AS TO THE ADMISSIBILITY OF

Application No. 18477/91
by E.G.
against Switzerland

The European Commission of Human Rights sitting in private on 1 December 1993, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS

Mrs. M.F. BUQUICCHIO, 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 28 May 1991 by E.G. against Switzerland and registered on 9 July 1991 under file No. 18477/91;

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 facts of the case, as they have been submitted by the applicant, may be summarised as follows.

The applicant, born in 1943, is a Swiss national and resident in St. Gallen. He is a businessman by profession. Before the Commission he is represented by Mr. L.R. Gehrer, a lawyer practising in St. Gallen.

A. The particular circumstances of the case

On 28 August 1989 the Gossau District Office (Bezirksamt) issued a penalty order (Strafbescheid) against the applicant for having negligently contravened S. 38 para. 1 of the Food Act (Lebensmittel-gesetz), and imposed a fine of SFR 2,000.

The Office found that the applicant, in his position as a manager of the Swiss trading company B., had failed to act with the due diligence to the effect that contaminated figs imported from Turkey had been on sale. The Office considered that the fact that the company's Turkish suppliers had been bound by contract to exercise such a control could not exculpate the applicant. The company B. should have carried out own controls.

The Office noted in particular that, already in September 1986, the Federal Health Office (Bundesamt für Gesundheitswesen) had informed, inter alia, the company B. about the contamination of Turkish figs with aflatoxin (highly carcinogenic poison produced by mildew) and about a simple method to sort out highly contaminated figs. In November 1986 the Gossau Health Office (Gesundheitsamt) had taken samples of seven lots of Turkish figs imported by the company B. whereby only two had an aflatoxin content below the maximum permissible. In December 1986 the Federal Health Office had again informed all companies importing figs, amongst them the company B., about the problems relating to aflatoxin and had prescribed maximum values regarding the aflatoxin content of single figs. Nevertheless, the company B. had continued to sell highly contaminated figs. Thus, in January and February 1987 figs delivered by the company B. had been seized which were highly contaminated. Subsequently, the company B. had failed to comply with a request by the Gossau Health Office dated 5 March 1987 to take figs of the same lots as the ones examined in January and February 1987 off the market.

In these and the following proceedings, the applicant was assisted by defence counsel.

Upon the applicant's objection (Einsprache) against the penalty order, the criminal proceedings against him were continued before the Gossau Judicial Commission (Gerichtskommission). A hearing was held on 8 December 1989, and the Judicial Commission subsequently took further evidence, in particular as to the standard of due diligence in controlling the figs.

On 19 January 1990 the Gossau Judicial Commission found the applicant guilty of having negligently contravened S. 38 para. 1 of the Food Act in that he had negligently imported Turkish figs which were injurious to health.

The Judicial Commission had in particular regard to the applicant's defence that a maximum value regarding the aflatoxin content of food in general had only been prescribed in the Directive on Hygienic and Microbiological Standards concerning Food and Commodities (Verordnung über die hygienisch-mikrobiologischen Anforderungen an Lebensmittel, Gebrauchs- und Verbrauchsgegenstände) of July 1987, i.e. subsequent to the facts charged. The Judicial Commission considered that S. 38 of the Food Act was a general provision and did not presuppose the existence of maximum values prescribed by statute. In this respect, the Judicial Commission noted that the Federal Health Office, in its letter of December 1986, had informed, inter alia, the applicant about maximum aflatoxin contents concerning figs and had prohibited the sale of figs with a higher content because they were injurious to health.

On 20 August 1990 the St. Gallen Cantonal Court (Kantonsgericht) dismissed the applicant's appeal (Berufung). The Cantonal Court noted in particular that the Directive on Hygienic and Microbiological Standards concerning Food and Commodities of 1981, as amended in 1983, which had been in force at the time of the facts charged, only prescribed a maximum value regarding the aflatoxin content for some particular food product without referring to figs. Only the Directive of 1987 had extended this maximum value to all kind of food. The Cantonal Court considered that the figs had previously not been mentioned on the ground that a contamination of figs with aflatoxin had not yet been established. However, the Cantonal Court confirmed the reasoning of the lower instances according to which the factual element whether food was injurious to health, as laid down in S. 38 para. 1 of the Food Act, was not necessarily linked to a maximum aflatoxin content prescribed by statute or directives. Following the information on the aflatoxin content of figs given by Swiss health authorities to, inter alia, the company B., the applicant, as responsible manager, did not act with the due diligence in controlling the Turkish imports of figs.

On 19 February 1991 the Federal Court (Bundesgericht) dismissed the applicant's application for a declaration of nullity (Nichtigkeits-beschwerde).

According to the Federal Court, an aflatoxin content exceeding a particular maximum value was injurious to health irrespective of the kind of food concerned. The Directive on Hygienic and Microbiological Standards of 1981, as amended in 1983, had not mentioned figs for the sole reason that at the time in question it had not been known that figs could also contain aflatoxin. However, the question of whether food or its contents was injurious to health within the meaning of S. 38 para. 1 of the Food Act did not depend upon statutes or directives, but could only be answered in accordance with the rules of nature. Legal provisions on the basis of scientific findings, which were commonly known to be wrong at the time of the facts charged or of the judgment concerned, were irrelevant under S. 38 para. 1 of the Food Act. The Federal Court further considered that the applicant, following the repeated official information, could no longer proceed on the assumption that there was no aflatoxin problem in respect of figs.

B. Relevant domestic law

According to S. 38 para. 1 of the Swiss Food Act (Lebensmittel-gesetz), anybody who sells, or otherwise puts into circulation,food or commodities which are injurious to health or dangerous to life and limb shall be punished, in case of negligence, by imprisonment for a term not to exceed six months and a fine not to exceed SFR 1,000, or only by imprisonment or a fine.

The Federal Council (Bundesrat), in accordance with SS. 54 to 57 of the Food Act, issued a Regulation on Food (Lebensmittelverordnung). S. 8 a of this Regulation relates to hygienic and microbiological standards. S. 8 a para. 1 provides that food, substances to produce or treat food as well as commodities may contain microorganisms and metabolic produces of microorganisms only of such a quantity which is not injurious to human health. Pursuant to S. 8 a para. 2, the Federal Ministry of the Interior (Eidgenössisches Departement des Inneren) is entitled to issue a directive on hygienic and microbiological standards concerning food and commodities.

The Directive on Hygienic and Microbiological Standards concerning Food and Commodities (Verordnung über die hygienisch-mikro-biologischen Anforderungen an Lebensmittel, Gebrauchs- und Verbrauchs-gegenstände), issued by the Federal Ministry of the Interior in 1981, as amended in 1983, prescribed a maximum value regarding the aflatoxin content for some particular food products without referring to figs. The Directive on Hygienic and Microbiological Standards concerning Food and Commodities of 1 July 1987 extended this maximum value regarding the aflatoxin content to all kind of food.

COMPLAINTS

The applicant complains under Article 7 para. 1 of the Convention about his conviction by the Swiss Courts of having contravened S. 38 para. 1 of the Swiss Food Act. He submits that he was found guilty of having imported figs highly contaminated with aflatoxin although, at the time of the facts charged, figs had not been mentioned in the Directive on Hygienic and Microbiological Standards concerning Food and Commodities, issued by the Federal Ministry of the Interior, which prescribed a maximum aflatoxin content only for other particular food products.

THE LAW

The applicant complains under Article 7 para. 1 (Art. 7-1) of the Convention about his conviction by Swiss courts, under S. 38 para. 1

of the Swiss Food Act, of having put into circulation figs which were injurious to health.

Article 7 para. 1 (Art. 7-1) provides as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Article 7 para. 1 (Art. 7-1) of the Convention embodies the principle that only the law can define a crime and prescribe a penalty and that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable (Eur. Court H.R., Kokkinakis judgment of 25 May 1993, Series A no. 260-A, para. 52). This implies that constituent elements of an offence may not be essentially changed by the case-law of the domestic courts. However, it is not objectionable that the existing elements of a criminal offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence (cf. No. 13079/87, Dec. 6.3.89, D.R. 60 p. 256).

The applicant was convicted by the Gossau Judicial Commission, as confirmed by the St. Gallen Cantonal Court and the Federal Court, of an offence under S. 38 para. 1 of the Swiss Food Act, namely of having put into circulation figs, which were highly contaminated with aflatoxin and, therefore, injurious to human health. The St. Gallen Cantonal Court and the Federal Court had in particular regard to the applicant's defence that, at the time of the facts charged, figs could not be regarded as injurious to health within the meaning of S. 38 para. 1 of the Food Act on the ground that they were not mentioned in the Directive on Hygienic and Microbiological Standards concerning Food and Commodities of 1981, as amended in 1983, which prescribed a maximum aflatoxin content for particular food products. They found that the term "injurious to health" in S. 38 para. 1 of the Food Act had to be interpreted independently and was not linked to legal provisions which were based on scientific findings commonly accepted to be wrong at the time of the facts charged or the passing of the judgment.

The Commission finds no indication that, in the present case, the Swiss courts interpreted and applied S. 38 para. 1 of the Food Act, in particular the notion of "injurious to health", in a manner which was inconsistent with Article 7 para. 1 (Art. 7-1) of the Convention. In this respect the Commission notes that S. 38 para. 1 of the Food Act mentions the fact that food or commodities were "injurious to health" as one constituent element of the offence in question without referring to any further provisions laying down standards for the application of this notion, such as the Regulation on Food or the Directive on Hygienic and Microbiological Standards concerning Food and Commodities.

The Commission also had regard to the findings of the Swiss courts that the said Directive on Hygienic and Microbiological Standards concerning Food and Commodities, in its version in force at the time of the facts charged, contained maximum values regarding the aflatoxin content in particular food products though it did not mention figs. At the relevant time, the applicant, a responsible manager of the company B. and in his position acquainted with the relevant rules, had been repeatedly informed by Swiss health authorities on the general problem of an aflatoxin contamination of figs, and about the results of hygienic examinations which had established the contamination of

some lots of Turkish figs imported by the company B., of which he was a responsible manager. The Commission, therefore, considers that the applicant could reasonably foresee the risk of punishment under S. 38 para. 1 of the Food Act for putting highly contaminated figs into circulation.

Consequently, the Commission finds no appearance of a violation of Article 7 para. 1 (Art. 7-1) of the Convention. It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)