AS TO THE ADMISSIBILITY OF

Application No. 21353/93
by B.C.
against Switzerland

The European Commission of Human Rights sitting in private on 27 November 1995, the following members being present:

MM. H. DANELIUS, Acting President
S. TRECHSEL
C.L. ROZAKIS
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 2 October 1992 by B.C. against Switzerland and registered on 9 February 1993 under file No. 21353/93;

Having regard to :

- the Commission's decision of 27 February 1995 to declare the application partly inadmissible and to communicate the remainder of the application;

- the observations submitted by the respondent Government on 28 April 1995 and the observations in reply submitted by the applicant on 26 June 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Swiss citizen born in 1930. He is a lawyer and resides in Fribourg. Before the Commission he is represented by

Mr. Martin Portmann, a lawyer practising in Fribourg.

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

The particular circumstances of the case

On 5 December 1991 the radio communications surveillance unit of the Swiss Post, Telephone and Telegraph Company (Sektion Funküberwachung der Generaldirektion PTT) located a private telephone conversation being held by means of a cordless telephone which did not conform to the PTT standards. The conversation was located on a wave-band reserved for civil and military aviation. The surveillance unit recorded the conversation and established that it was carried out on the line to which the applicant had subscribed. The surveillance unit informed the appropriate PTT authority about this fact under Section 19 of the 1974 Administrative Criminal Law Act (Bundesgesetz über das Verwaltungsstrafrecht).

The applicant was suspected of having committed a contravention (Widerhandlung) within the meaning of Section 42 of the 1922 Telegraph and Telephone Communications Act (Bundesgesetz betreffend den Telegrafen- und Telefonverkehr). On 11 December 1991 the PTT district telecommunications administration (Fernmeldekreisdirektion) in Berne instituted criminal proceedings against him under the Administrative Criminal Law Act.

On 13 December 1991 the head of the PTT telecommunications administration in Berne issued a warrant to search the applicant's house pursuant to Sections 48-50 of the Administrative Criminal Law Act. The aim of the search was to find and seize the unauthorised cordless telephone.

On 21 January 1992 at 9.50 a.m. two PTT officials came to the applicant's door. The applicant informed them that he had tested a cordless telephone once in the past and that he no longer had it. When he was told that by virtue of the warrant the officials were entitled to enter his house, he consented to the search.

The PTT officials then summoned an officer of the cantonal police, and the applicant let the three persons enter the entrance hall. The applicant in fact used only one room of his house, the remaining parts being rented to a third person.

In the entrance hall the applicant was briefed on the legal aspects of the search. He also consulted the file concerning his case and made phone calls with a lawyer and with an official of the PTT telecommunications administration in Berne.

As requested by the applicant, the search was carried out by a single PTT official in his presence. The official searched the whole house. He restricted himself to checking whether the telephones and TV sets in the applicant's house complied with the PTT standards. He did not touch any objects, open any drawers or consult any documents. At 11.55 a.m. a record was drawn up and signed both by the applicant and the investigating official. A copy thereof was immediately handed over to the applicant.

On 24 January 1992 the applicant introduced a complaint with the Federal Court (Bundesgericht). He claimed that the search of his house by the PTT officials was unlawful, and that it should therefore be declared null and void.

On 27 March 1992 the Federal Court rejected the complaint. It held that since the search no longer infringed the applicant's rights, there was no further legal interest in his protection in this respect as required by law. The judgment was served on 3 April 1992.

Relevant domestic law

House searches in the context of administrative criminal proceedings are governed by the 1974 Administrative Criminal Law Act. The relevant provisions stipulate as follows:

[Translation]

Section 20

"1. Administrative authorities are empowered to institute investigation. Hearings of which official records are drawn up, inspections of the premises and coercive measures shall be entrusted to officials who have been specially trained for that purpose." ...

Section 48

"1. Dwellings and other premises including adjoining enclosed pieces of land can only be searched when it is probable that the accused is hiding therein or if objects or valuables liable to sequestration or traces of an offence can be found therein. ...

3. The search is carried out by virtue of a written order issued by the director or head of the administrative authority or, if the investigation is within his or her competence, by the director of the customs district or the PTT district director." ...

Section 49

"1. At the beginning of the search the investigating official shall justify that he is authorised to carry out the search.

2. The purpose of the search shall be communicated to the dweller. The latter shall be invited to attend the search if he or she is present. In case of his or her absence a relative or a person from the household shall be asked to attend the search. A public official designated by the competent cantonal authority or, if the investigating official acts on his own initiative, a member of the municipal authority or an official of the canton, district or municipality shall also be summoned to attend the search in order to see that it is in conformity with its aim. The search can be carried out in the absence of public officials, members of the household or relatives in cases of imminent danger or with the dweller's consent.

3. As a general rule, with the exception of important cases and cases of imminent danger, searches must not be carried out on Sundays, public holidays and at night.

4. A record of the search shall be drawn up immediately in the presence of those who attended it. Upon their request a copy of the search warrant and of the record shall be handed over to these persons."

COMPLAINTS

The applicant complains under Article 8 of the Convention that the search of his house was unlawful, groundless and disproportionate.

He further alleges that by searching his house the PTT officials violated his rights guaranteed by Article 13 of the Convention. He claims that contrary to the opinion expressed by the Federal Court, there was a need for his legal protection (Rechtsschutzbedürfnis) as regards the search of his house.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 October 1992 and the applicant claimed, inter alia, that his rights under Article 13 of the Convention had been violated, and that there still existed a need for his legal protection. The application was registered on 9 February 1993.

On 27 February 1995 the Commission declared the application partly inadmissible but decided to communicate to the respondent Government the complaints under Articles 8 and 13 of the Convention as regards the search of the applicant's house, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 28 April 1995. The applicant replied on 26 June 1995.

THE LAW

The applicant complains that the search of his house was unlawful. He alleges a violation of Articles 8 and 13 (Art. 8, 13) of the Convention which provide, so far as relevant, as follows:

Article 8 (Art. 8)

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

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 ... for the prevention of disorder or crime, ..."

Article 13 (Art. 13)

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

As to the complaint under Article 8 (Art. 8) of the Convention, the Government contend that the applicant can be regarded as a "victim" only as regards the search of the single room which he actually uses. They submit that the search had a legal basis under Swiss law, namely Section 48 of the Administrative Criminal Law Act, and that it was carried out for the prevention of crime which is a legitimate aim under Article 8 para. 2 (Art. 8-2) of the Convention.

In the Government's view Swiss law provides adequate and effective safeguards against abuse of house searches in the context of administrative criminal proceedings. The Government conclude that the interference complained of complied with the requirements of Article 8 para. 2 (Art. 8-2) of the Convention.

The applicant contends that he has been acting also at the request and on behalf of the tenant residing in his house. Moreover, he considers himself entitled to complain of the search of the whole house in his capacity of house-owner and landlord.

The applicant further submits that there was no satisfactory legal basis for the search of his house, and that therefore it was unlawful. In his view, the search was in any event disproportionate.

As to the complaint under Article 13 (Art. 13) of the Convention, the Government submit that the applicant has failed to raise it in his

application before the Commission. Subsidiarily, they contend that as the applicant's claim under Article 8 (Art. 8) of the Convention is manifestly ill-founded, it cannot be regarded as arguable.

In the Government's view, the complaint under Article 13 (Art. 13) of the Convention is in any event manifestly ill-founded since, for one thing, anybody who was discharged in the context of administrative criminal proceedings is entitled to claim damages. Within such proceedings the court has to examine also the merits of the coercive measure ordered pursuant to the Administrative Criminal Law Act.

Further, anybody whom an administrative authority has found guilty of an offence can bring his or her case before a court. The Government contend that if the court concerned wishes to found its decision on the result of the coercive measures at issue, it has to examine the merits of such measures.

The applicant contends that he expressly raised the complaint under Article 13 (Art. 13) of the Convention in the final part of his application, and that it relates to the application as a whole. In his view the search has had adverse effects on him, and therefore his claim is arguable and cannot be regarded as manifestly ill-founded.

The Commission notes that in his submission of 2 October 1992 the applicant expressly alleged a violation of Article 13 (Art. 13) of the Convention by the search of his house.

Moreover, the Commission recalls that the Convention organs have jurisdiction to review in the light of the entirety of the Convention's requirements circumstances complained of by an applicant. In particular, they may attribute to the facts of the case a characterisation in law different from that given by the applicant (cf. Eur. Court H.R., Foti and others judgment of 10 December 1982, Series A no. 56, p. 15, para. 44, with further references). In his submission of 2 October 1992 the applicant invoked, inter alia, the need for legal protection in connection with the Federal Court's refusal to examine his complaint.

The Commission may therefore examine the complaint under Article 13 of the Convention.

Having examined the above complaints, the Commission finds that they raise serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The remainder of the application cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

For these reasons, the Commission, by a majority,

DECLARES THE REMAINDER OF THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — Acting President of the Commission

(H.C. KRÜGER) — (H. DANELIUS)