

Between the protection of reliance and the principle of legality : discrimination against wives of Swiss abroad compulsorily insured at home

Autor(en): **Bernheim, Roger**

Objektyp: **Article**

Zeitschrift: **Swiss review : the magazine for the Swiss abroad**

Band (Jahr): **10 (1983)**

Heft 1

PDF erstellt am: **23.07.2024**

Persistenter Link: <https://doi.org/10.5169/seals-906862>

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cover page:

Saint Crispin, the patron of the bootmakers. Illustration from the publication «Neue Geschichte der Schweiz – und der Schweizer», see page 7.

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Between the Protection of Reliance and the Principle of Legality

Discrimination against wives of Swiss abroad compulsorily insured at home

In the «Neue Zürcher Zeitung» of 13th December, our colleague, Dr Roger Bernheim, published the article below which is of direct interest to Swiss women and men abroad, for the problem in ques-

tion is at the moment the object of negotiations by the Organization of Swiss Abroad. We are reprinting the text by courtesy of the author.

Biographical note

Roger Bernheim was born in Berne in 1925. After an apprenticeship as mechanic, he studied philosophy in Berne and in Paris, finishing with a doctorate. He became a journalist with the «Neue Zürcher Zeitung», first in New Delhi, then in Vienna, Rio de Janeiro and Moscow. At present he represents the important daily in London.

A distressing argument has arisen between a category of Swiss wives abroad and the Swiss Compensation Office in Geneva, concerning a question on AHV/IV (Old-age and dependents insurance and invalidity insurance). This disagreement is dragging on and is gradually becoming scandalous. The public in Switzerland is hardly aware of the matter, understandably so, for relatively few people are affected and those live mainly abroad. First of all it concerns the wives of Swiss citizens working abroad for a Swiss company. They get paid by the firm in Switzerland and are therefore insured compulsorily with the AHV/IV, paying contributions in Switzerland. Secondly, it relates to the wives of employees of the Confederation abroad, who are also insured compulsorily, mainly of the diplomatic and consular services. The exact number of wives affected is not known. But it should be somewhere about 10 000, although in all probability,

only some thousand women would directly be affected and suffer damage due to this legal discrimination.

Official statements are refuted

For thirty years, the competent consular services abroad have told the women concerned that it was not necessary for them to join the voluntary AHV/IV scheme for Swiss abroad, as insurance cover of their husbands extended to them, too, in the same way as in Switzerland. This information was given by the country's representatives on the basis of decisions by the Federal Insurance Tribunal and of statements made by the competent authorities, mainly by the Federal Office for Social Insurance and by the Federal Compensation Office in Berne, which deals with AHV benefits for the federal personnel. In 1981, a change in the legal interpretation was made overnight, and the wives concerned were informed that, contrary to the official declarations over the last 30 years, they were not insured and that they should have joined the voluntary scheme for Swiss abroad. They could now join this scheme, provided they were not yet 51, but according to the regulations, their enrolment

would have no retrospective value.

Wives and children discriminated against

This has disadvantages for those concerned. The retired couple's pension and the widow's pension are not affected. It only concerns any possible independent insurance claims by the wife as, for instance, if she reaches pensionable age before her husband, if there is a divorce, or if she becomes an invalid. In these cases, the years spent abroad and not being insured will not be taken into account when working out the benefits. There may be no entitlement to a full pension at all, at best only a reduced one. Also affected are any possible claims on behalf of the children, especially in respect of the mother's orphan benefits.

It goes without saying that the women affected would have joined the voluntary insurance scheme immediately at the outset of their residence abroad if they had been given the new information then and not the very opposite of it. After all, all that is required is simply to fill in a short form. No costs are entailed, and if the wife is not earning, she does not have to pay any insurance contributions either – exactly as in the obligatory insurance. In view of this, the refusal by the authorities to grant the women concerned full retrospective validity of their subsequent enrolment, looks like excessive legal formalism.

Change in legal judgement

The Swiss Compensation Office in Geneva, which is competent in these matters, is of different opinion. It states that the legal basis has not changed since the AHV Law became operational in 1948. The wording of the relevant statutory article, viz. Article I

of the AHV Law, has remained unchanged; but the interpretation of this article, in fact to the very opposite, has changed as is evident from certain legal judgements, in other words, the meaning of the law which, together with the wording of it, provides the legal basis.

On 6th August 1980 and in subsequent cases, the Federal Insurance Tribunal, basing its judgement on Article I of the AHV Law, declared that the insurance status of a Swiss citizen abroad insured under the compulsory insurance at home, did not extend to his spouse («Zeitschrift für die Ausgleichskassen der AHV» etc ZAK 1981, p. 337 succ.). Yet on 14th November 1958, the same Tribunal, based on the same article, had decided the very opposite, that the insurance status of a husband «abroad as inside Switzerland» and «in the compulsory as in the voluntary AHV insurance» extended to the wife (ZAK 1960 p. 85). The Tribunal confirmed this interpretation in a further judgement on 15th April 1964 (unpublished). Strangely, the Tribunal in its contrary judgement of 6th August 1980 did not refer to the two previous judgements, nor did it mention any reasons for the change in the legal interpretation.

Original intention of the legislator...

The interpretation expressed in the two judgements of 1958 and 1964 corresponded to the intention of the legislator. The Federal Insurance Tribunal itself referred to this in a later judgement (ZAK 1981/p. ee8 succ.). When preparing the draft of the AHV Law, Parliament insisted that Paragraph 1c of Article 1 concerning the Swiss abroad – this is the one at the centre of the controversy – was aimed at guaranteeing «Swiss citizens and their families» conti-

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nued cover under the AHV. The new interpretation of the law as expressed in the judgement of 6th August 1980 is in exact contradiction with the meaning of the legal paragraph as intended by the legislators.

The Federal Department of Foreign Affairs (EDA) adhered to the interpretation as expressed in the two judgements by the Federal Insurance Tribunal of 1958 and 1964. Consequently, the embassies and consulates abroad also acted upon this in the same way. It is their task to inform the Swiss resident abroad in this matter, according to the «directions regarding the voluntary insurance for Swiss abroad» issued by the Federal Office for Social Insurance.

... and the interpretation by the Administration

At that time, the same interpretation was upheld also by the Federal Office for Social Insurance. In a statement to the EDA of 9th September 1964, that Office decidedly contradicted the opinion expressed by a consular official abroad that the insurance status of a Swiss abroad insured under the compulsory AHV did not extend to his wife. The Office stressed that the wife was insured automatically. This interpretation was also upheld – right up to 1982 –, in its «Merkblatt über die freiwillige Versicherung für Auslandschweizer» (leaflet on the voluntary insurance scheme for Swiss abroad) which is handed to all Swiss abroad when they register with their Embassy or Consulate. Furthermore, in paragraph 5 of this leaflet, it even says that the wives concerned cannot join the voluntary insurance at all. It is only since 1982 that the Federal Office has issued the leaflet in lettered form, and now those wives are recommended to enrol in the voluntary scheme.

The Federal Compensation Office in Berne, which is responsible for dealing with the AHV benefits of the federal personnel, always represented the old interpretation. As late as 1975 and again in 1976, it confirmed in a statement to the Federal Department of Foreign Affairs that «wives of Swiss citizens abroad insured under the compulsory AHV are treated the same way as the wives of Swiss citizens resident in Switzerland and are therefore insured.»

The Compensation Office in contradiction with itself

That was the interpretation of the law at that time. The judgement passed by the Federal Insurance Tribunal of 6th August 1980, therefore, represents a change in the legal interpretation and an about turn. May a Tribunal change its mind in the course of years? Yes, it may. But then its new interpretation of the law may not be used retrospectively to a state which the Tribunal itself helped previously to bring about. The Swiss Compensation Office in Geneva, which maintains today that the legal basis has never changed, stumbled over the turn about made by the Insurance Tribunal. On 17th March 1982, it informed one of the women affected that «wives of Swiss citizens abroad compulsorily insured are treated the same way as the wives of Swiss citizens resident in Switzerland». Three weeks later, on 8th April, it revoked in a new letter what it had written and informed the applicant that the opposite of the previous statement was relevant.

In spite of all this, the Compensation Office insists that nothing has changed since 1948. Possibly – it has written to the complaining women – the official bodies may at times have given the wrong information; but those affected «could not derive any legal rights from asserted wrong informa-

tion». The law and not some information deviating from it determined the citizen's legal position.

Incorrect information and the protection of reliance and trust

There can be no question of «asserted wrong information», and this not only because of the grammatical nonsense of this formulation. There is no assertion, but simply a statement of fact. The EDA itself confirmed in its official report to the AHV/IV appeals commission of 31st August 1982 that its representations abroad – up to 1981 and on the basis of the instructions by the authorities – had given the information today declared as incorrect, not only in the odd case but in general. The EDA added: «These incorrect particulars, therefore, not only apply to some individual cases but to the whole category mentioned, i.e. the wives of all the Confederation's employees abroad as well as those of all compulsory insured Swiss resident outside Switzerland». The proof that this is so had been given long ago, as according to the Federal Department of Foreign Affairs, all its employees abroad from the chancery secretary right up to the Ambassador had themselves without exception acted according to the old interpretation and had not asked their wives to join the voluntary insurance scheme.

Given these facts, the women concerned have evoked the principle, accepted by the Federal Court, that «the protection of reliance and trust is to be valued more highly under certain circumstances than the principle of legality». According to the legal judgement by the Federal Court, the citizen, on the basis of the «Treu und Glauben» principle (trust and faith), «is entitled to the protection of justified trust in and reliance on the assurances by the

authorities, provided that the office which gave the information, was competent to issue such information; that the citizen was not in a position to realise the incorrectness of the information; and that, relying on the information, he had made some dispositions which could not be cancelled.» (BGB 961, p. 15 succ.).

Privileges for federal employees?

These prerequisites have been satisfied. Yet this does not prevent the Compensation Office from wanting to preclude the protection of reliance and trust notwithstanding, by referring to other legal paragraphs. And now, just as this battle of paragraphs is raging, something quite new happens suddenly which turns the whole matter already considered scandalous by people in highest authority, into a real scandal. The Federal Council accepts that

an injustice has been committed, but for the moment it protects its own personnel. It made the following resolution: «If the years spent abroad without being insured should not be taken into account by the AHV appeal bodies, the Confederation would accept any damages to the wives and children of its employees abroad, provided they accrued from incorrect or incomplete information by the federal authorities.» (Federal Council decree of 19th May 1982).

Why only the damages of the federal employees: Why not also those of the Swiss abroad who have been affected in the same way by information from federal authorities, but who are not employed in federal service? It is true that the Federal Council as employer has special obligations. But do these exempt it from the liability laid down in the Federal Law concerning the responsibility

of the Confederation? According to this law, the Confederation is liable for damages which are inflicted on third persons by an official in the course of his official duties. On third persons, not only federal employees.

Trying to find a way out

One has to say that the Federal Council is trying to find a solution also for wives of others not in the service of the Confederation. One visualizes temporary regulations to the AHV/IV Law, which should afford all women concerned the possibility of retrospective enrolment in the voluntary insurance scheme. The special committee of the Federal AHV/IV Commission has already been studying a relevant draft, and the Commission itself should consider this in spring, upon which the proposal should be submitted to the two Chambers.

But the way things work in Berne,

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these temporary regulations can come into force at the earliest in 1984. In the meantime, expected benefits are refused, income relied upon fails to arrive. An invalid wife who had been paid invalidity benefits according to the old interpretation of the law, has been asked by the Compensation Office and the Federal Office for Social security for the repayment of benefits received on the basis of the new legal interpretation – a total sum of Fr. 37 000.–.

Background

The authorities refer to the law. But the change in legal interpretation made by the Federal Insurance Tribunal on 6th August 1980 was not based on legal grounds. It resulted from reasons of «staatshaushälterischer Zweckdienlichkeit», i.e. serving the purpose of state expediency. The promulgation by the Federal Office for Social Insurance to the Tribunal was the basis on which the Court built its judgement.

In this promulgation the Federal Office for Social Insurance advocates the thesis that the extension of the insurance status of a compulsorily insured Swiss abroad to his wife could have undesirable effects on the wives living abroad of foreign workers in Switzerland. According to the Federal Office, the clauses of equal treatment might come into play, which figure in the agreements on social insurance which Switzerland has concluded with seven other states. From this clause of equal treatment, entitlement might accrue to the wives of foreign employees, so that the insurance status of the husband would have to be extended to the wife, too. This is the reason why the Federal Office for Social Insurance «fears for the financial future of the Swiss social institution».

The Federal Office for Social Insurance is in charge of the pre-

paration of Switzerland's interstate agreements on social insurance. Most of the seven agreements mentioned were concluded in the 'fifties and the 'sixties, all of them before 1975.

At that time, where was the concern for the financial future of

the Swiss social institution, demonstrated today by the Federal Office? When the Federal Office concluded the seven interstate agreements at the time, it ignored that the clause on equal treatment could bring undesirable results in connection with the AHV Law.

PUBLICITY

Retirement in Switzerland: An Interesting Project

Do you know Aigle, a town which is among the most attractive in French-speaking Switzerland. In the Middle Ages, an imposing castle was built which today houses the Wine Museum. The picturesque streets dating from that time, still exist as a pedestrian precinct. The town offers the same advantages as a larger town with all desirable shops and service centres. In short, a small town which one can only find in Switzerland, quiet, clean, lively. Situated at an ideal altitude of 400m above sea level, it enjoys a mild climate, excellent means of communications, a well-known golf course nearby. It lies between Montreux and Lavoy-les-Bains, not quite half an hour by train from Lausanne.

These extraordinary advantages induced a small group of contractors and enthusiasts to establish a settlement on the outskirts of the town, mainly for the retired of all ages. The number of people who face realistically the moment in their lives when tiredness, impeded health or simply fearing some weakness which would not allow them to live alone any more, is considerable. There is nothing worse than to have to deal with anonymous staff at some oldpeople's home, to lose one's independence, not to be able to take decisions oneself or to lose one's own initiative. All this will be spared the future inhabitant of the Community of Aigle. They select a flat to their taste, furnish it with their own furniture and familiar objects and run their own car. Everyone lives according to taste and accustomed comfort. One may go out whenever one likes, eat where one wants (at home, at the restaurant of the Community or away) without anybody interfering on one's business. According to one's disposition, one may take part in the activities of a group of friends, organize meetings, express one's opinion and make proposals. All this without any additional cost, inspite of the luxurious establishment, the gardens and various dependances. And above all, one may enjoy the security which is provided by the permanent medical service which offers help quickly at any time, day or night.

Under these circumstances, there is no point in waiting before securing a flat. Especially those Swiss resident abroad who visualize retirement in Switzerland at a later date, could use their reserved flat as holiday home or let it to third parties until such time as they want to use it for a longer period or permanently.

Which are the aims of the initiators of the Community? It is thanks to them only that people of a certain age can enjoy their retirement and remain optimistic and resolute as the name of «Les Chênes Verts» signifies.

Otherwise it would have included the necessary provisos in the agreements, as has been done in other connections and also in the agreement on social insurance concluded with Norway in 1979. In 1979, therefore, when the agreement with Norway was con-

cluded, the Federal Office had noticed that the clause on equal treatment might have undesirable results, as long as the old interpretation of the law regarding the wives of compulsorily insured Swiss citizens abroad prevailed. The Insurance Tribunal on its part

had not yet made the change in the legal interpretation.

The wives of Swiss abroad, therefore, have to suffer for mistakes which the Federal Office for Social Insurance made when preparing the interstate agreements on social insurance.

New History of Switzerland – and the Swiss

A bold realization at federal level.

Since details and associations of daily life were often not known, history was compiled and taught according to dates of battles, important diplomatic events, big catastrophes and revolutions. Nowadays, one is far more sensitive to what happens in economic, social and cultural life.

In the «New History of Switzerland – and the Swiss», the above-mentioned aspects have been reconciled, which makes this collective work the helvetic literary event of the year. This all the more, as it is the first time that a Swiss history book is published at the same time in German, French and Italian. Thus all regional patriotic bias has been avoided, although the eleven authors did not always have an easy passage to present certain difficulties in the territorial development of Switzerland in the course of the centuries, for, as an example, history is not seen the same way by the Bernese as by the Vaudois.

Ten historians, Georges Andrey, François de Capitani, Pierre Ducrey, Peter Gilg, Peter Habluetzel, Hans-Ulrich Jost, Martin Koerner, Ulrich im Hof, Guy Marchal, Nicolas Morand and Roland Ruffieux worked according to directives under the patronage of a learned committee chaired by Jean-Claude Favez, Professor of History at Geneva University. The complete work comprises



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and Switzerland in the centre of her place within Europe. It is not only the history of an elite strata of Society, but also of the people and the masses who may not necessarily have left archives to posterity.»

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The first volume was published in November 1982, the second one in February 1983, and the third will appear early in April.

The total work comprises more than 1000 pages, 550 illustrations, tables and maps.

The Swiss living abroad will be able to purchase the work at a preferential price until 30th April 1983 – Fr.129.– (price per volume Fr.43.– instead of Fr.50.–).

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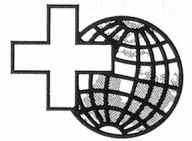
In view of the wide interest in the article on the First Biennale of Swiss Painters Abroad, which appeared in the issue of December 1982, we have pleasure in giving

you the address of the gallery which organized the exhibition: La Maison des Arts, 1026 Den- ges/Lausanne, Switzerland. You will be pleased to learn that a

second biennial exhibition will be organized in 1984. Details will be given in this periodical in due course.

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