AS TO THE ADMISSIBILITY OF

Application No. 23218/94
by Riza GÜL
against Switzerland

The European Commission of Human Rights sitting in private on 10 October 1994, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS

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 31 December 1993 by Riza Gül against Switzerland and registered on 10 January 1994 under file No. 23218/94;

Having regard to:

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 21 June 1994 and the observations in reply submitted by the applicant on 26 August 1994;

Having deliberated;

Decides as follows:

THE FACTS

A. Particular circumstances of the case

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

The applicant, a Turkish citizen born in 1947, resides at Pratteln in Switzerland. Before the Commission he is represented by Mr J. Walker, a lawyer practising at Olten in Switzerland.

I.

Until 1983 the applicant resided in Turkey with his wife and two sons, namely T., born in 1971, and E., born in 1983. His wife suffers from epilepsy.

The applicant entered Switzerland in 1983 and filed a request for asylum. He worked in a hotel kitchen until 1990 when he fell ill.

In 1987 his wife, who was still in Turkey, fell into a fire when suffering an epileptic fit and was severely burnt. As she could not be treated adequately in the area where she lived, she travelled to Switzerland where she was treated as an emergency case. Two fingers of her left hand were eventually amputated.

In 1988 their child N., a girl, was born in Switzerland. Soon it became clear that the applicant's wife who continued to suffer from epilepsy could not care for the child, and N. was placed in a home in Switzerland. It also transpired that the wife was unable to return to Turkey.

On 26 June 1989 the Aliens' Police (Fremdenpolizei) of the Canton of Basel-Landschaft granted the applicant, his wife and N. a residence permit (Aufenthaltsbewilligung) in Switzerland on humanitarian grounds. In view thereof the applicant withdrew his request for asylum.

II.

The applicant then filed a request to permit the sons T. and E., who were still in Turkey, to join him in Switzerland. On 19 September 1990 the Aliens' Police of the Canton of Basel-Landschaft dismissed the request. It found in particular that the applicant and his wife did not have an apartment meeting the necessary requirements; that they did not have the financial means to take care of the family; and that T. could not join them in Switzerland as he was already 18.

The applicant's appeal against this decision was dismissed by the Council of State (Regierungsrat) of the Canton of Basel-Landschaft on 30 July 1991. It found that the applicant's children could not be permitted entry into Switzerland as he only had a residence permit, not a permit to establish domicile (Niederlassungsbewilligung), as required by Section 17 para. 2 of the Federal Act on Residence and Domicile of Foreigners (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer; see below, Relevant domestic law). Furthermore, Article 8 of the Convention could only be of relevance if the applicant had either Swiss nationality or a permit to establish domicile.

Insofar as the Aliens' Police could on its own accord permit children under 18 years of age to join the applicant and his wife according to Section 38 of the Federal Ordinance on the Limitation of the Number of Foreigners (Verordnung über die Begrenzung der Zahl der Ausländer; see below, Relevant domestic law), the Council of State noted that T. was 18. In respect of E. the Council of State left open whether the applicant's apartment was sufficiently big to house further persons, finding that the applicant's income, derived from social welfare, amounted to 2,060 SFr per month and thus did not reach the subsistence minimum of 2,710 SFr per month. Moreover, the applicant's wife was unable to rear N. on account of her health, for which reason it did not appear certain that the applicant's family could take care of E. In this respect the Council of State relied on Section 39 para. 1 of the Federal Ordinance (see below, Relevant domestic law).

Finally, the Council of State found that it could not be the purpose of residence permits granted on humanitarian grounds further to privilege the persons concerned by granting their family members the right to join them.

Against this decision the applicant filed an administrative law appeal (Verwaltungsgerichtsbeschwerde) which the Federal Court (Bundesgericht) dismissed on 2 July 1993. The Court recalled its case-law on Article 8 of the Convention according to which family members could only join a person in Switzerland if the latter had either Swiss nationality or permission to establish domicile. Moreover, in the present case it could not be completely excluded that in future the circumstances which had been regarded as justifying the granting of a residence permission on humanitarian grounds would change, or that other grounds would arise militating against prolongation of the residence permit.

B. Relevant domestic law

According to Section 4 of the Federal Act on Residence and Domicile of Foreigners (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer), within the framework of the legal order, the authorities will freely appreciate (nach eigenem Ermessen) whether to grant a residence permit.

According to Section 16 para. 1 of the Federal Act, when granting a residence permit the authorities will consider, inter alia, the economic interests of the country.

Section 17 para. 2 of the Federal Act provides, inter alia, that if a foreigner has permission to establish his domicile (Niederlassungsbewilligung) in Switzerland, this permission will include unmarried children under 18 years of age.

According to Section 38 of the Federal Ordinance on the Limitation of the Number of Foreigners (Verordnung über die Begrenzung der Zahl der Ausländer), the Cantonal Aliens' Police may permit the spouse and unmarried children under 18 years of age to join a foreigner in Switzerland. According to Section 39 para. 1 of the Ordinance, members of the family may join the foreigner on condition, inter alia, that he has sufficient means to support the family and the care of the children is assured.

COMPLAINTS

The applicant complains under Article 8 of the Convention that the Swiss authorities will not permit his children to join him in Switzerland. He submits that it is not possible for him, his wife and their child N. to return to Turkey in view of the inadequate medical treatment his wife would receive there. Thus, their position in Switzerland is such that the remaining family members should be permitted to join them.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 31 December 1993 and registered on 10 January 1994.

On 11 April 1994 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits in respect of the complaint under Article 8 of the Convention relating to the applicant's son E.

The Government's observations were submitted on 21 June 1994. The applicant's observations were submitted on 26 August 1994.

THE LAW

1. The applicant complains under Article 8 (Art. 8) of the

Convention that the Swiss authorities have refused his sons, T. and E., entry into Switzerland, and states that he, his wife and daughter cannot be expected to return to Turkey. Article 8 (Art. 8) provides:

> "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 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, remain or reside in a particular country is as such guaranteed by the Convention. However, if a person is refused entry to a country where his close family resides, an issue may arise under Article 8 (Art. 8) of the Convention (see No. 10375/83, Dec. 10.1.84, D.R. 40 p. 196).

In examining such cases the Commission must first consider whether a sufficient link exists between the relatives concerned as to give rise to the protection of "family life" within the meaning of Article 8 (Art. 8) of the Convention. Generally, this protection involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case.

2. The Commission has first examined the situation of the son T., born in 1971. Relationships between the applicant and this son, who is at present 23 years old and no longer a minor, do not enjoy the protection of Article 8 (Art. 8) of the Convention without evidence of further elements of dependency, involving more than the normal, emotional ties (see No. 10375/83, ibid.).

In the present case it has not been shown that T. is in any way dependent on the applicant. Moreover, it is not excluded that the applicant can visit T. in Turkey. In these circumstances there is no appearance of an interference with the applicant's right to respect for family life in respect of his son T., within the meaning of Article 8 (Art. 8) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The Commission has next examined the situation of the applicant's son E., born in 1983.

The Government submit that this complaint is incompatible ratione materiae with the Convention, pursuant to Article 27 para. 2 (Art. 27-2) of the Convention. Thus the applicant, who only has a residence permit on humanitarian grounds, has no right to stay in Switzerland, and cannot therefore invoke the rights of Article 8 (Art. 8) of the Convention.

Even assuming that this provision were applicable, the Government contend that the measure would be justified under Article 8 para. 2 (Art. 8-2) of the Convention. It was based on the Federal Act on Residence and Domicile of Foreigners and therefore "in accordance with the law" within the meaning of this provision. The purpose of the measure was the prevention of disorder, the protection of the economic well-being of the country and the protection of the rights and freedoms of others.

Given the margin of appreciation afforded to States in such

matters, the Government submit that the measure was "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention. The Government refer in particular to the fact that the applicant's family could also live in another country, and that it is not excluded that the applicant's wife could be treated in Turkey. Moreover, the applicant left Turkey of his own free will, when E. was three months old, and he could return to Turkey if he wished. Finally, the applicant and his wife do not have the financial means to rear E., whose stay in Switzerland would be disadvantageous to his well-being.

The applicant contests that he could live in another country. Medical treatment for his wife would be insufficient in Turkey, and the necessary social network would be missing. If his son E. had been permitted to enter Switzerland with his mother earlier on, he would have also received a residence permit on humanitarian grounds. The applicant submits that he cannot work, but draws an invalidity pension, so he could take care of E. The daughter N. was only placed in a home as the applicant could not take care of her when she was a baby; meanwhile, it would be disproportionate to take N. away from the home.

The Commission finds that this complaint raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This aspect of the case 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 ADMISSIBLE, without prejudging the merits of the case, the complaint under Article 8 of the Convention relating to the applicant's son E.;

unanimously,
DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)