposal:**

- 1) In a letter to the head of the Lucerne criminal investigation department, dated 2/02/2007, one of the mother's lawyers offered mediation, a meeting with a mediator and representatives of the two parties. The federal authorities are awaiting a reply from the responsible police authorities in Lucerne.

2) In September 2007 the applicant informed the Secretariat that he had made an offer of family mediation through the General Consulate of Italy on 28/07/2007. This proposal has been forwarded to the Swiss Embassy in Italy and the Federal Department of Justice for information. It proposes that the child should be entrusted to a regional supervisory authority in Ticino and that the mother should continue to live with the child; the criminal proceedings would be stayed during the period of mediation.

General measures (No examination envisaged at this meeting): The judgment of the European Court was sent out to the authorities directly concerned and brought to the attention of the Cantons via a circular. It was also published in *Verwaltungspraxis der Bundesbehörden* (Digest of Confederal Administrative Case-law), VPB 70.115, available via <http://www.vpb.admin.ch/deutsch/doc/70/70.1115.html> and was mentioned in the yearly report of the Federal Council on the activities of Switzerland in the Council of Europe in 2006. According to information that has been received, a new law has been drafted proposing new measures to deal with cases of international abduction in Switzerland, particularly with a view to accelerating proceedings in cases of child abduction. This information is currently being assessed.

The Deputies,

1. noted with satisfaction that the action taken to find the applicant's child had been successful and that the applicant and his child were now reunited;
2. agreed consequently that no further individual measure was required in this case;
3. decided to resume consideration of the only remaining general measure, namely in the light of the draft law concerning "the implementation of the conventions on the international abduction of children as well as the adoption and implementation of The Hague conventions for the protection of children and adults", at their 1020th meeting (4-6 March 2008) (DH).

1007 (October 2007) section 2

17073/04 Kaiser, judgment of 15/03/2007, final on 15/06/2007

The case concerns the authorities failure to bring the applicant promptly before a judge following his arrest (violation of Article 5§3). The applicant was arrested and taken into police custody on suspicion of having brought a foreign woman into Switzerland and then encouraging her to work as a prostitute. She was presented to a judge after five days.

Individual measures: The Court considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. Moreover the Court noted that the applicant had not exhausted domestic remedies to obtain compensation for the three days of unlawful detention.

• *Evaluation: no further measure seems necessary.*

General measures: Domestic law provides that a judge must rule on the lawfulness of an individual's detention at the latest two days after his/her arrest. Nevertheless, the District Court of Zurich held that the five-day detention of the applicant was regular. The Federal court admitted that the applicant's detention was illegal but had to reject an appeal of the applicant for reasons of domestic procedure.

• *Evaluation: Dissemination of the Court's judgment to the District Court of Zurich, and to the investigative agents of the Zurich Canton, is awaited.*

The Deputies decided to resume consideration of this item:

1. at their 1013th meeting (3-5 December 2007) (DH), in the light of information to be provided on the payment of the just satisfaction, if necessary;
2. at the latest at their 1020th meeting (4-6 March 2008) (DH), in the light of information to be provided concerning general measures, namely dissemination of the European court's judgment to the District Court of Zurich.