AS TO THE ADMISSIBILITY OF

Application No. 30997/96
by A. H.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 15 May 1996, the following members being present:

MM. H. DANELIUS, President
S. TRECHSEL
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 29 January 1996 by A. H. against Switzerland and registered on 12 April 1996 under file No. 30997/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Lebanese citizen born in 1958, is a painter residing in Tagelswangen. Before the Commission he is represented by his wife, Yvonne Hoteit.

A. Particular circumstances of the case

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

In 1989 the applicant entered Switzerland where under different names he filed various requests for asylum. In 1991, after the Federal Office for Refugees (Bundesamt für das Flüchtlingswesen) had dismissed the requests, the applicant was expelled to Lebanon.

On 12 November 1991 the applicant married his present wife, a Swiss citizen, in Lebanon. Thereafter, he obtained a residence permit (Aufenthaltsbewilligung) from the Canton of Zurich. On 2 March 1992 the applicant returned to Switzerland.

On 28 July 1993 the applicant was remanded in custody on

suspicion of having contravened the Narcotics Act (Betäubungsmittelgesetz). On 15 April 1994 the Zurich District Court (Bezirksgericht) sentenced the applicant to two and a half years' imprisonment on account of various contraventions of the Narcotics Act, in particular of having dealt with heroin and cocaine. On 27 March 1995 he was released on probation.

Meanwhile, on 16 February 1994 the Police Directorate (Polizeidirektion) of the Canton of Zurich dismissed the applicant's request for a prolongation of the residence permit.

An appeal against this decision was dismissed by the Government (Regierungsrat) of the Canton of Zurich on 5 April 1995. In its decision, the Government found, inter alia, that doubts arose as to the intensity of the applicant's marriage since he himself had admitted having had a relationship with another person. Moreover, the applicant's parents and his seven brothers and sisters lived in Lebanon. The applicant had married his wife in Lebanon, and she had visited his family there. His wife could be expected to follow the applicant, particularly since he had explained that he wished to travel to a third country.

The applicant and his wife filed an administrative law appeal (Verwaltungsgerichtsbeschwerde) which the Federal Court (Bundesgericht) dismissed on 25 July 1995. In its decision, the Court relied on Section 7 para. 1 and Section 10 para. 1 subpara. (a) of the Federal Act on the Residence and Domicile of Aliens (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer; see below, Relevant domestic law). The Court considered that there was a considerable public interest in removing the applicant from Switzerland as he had committed serious offences, and as there was a danger that he would commit new offences. The Court continued:

<Translation>

> "he has not been long in Switzerland. After the applicant was lawfully permitted to stay here in view of his marriage, he committed a criminal offence already after eleven months' residence. Professionally he is not particularly integrated; his criminal convictions did not facilitate this. Both applicants have themselves stated that they had hardly any close contacts in Switzerland with the exception of the wife's family members. The possibility to be supported by a family is also open to her in Lebanon, as the applicant's family lives there. Thus, only the applicant's relationship with his wife is an important connection with Switzerland. Even if she could support him, it must nevertheless be considered that his marriage did not stop him from committing criminal offences. A new element is the fact that the second applicant is in her late pregnancy, i.e. she expects a child from her husband in early July 1995. It is unknown whether the child has meanwhile been born. The personal relations with Switzerland may thereby have become somewhat more dense, but on balance it is not decisive. ...
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> The pregnancy and the birth of a child, respectively, may increase the difficulties of a departure, but they do not render it impossible. For instance, it is not excluded that the second applicant, before following her husband abroad, waits until she has recovered from birth. For the rest, the cantonal authorities can take these circumstances into consideration when determining the date of departure, which must in any event be newly decided. Even if the second applicant could not be expected to leave Switzerland, this would not in the end decisively affect the balancing of interests. The first applicant should already earlier on have considered that he bears a responsibility towards his wife and any - at that time future - children."

<Original>

"(es handelt) sich nicht um eine lange hiesige Anwesenheit. Nachdem der Beschwerdeführer sich infolge seiner Heirat rechtmässig hier aufhalten durfte, wurde er bereits nach nur elfmonatiger Anwesenheit straffällig. Beruflich scheint er nicht fest integriert zu sein, wobei er sich dies durch seine Straffälligkeit auch nicht erleichtert hat. Beide Beschwerdeführer haben sodann selbst ausgesagt, in der Schweiz abgesehen von den Familienmitgliedern der Ehefrau kaum enge Kontakte zu pflegen. Die Möglichkeit zu familiärem Rückhalt eröffnet sich für sie aber auch im Libanon, lebt dort doch die Familie des Beschwerdeführers. Somit stellt einzig die Beziehung zur Ehefrau einen wichtigen Bezugspunkt des Beschwerdeführers zur Schweiz dar. Selbst wenn sie ihm eine Stütze sein könnte, ist doch zu beachten, dass ihn auch die Ehe nicht an seiner Delinquenz gehindert hat. Neu kommt nunmehr dazu, dass die Beschwerdeführerin hochschwanger ist beziehungsweise auf Anfang Juli 1995 von ihrem Mann ein Kind erwartet hat. Ob dieses inzwischen geboren wurde, ist nicht bekannt. Die persönlichen Beziehungen zur Schweiz mögen sich dadurch etwas verdichtet haben, entscheidend ins Gewicht fällt dies aber auch nicht ...

Die Schwangerschaft beziehungsweise die Geburt eines Kindes mögen die Schwierigkeiten einer Ausreise vergrössern, sie verunmöglichen sie aber nicht. So ist nicht ausgeschlossen, dass die Beschwerdeführerin, bevor sie dem Ehemann ins Ausland nachfolgt, noch so lange zuwartet, bis sie sich von der Geburt erholt hat. Im übrigen können die kantonalen Behörden diesen Umständen allenfalls auch bei der Festlegung der Ausreisefrist, die gemäss dem angefochtenen Entscheid ohnehin neu zu bestimmen ist, Rechnung tragen. Selbst wenn eine Ausreise der Beschwerdeführerin aber unzumutbar wäre, würde dies die Interessenabwägung im Ergebnis nicht entscheidend beeinflussen. Der Beschwerdeführer hätte sich bereits früher darüber klar werden können, dass er seiner Frau und seinen allfälligen - aus damaliger Sicht künftigen - Kindern gegenüber Verantwortung trägt."

On 28 July 1995 the applicant's wife gave birth to a child, a boy, at Winterthur in Switzerland.

The applicant's request for reopening the Federal Court proceedings was dismissed by the Federal Court on 10 November 1995.

B. Relevant domestic law

Article 7 para. 1 of the Federal Act on Residence and Domicile of Aliens states:

<Translation>

"The foreign spouse of a Swiss citizen is entitled to be granted, or have prolonged, a residence permit ... This entitlement ceases when there is a ground for expulsion."

<German>

"Der ausländische Ehegatte eines Schweizer Bürgers hat Anspruch auf Erteilung und Verlängerung der Aufenthalts-bewilligung ... Der Anspruch erlischt, wenn ein Ausweisungsgrund vorliegt."

According to Article 5 para. 1 of the Act, the residence permit is always limited in time (ist stets befristet). Article 10 para. 1 <a> of the Act states:

<Translation>

"A foreigner may be expelled from Switzerland ... only if:

(a) he has been punished by a court for a crime or offence;"

<German>

"Der Ausländer kann aus der Schweiz ... nur ausgewiesen werden:

(a) wenn er wegen eines Verbrechens oder Vergehens gerichtlich bestraft wurde;"

COMPLAINTS

The applicant complains under Article 8 of the Convention that the authorities refused to prolong his residence permit. He submits that they relied solely on the sentence of two and a half years which he received. His personal circumstances, for instance his reduced culpability and his integration in Switzerland, were not considered. After his release he has behaved well.

The applicant points out that he has a child. The matrimonial relationship continued while he was in prison; his wife visited him regularly, and after his release, he again lived together with her.

The applicant submits that his wife could not integrate in Lebanon. She was not responsible for the applicant's conviction, and residence in Lebanon would be extremely complicated for her. She would lose her employment in Switzerland. She could not be expected to live with a baby in a country which has been destroyed by war, the language of which she does not speak, and to the culture of which she has no attachment. The applicant's wife only saw his family members once, i.e. upon marriage. On the other hand she has strong roots in Switzerland where her brother and parents live who assist her with their child. In the long run, it would be very painful for the child to be without the father.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 January 1996.

On 6 February 1996 the Acting President decided not to apply Rule 36 of the Commission's Rules of Procedure.

The application was registered on 12 April 1996.

THE LAW

The applicant complains under Article 8 (Art. 8) of the Convention that his residence permit has not been prolonged and that he will therefore be separated from his wife. Article 8 (Art. 8) states, insofar as relevant:

"1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for private and family life guaranteed in Article 8 para. 1 (Art. 8-1) of the Convention (see Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A, no. 193, p. 18, para. 36; No. 9203/80, Dec. 5.5.81, D.R. 24, p. 239).

The present applicant is married to a Swiss citizen. Thus the refusal to prolong his residence permit interfered with his right to respect for private and family life within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention. The Commission must therefore examine whether such interference is justified under Article 8 para. 2 (Art. 8-2) of the Convention. The Commission will thereby take into account that it would raise difficulties for the applicant's wife to follow him to Lebanon.

The Commission observes that the Swiss authorities, when refusing to grant the applicant a new residence permit, relied on Sections 7 and 10 of the Federal Act on the Residence and Domicile of Aliens. According to these provisions, the applicant as the spouse of a Swiss citizen no longer had a right to a residence permit in view of his conviction of a criminal offence which constituted a ground for expulsion. The interference was therefore "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

Moreover, when refusing to grant the applicant a new residence permit, the Swiss authorities considered that the applicant had been convicted of serious offences. The Commission notes in particular that he was convicted of contraventions under the Narcotics Act and sentenced to imprisonment of altogether two and a half years. The interference was therefore imposed "for the prevention of crime" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

Furthermore, in its decision of 25 July 1995 the Federal Court carefully balanced the various interests involved. It considered, on the one hand, that apart from the applicant's marriage to a Swiss citizen, he had no contacts with Switzerland. On the other hand, it considered that the applicant had committed serious criminal offences and that his departure from Switzerland was in the public interest.

It is true that the applicant claims to have behaved well since his release from prison. However, the Commission notes that the Federal Court decided on the applicant's case in the last resort, and after having considered all circumstances of the case. It concluded that the refusal to grant the applicant a new residence permit served the purpose of removing him from Switzerland.

Moreover, the present case differs from the Beldjoudi case (Eur. Court H.R., judgment of 26 March 1993, Series A no. 234-A) in that the present applicant was not born in Switzerland; that his stay in Switzerland was comparatively short; and that the period of marriage spent together with his wife was also comparatively short.

Finally, the domestic authorities considered that the applicant had a large family in Lebanon - his parents as well as seven brothers and sisters - who could assist the applicant's wife and their child, which is still of an adaptable age, if they settled in Lebanon. The Commission also notes the decision of the Government of the Canton of Zurich of 5 April 1995 according to which the applicant had stated that he and his wife wished to travel to a third country, rather than returning to Lebanon.

Taking into account the margin of appreciation which is left to Contracting States in such circumstances (see Eur. Court H.R., Berrehab judgment of 21 June 1988, Series A no. 138, p. 15, para. 28), the

Commission does not find that the Swiss authorities, when refusing to grant the applicant a new residence permit, acted unreasonably in balancing the various interests involved.

The Commission therefore considers that the interference with the applicant's right to respect for his private and family life was justified under Article 8 para. 2 (Art. 8-2) of the Convention in that it could reasonably be considered "necessary in a democratic society ... for the prevention of disorder or crime".

The application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)