

In the case of Scherer v. Switzerland*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr I. Foighel,
Mr J.M. Morenilla,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr G. Mifsud Bonnici,
Mr D. Gotchev,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 28 January and 23 March 1994,

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

* Note by the Registrar. The case is numbered 19/1993/414/493. 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.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 13 April and 3 May 1993 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 17116/90) against Switzerland lodged with the Commission under Article 25 (art. 25) by Mr Bruno Scherer, a Swiss citizen, on 6 August 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application 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 para. 1, 8 and 10 (art. 6-1, art. 8, art. 10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr Ludwig Minelli, Rechtsanwalt, who had acted for the applicant before the Commission, informed the Registrar on 3 May 1993 that his client had died. On 24 May 1993 he notified the Registrar that the applicant's executor wanted the proceedings to continue and had appointed him as his representative (Rule 30). For reasons of convenience Mr Scherer will continue to be referred to in this judgment as "the applicant". In the proceedings before the Commission he was designated by the initial S., but his counsel has consented to the disclosure of his identity.

3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 April 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr A. Spielmann, Mr I. Foighel, Mr J.M. Morenilla, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the registry, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 30 September 1993 and the applicant's memorial on 4 October 1993. On 2 December 1993 the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

On 1 July 1993 the President had given the applicant leave to use the German language (Rule 27 para. 3).

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 January 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr O. Jacot-Guillarmod, Assistant Director of the Federal Office of Justice,	Agent,
Mr J. Lindenmann, Department of European Law and International Affairs, Federal Office of Justice,	Counsel;

(b) for the Commission

Mr M.P. Pellonpää,	Delegate;
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(c) for the applicant

Mr L. Minelli, Rechtsanwalt,	Counsel.
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The Court heard addresses by Mr Jacot-Guillarmod, Mr Pellonpää and Mr Minelli, and also replies to a question put by one of its members.

AS TO THE FACTS

I. The circumstances of the case

6. Mr Bruno Scherer, a Swiss citizen who died on 13 March 1992, ran a sex shop in Zürich for homosexuals. The shop sold, among other things, magazines, books and video films. The nature of the establishment was not apparent to passers-by, but customers knew about it through advertisements to be found in specialist magazines or at homosexuals' meeting-places. At the back of the shop there was a room seating twelve people that was used for showing video films, which were changed every week or every fortnight. Customers heard of the films by word of mouth.

7. From 21 to 23 November 1983 nine people saw the film New York City, which lasted two hours and was made up almost exclusively of sexual acts. Any interested person of the male sex could gain entry to the room on presentation of a membership card and payment of an admission charge of 15 Swiss francs (CHF) or by purchasing six

magazines for over CHF 50.

1. Proceedings conducted by the Zürich district attorney's office

8. On 23 November 1983 the sex shop was searched; the Zürich district attorney's office (Bezirksanwaltschaft) confiscated the film New York City, the video recorder and the film-show takings of CHF 60 and brought proceedings against the applicant.

On 28 November the applicant was questioned by the police.

9. On 15 March 1984 the district attorney's office issued a sentence order (Strafbefehl) whereby Mr Scherer was fined CHF 6,000 for publishing obscene items (Article 204 of the Swiss Criminal Code - see paragraph 21 below) and driving while under the influence of alcohol.

2. Proceedings in the Zürich District Court

10. On an appeal (Einspruch) by Mr Scherer, proceedings were instituted in the Zürich District Court (Bezirksgericht). On 27 June 1984 the court fined the defendant CHF 1,000 for drunken driving but acquitted him on the charge of publishing obscene items.

It noted that only a small number of people had been allowed to see the film, namely those who knew about it and wanted to see it. The nature of the shop had not been discernible from the street; those wishing to attend showings had had to vouch that they were homosexuals or produce a membership card; and admissions to the sex shop had been controlled, so that undesirables could be kept out.

Mr Scherer stated that he had thought a plain-clothes policeman who had been in the projection room was a homosexual. The court accepted this statement as, in its view, the fact that the defendant could remember how the policeman had behaved, although he had left the room very quickly, showed that admissions had indeed been supervised.

Lastly, given the limited audience, the court considered it impossible to maintain that obscene items had been displayed "in public" within the meaning of Article 204 of the Criminal Code. The defendant had taken all necessary precautions to ensure that no one was unwillingly confronted with the items in question.

3. First set of proceedings before the Canton of Zürich Court of Appeal

11. The Zürich public prosecutor's office (Staatsanwaltschaft) appealed against that judgment. After hearing the parties, the Canton of Zürich Court of Appeal (Obergericht) sentenced Mr Scherer on 18 January 1985 to a fine of CHF 4,000 for publishing obscene items and for driving while under the influence of alcohol.

On the first count the court held that the aim of Article 204 of the Criminal Code was to protect the public in a wider sense. It took into account several factors, including the conditions of admission to the back of the shop, the fact that the membership card did not carry any particulars of the bearer, and the applicant's statement that he could tell whether or not a person was a homosexual. The court continued in the following terms:

"It is not possible to prevent a display being classified as public merely by deliberately restricting the number of those who see it; the audience must be well defined and able to be checked Contrary to the opinion of the court below, the defendant's film show was a public one, because it was accessible not to an objectively limited group consisting of a small number of individuals, but to an unlimited number of

people, namely all homosexuals and bisexuals. In particular, that being so, the audience could not be sufficiently checked In addition, the defendant could not tell merely from a person's appearance whether or not he was a homosexual, as he could not know him personally when meeting him for the first time as a customer Thus, without any further ado, the defendant admitted a young plain-clothes policeman, who was investigating the sex shop, to see the pornographic film in question, because he had mistaken him for a homosexual."

The applicant had requested the court to call the policeman as a witness. It refused to do so on the ground, *inter alia*, that it was impracticable to take oral evidence from all the public servants who had taken part in the investigation.

4. First set of proceedings in the Canton of Zürich Court of Cassation

12. Mr Scherer lodged an application for a declaration of nullity (Nichtigkeitsbeschwerde) with the Zürich Court of Cassation (Kassationsgericht), which granted it on 25 November 1985. The court ruled that the Court of Appeal should have heard the policeman as a witness. The judgment was served on the applicant on 27 December.

5. Second set of proceedings in the Canton of Zürich Court of Appeal

13. The proceedings resumed in the Court of Appeal. On 28 August 1986 the court summoned the parties to a hearing on 21 October, during which the policeman gave evidence. On 29 October the court sentenced the defendant to a fine of CHF 4,000 for publishing obscene items and for driving while under the influence of alcohol. The judgment was served on the defendant on 17 February 1987.

6. Second set of proceedings in the Canton of Zürich Court of Cassation

14. On 2 March 1987 Mr Scherer again applied to the Canton of Zürich Court of Cassation for a declaration of nullity. He relied, *inter alia*, on Article 10 (art. 10) of the Convention and complained of the length of the proceedings. He asked the court to defer its decision until the European Court of Human Rights had given judgment in the case of *Müller and Others v. Switzerland*** and the Federal Court had given judgment in another case concerning him.

** Note by the Registrar. Judgment delivered on 24 May 1988 (Series A no. 133).

The public prosecutor's office filed submissions on 24 March 1987.

15. The Court of Cassation delivered its judgment, which was twenty-seven pages long, on 2 May 1988. It refused Mr Scherer's request, on the ground that it was not certain when the European Court of Human Rights would rule on the Müller case, and fined the defendant CHF 800 for driving while under the influence of alcohol. It acquitted him of publishing obscene items, however.

After stating that it was not for the States to define the scope of the term "expression" in Article 10 (art. 10) and that freedom of expression covered freedom of individual communication, including freedom to show pornographic films, the Court of Cassation gave the following analysis:

"On the basis of the facts which led to the conviction

complained of, there was no risk of anyone being confronted with the film in question unintentionally, or even against their will. Admittedly, the membership card, which entitled its bearer to enter the projection room, could be obtained or issued without great difficulty ... , so that it is not possible, in this case, to consider that there was a private or closed group of individuals. But on the other hand, it is beyond doubt that the sex shop in question and, a fortiori, the separate projection room adjoining it were visited only by individuals who were aware of what awaited them and intended to see a film of this kind If the sole objective is in fact indirectly - by means of criminal proceedings instituted against the applicant - to prevent adults from seeing the film in question although they wish to do so and are aware of its subject-matter, no 'pressing social need' for such a measure can be perceived. If it were thought that there was a pressing need to protect individuals from their own desire to see obscene publications, it would logically be necessary to punish private showings of such films too. That is not the case, however."

7. First set of proceedings in the Federal Court

16. On 9 May 1988 the Zürich public prosecutor's office lodged an application for a declaration of nullity with the Federal Court; Mr Scherer replied in writing on 19 June 1988.

17. On 20 September 1988 the Federal Court (Criminal Cassation Division) set aside the judgment of the Zürich Court of Cassation and remitted the case to that court. The Federal Court held that the failure to apply Article 204 of the Criminal Code on the ground that it did not comply with Article 10 (art. 10) of the Convention constituted a breach of federal law.

The court said the following:

"It is impossible to see why the morals of adults (who include weak, easily influenced individuals) and consequently the morals of society as a whole should not also be protected. At all events, this view lies within the margin of appreciation which the European Court of Human Rights recognises that member States have and takes due account of the different opinions that may prevail in a democratic society as to the requirements of the protection of morals.

...

The difference [between the Müller case and] the case before the court today lies in the fact that in the instant case neither any unwilling adult nor any youth was confronted with the film New York City. A punishment is nevertheless justifiable in such cases also. As stated above, the purpose of Article 204 of the Criminal Code is to safeguard public decency and morals. No obscene item is to be distributed or displayed in public. To achieve this objective, a prohibition has been enacted to which criminal penalties are attached. A criminal provision of this kind is necessary because the protection sought cannot be achieved (at least not as efficiently) in any other way." (Judgments of the Swiss Federal Court (ATF), vol. 114 [1988], part IV, pp. 121-22)

Lastly, the Federal Court held that for the applicant to invoke the right to freedom of expression when his obvious intention was merely to derive substantial financial profit from trading in pornography was an abuse of process (*rechtsmissbräuchlich*).

The judgment was served on Mr Scherer on 14 November 1988.

8. Third set of proceedings in the Canton of Zürich Court of Cassation

18. In a judgment of 3 April 1989, served on 13 April, the Canton of Zürich Court of Cassation found Mr Scherer guilty of publishing obscene items and fined him CHF 2,500 in addition to the fine imposed on 2 May 1988 (see paragraph 15 above).

It held that the Federal Court had not determined whether it was still possible to acquit on the basis of an interpretation of Article 204 of the Criminal Code consistent with federal law; however, the Federal Court had undoubtedly remitted the case to it for a conviction on the strength of that provision.

9. Second set of proceedings in the Federal Court

19. Mr Scherer lodged a public-law appeal with the Federal Court, alleging a breach of Article 6 (art. 6) of the Convention, on account of an infringement of the rights of the defence, and of Articles 8 and 10 (art. 8, art. 10).

20. The Federal Court (First Public-Law Division) dismissed the appeal on 31 January 1990.

It noted that the applicant had rightly not sought to challenge the compatibility of Article 204 of the Criminal Code with Article 10 (art. 10) of the Convention. It held that the appeal was inadmissible with regard to Mr Scherer's complaint of an indirect breach of Articles 8 and 10 (art. 8, art. 10), as he should have lodged an application for a declaration of nullity for that purpose. The Criminal Cassation Division of the Federal Court, however, had already held that the conviction complied with Article 10 (art. 10) (see paragraph 17 above).

The judgment was served on the applicant on 16 February 1990.

II. Relevant domestic law

A. The law applicable at the material time

1. The Swiss Criminal Code

21. Article 204 of the Swiss Criminal Code provides:

"1. Anyone who makes or has in his possession any writings, pictures, films or other items which are obscene with a view to trading in them, distributing them or displaying them in public, or who, for the above purposes, imports, transports or exports such items or puts them into circulation in any way, or who openly or secretly deals in them or publicly distributes or displays them or by way of trade supplies them for hire, or who announces or makes known in any way, with a view to facilitating such prohibited circulation or trade, that anyone is engaged in any of the aforesaid punishable activities, or who announces or makes known how or through whom such items may be directly or indirectly procured, shall be imprisoned or fined.

2. Anyone supplying or displaying such items to a person under the age of 18 shall be imprisoned or fined.

3. The court shall order the destruction of the items."

2. The Federal Court's case-law

22. The Federal Court has consistently held that any works or items

which offend, in a manner that is difficult to accept, the sense of sexual decency are obscene; the effect may be to arouse a normal person sexually or to disgust or repel him (ATF, vol. 83 [1957], part IV, pp. 19-25; vol. 86 [1960], part IV, pp. 19-25; vol. 87 [1961], part IV, pp. 73-85); making such items available to an indeterminate number of people amounts to "publication" of them; their consent should not be taken into account (ATF, vol. 96 [1970], part IV, p. 68; vol. 100 [1975], part IV, p. 237).

B. The subsequent regime

1. The change in the case-law

23. In a judgment of 21 June 1991 (ATF, vol. 117 [1991], part IV, pp. 276-83) delivered after the events giving rise to the instant case had occurred, the Federal Court departed from earlier case-law by ruling that, regard being had to the evolution of ideas, the threshold of tolerance had to be higher for films which could not be classified as hard pornography, provided that those who saw them had been warned of the subject-matter and nature of the film and that persons under the age of 18 had not been admitted.

2. The change in the legislation

24. On 1 October 1992, when the Federal Law of 21 June 1991 came into force, the provisions of section V of the Swiss Criminal Code ("Offences against sexual propriety") were amended. Article 197, which replaced Article 204, reads as follows:

"1. Anyone who offers, shows or makes accessible or available to a person under the age of 16 pornographic writings, sound or video recordings, pictures or other items or pornographic performances, or who broadcasts them on radio or television, shall be imprisoned or fined.

2. Anyone who displays or shows in public any items or performances referred to in paragraph 1, or who offers them to a person unasked, shall be fined.

Anyone who, when an exhibition or performance on closed premises is being held, warns those attending of the pornographic nature of the exhibition or performance shall not be liable to punishment.

3. Anyone who makes, imports, stores, puts into circulation, promotes, displays, offers, shows or makes accessible or available items or performances referred to in paragraph 1 which depict sexual acts with children, animals, human excrement or acts of violence shall be imprisoned or fined.

The items shall be confiscated.

4. If the offender acted with a view to financial gain, the punishment shall be imprisonment and a fine.

5. The items or performances referred to in paragraphs 1 to 3 shall not be deemed pornographic when they have a cultural or scientific value worthy of protection."

PROCEEDINGS BEFORE THE COMMISSION

25. Mr Scherer applied to the Commission on 6 August 1990. He complained under Article 6 (art. 6) of the Convention of the length and unfairness of the criminal proceedings against him. He also relied on Articles 8 and 10 (art. 8, art. 10) in respect, firstly, of his conviction for showing the film New York City and the ban on showing that film on his own premises and, secondly, of later convictions for

selling obscene publications.

26. On 11 May 1992 the Commission declared the complaints concerning the fairness of the proceedings and the later convictions inadmissible either as being manifestly ill-founded or for failure to exhaust domestic remedies; it declared admissible the remainder of the application (no. 17116/90).

In its report of 14 January 1993 (made under Article 31) (art. 31), it concluded that:

(a) there had been a violation of Article 10 (art. 10) (by twelve votes to five);

(b) it was not necessary to examine the complaint under Article 8 (art. 8) (unanimously); and

(c) there had been no violation of Article 6 para. 1 (art. 6-1) (by fifteen votes to two).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment***.

*** Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 287 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

27. In their memorial, the Government requested the Court

"to hold that the Swiss authorities had not violated the European Convention on Human Rights in respect of the matters which had given rise to Mr Bruno Scherer's application".

AS TO THE LAW

STRIKING OUT OF THE LIST

28. In their memorial the Government also asked the Court to consider whether the instant case should not be struck out of its list under Rule 49 para. 2 of the Rules of Court, in view of Mr Scherer's death on 13 March 1992 (see paragraphs 2 and 6 above).

They acknowledged that an applicant's death did not automatically end the proceedings before the Convention institutions but pointed out that the heirs could not claim a right to continue them in their own name. It was in any event necessary to ascertain whether considerations of public interest required that the application should be examined further.

In the instant case, in a statement of 13 May 1993 the applicant's executor had cited exclusively pecuniary grounds, namely that if a violation were found the estate would have "a claim against Switzerland for repayment of legal fees and costs which should be included in the division". Reasons of that kind could not under any circumstances amount to "public interest" from the point of view of Article 6 para. 1 (art. 6-1) or a fortiori that of Articles 10 and 8 (art. 10, art. 8).

29. At the hearing Mr Scherer's lawyer challenged the Government's argument. He relied in the main on two grounds.

He first referred to the wishes of his client, who had given him a power of attorney on a number of occasions and had expressed the desire that the case should be pursued to its conclusion. Article 451 of the Zürich Code of Criminal Procedure provided that a conviction could be quashed even where the person concerned was dead, and federal law now allowed the victim of a violation found by the Court or the Committee of Ministers of the Council of Europe to request that the contested proceedings be reopened. The memorial to the Court had mentioned the heirs' interests only in the alternative.

The applicant's lawyer maintained secondly that, even though Switzerland had since amended its legislation so that it complied more closely with the requirements of the Convention, a judgment by the Court would clarify a number of difficult issues. This would be helpful to the respondent State and also to other Contracting Parties and the Commission.

30. The Delegate of the Commission likewise recommended that, regard being had to the Court's case-law, the case should be left on the list. The most important consideration was what the heirs wanted - a clear, unequivocal criterion. It was relevant in the instant case although the only interests pleaded had been pecuniary in nature.

31. Mr Scherer's lawyer informed the Registrar on 3 May 1993 that his client had died on 13 March 1992. He then indicated on 24 May 1993 that the applicant's executor wanted the proceedings to continue (see paragraph 2 above). He did not at any time provide information concerning the heirs or their connection with the applicant.

On a number of occasions the Court has accepted that the parents, spouse or children of a deceased applicant are entitled to take his place in the proceedings (see in particular the judgments *Vocatur v. Italy* of 24 May 1991, Series A no. 206-C, p. 29, para. 2; *G. v. Italy* of 27 February 1992, Series A no. 228-F, p. 65, para. 2; *Pandolfelli and Palumbo v. Italy* of 27 February 1992, Series A no. 231-B, p. 16, para. 2; *X v. France* of 31 March 1992, Series A no. 234-C, p. 89, para. 26; and *Raimondo v. Italy* of 22 February 1994, Series A no. 281-A, p. 8, para. 2). These cases have always involved close relatives. There is nothing to show that this is the position here.

Furthermore, the applicant's executor has not expressed any intention whatsoever of seeking, on Mr Scherer's behalf, to have the criminal proceedings reopened in Switzerland or to claim compensation for non-pecuniary damage in Strasbourg.

32. Under these circumstances Mr Scherer's death can be held to constitute a "fact of a kind to provide a solution of the matter" (Rule 49 para. 2 of the Rules of Court in force when the case was brought before the Court). There is also no reason of *ordre public* (public policy) why the case should not be struck out of the list (Rule 49 para. 4), especially as, since the events giving rise to the instant case, the Federal Court's case-law on "obscene items" and the relevant Swiss legislation have undergone substantial changes (see paragraphs 23-24 above). The case should accordingly be struck out of the list.

FOR THESE REASONS, THE COURT

Decides by six votes to three to strike the case out of the list.

Done in English and in French, and notified in writing under Rule 55 para. 2, second sub-paragraph, of the Rules of Court on 25 March 1994.

Signed: Rolv RYSSDAL

President

Signed: Marc-André EISSEN
Registrar

Mr Spielmann, Mr Foighel and Mr Morenilla expressed their disagreement with the operative provision (Rule 53 para. 2 in fine of the Rules of Court); they considered that the Court should have given judgment on the merits of the case.

Initialled: R. R.

Initialled: M.-A. E.