

**APPLICATION N° 16360/90**

**S F v/SWITZERLAND**

**DECISION of 2 March 1994 on the admissibility of the application**

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**Article 5 of the Convention**

- a) *The "right to liberty" concerns physical liberty and freedom from arbitrary arrest or detention. It does not relate to mere restrictions on liberty of movement*
- b) *In order to determine whether a person is "deprived of his liberty", it is necessary to examine his actual situation and take into account the type, duration, effects and manner of implementation of the measure in question*

*A person habitually resident in a part of the national territory entirely surrounded by the territory of another State and subject to an exclusion order prohibiting his entry into that State is not deprived of liberty within the meaning of that Article*

**Article 25 and Article 8 of the Convention** *A person excluded from the territory of a State by administrative decision cannot claim to be the victim of an interference with his private life when that decision has been declared inapplicable by the criminal court dealing with the offence of unlawful entry into that territory and when, in addition, the administrative measure has expired*

**Competence *ratione materiae*** *The Convention does not guarantee, as such, any right to enter, reside in or remain in a State of which one is not a national*

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## THE FACTS

The applicant, an Italian national born in 1963, lives in Campione d'Italia, an Italian enclave surrounded by Swiss territory on the shores of Lake Lugano (Canton of Ticino)

In the proceedings before the Commission he is represented by Mr. Mauro Mini, a lawyer practising in Lugano

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 28 March 1989 the Swiss Federal Aliens Office issued an order excluding the applicant from Switzerland from 28 March 1989 to 27 March 1994 following his conviction in Switzerland for repeated drugs offences

On 15 May 1989 the applicant appealed against this decision

On 3 August 1989 the Federal Justice and Police Department allowed the appeal in part and reduced the period of exclusion from five to three years, ending on 27 March 1992

On 24 April 1989, i.e. four days after service of the exclusion order, the applicant had been arrested in Lugano because he had entered Swiss territory in order to meet his insurers and his lawyer

In a decision dated 22 June 1989 the deputy public prosecutor of the canton of Ticino charged the applicant with unlawful entry into Switzerland and called for a suspended sentence of six days' imprisonment

In a judgment dated 26 March 1990 the judge sitting in the Lugano magistrate's court (pretore) acquitted the applicant

He first considered the question of the scope of his power, as a criminal court judge, to review administrative decisions. He held that, where the question of lawfulness could not be referred to an administrative court, as in this case, he had full powers of review

After describing the special features of the situation of Campione d'Italia, where all the essential activities forming part of daily life were closely connected with Switzerland, the judge observed that the exclusion order issued by the Federal Justice and Police Department was equivalent to a kind of obligation to reside in a particular place without leaving that place, or to a compulsory residence order. The exclusion order, for an Italian national who had lived since birth and worked in Campione d'Italia, was a restriction of liberty far more serious than a few days in prison, although much less dishonourable. The decision of the Justice and Police Department was

accordingly null and void, as the exclusion order was a more serious measure than a sentence imposed by a court. It was a punishment contrary to the fundamental principles enshrined by the Federal Constitution and the European Convention on Human Rights.

On 13 April 1990 the public prosecution service appealed against the above judgment, arguing that a criminal court had no power of review over an administrative procedure, it merely had to note the existence of the exclusion order and the fact that it had been breached.

In a judgment of 29 August 1990 the Court of Cassation and Criminal Appeal of the Canton of Ticino dismissed the appeal. Referring to the case-law of the Federal Court (particularly DTF 98 IV 108), it confirmed that the pretore was fully empowered to review the lawfulness of the administrative decision and held that he had set out pertinent considerations. The Court of Cassation also noted that there was a manifest disproportion between the administrative penalty and the applicant's relatively trivial transgression. Lastly, the Court of Cassation observed that, while agreeing with the pretore's conclusions, it could not, as the latter had wrongly decided, set aside the administrative decision, but only declare it inapplicable.

In a letter dated 20 December 1990 the applicant's lawyer informed the Commission that he wished to maintain the application, in view of the fact that the exclusion order was still in force.

## **COMPLAINTS**

The applicant complains that, on account of the special situation of Campione d'Italia, notably the small area of its territory and its close links with the canton of Ticino in all areas of daily life, the exclusion order issued against him is the equivalent of a compulsory residence order and constitutes a deprivation of his liberty. He maintains that this measure also infringes his right to respect for his home. He alleges the violation of Articles 5 and 8 of the Convention.

## **THE LAW**

1 The applicant complains that he has been the victim of a deprivation of liberty within the meaning of Article 5 of the Convention on account of the fact that, as a result of the order prohibiting his entry into Swiss territory, he was obliged to remain in Campione d'Italia, an Italian enclave surrounded by Swiss territory.

Under Article 5 para. 1 of the Convention, everyone has the right to liberty and security of person. No one may be deprived of his liberty save in specific cases and in accordance with a procedure prescribed by law.

The Commission recalls that in proclaiming the "right to liberty" Article 5 para 1 contemplates the physical liberty of the person, its aim is to ensure that no one is dispossessed of this liberty in arbitrary fashion. It is not concerned with mere restrictions on liberty of movement (see Eur Court HR, Guzzardi judgment of 6 November 1980, Series A no 39, p 33, para 92). In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 of the Convention, the starting-point must be his concrete situation, and account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the measure in question (see Eur Court HR, Engel and Others judgment of 8 June 1976, Series A no 22, p 25, paras 58-59).

The Commission notes that the applicant was not at any time incarcerated. He had liberty of movement within the territory of Campione d'Italia, although its area was small, and he was not subject to any supervision measure there. Accordingly, it considers that the measure complained of cannot be regarded as a deprivation of liberty within the meaning of the provision mentioned.

It follows that this part of the application is manifestly ill founded and must be rejected, pursuant to Article 27 para 2 of the Convention.

2 The applicant further complains that the order prohibiting his entry into Swiss territory infringes his right to respect for his home, as guaranteed by Article 8 of the Convention.

The Commission recalls that the Convention does not guarantee any right to reside in a State of which one is not a national (see No 12068/86 Dec 1 12 86 DR 51 p 237).

It follows that this part of the application must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, in accordance with Article 27 para 2 of the Convention.

Even supposing that the applicant's complaint raises an issue with regard to the right to respect for one's private life, within the meaning of Article 8 of the Convention, the Commission must first consider whether the applicant can still claim to be a victim of a violation of that provision.

Article 25 para 1 of the Convention is worded as follows:

The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention.

The Commission notes that the circumstances have altered considerably since the application's introduction. On 26 March 1990 the applicant was acquitted of

unlawfully entering Swiss territory. In a judgment of 29 August 1990 the Court of Cassation and Criminal Appeal of the Canton of Ticino upheld the acquittal, holding that the decision in which the administrative authorities prohibited the applicant's entry was inapplicable.

Consequently, the Commission considers that, in the absence of any legal effect of the decision concerned, and having regard to the fact that it expired on 27 March 1992, the applicant can no longer claim to be a victim of a violation of Article 8 of the Convention, within the meaning of Article 25 (see No. 8083/77, Dec. 13.3.80, D.R. 19 p. 223).

It follows that, on this point, the application is incompatible *ratione personae* with the provisions of the Convention and must be rejected, pursuant to Article 27 para. 2.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.