AS TO THE ADMISSIBILITY OF

Application No. 25436/94
by H. M. C.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 7 December 1994, the following members being present:

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

Mr. K. ROGGE, 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 26 May 1994 by H. M. C. against Switzerland and registered on 18 October 1994 under file No. 25436/94;

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 submitted by the applicant, may be summarised as follows.

The applicant, born in 1958, is a Turkish citizen residing in Kreuzlingen. Before the Commission he is represented by Mr. D. Vischer, a lawyer practising in Zürich.

A. Particular circumstances of the case

In 1980 the applicant entered Switzerland with a residence permit for one year (Jahresaufenthaltsbewilligung). On 17 August 1984 the Aliens' Police (Fremdenpolizei) refused to prolong his residence permit, as he had obtained it by means of untrue statements and by concealing important facts. For instance, he had not disclosed that he had been expelled from Germany and that he had been convicted of criminal offences by German courts. Furthermore, he had also been convicted of criminal offences in Switzerland.

Subsequently, in 1984, the applicant married a Swiss citizen. As a result, the Aliens' Police prolonged his residence permit on 23 January 1985 for the time being and depending on his good conduct.

On 12 March 1985 the Unterrheintal Court Commission (Gerichts-

kommission) sentenced the applicant to a fine of 300 SFr for having facilitated the illegal entry of foreigners (Erleichterung der rechtswidrigen Einreise).

On 19 February 1986 the Unterrheintal District Court (Bezirksgericht) convicted the applicant of repeated contraventions of the Narcotics Act (Betäubungsmittelgesetz) and sentenced him to 15 months' imprisonment and 8 years' expulsion from Switzerland, both suspended on probation.

On 20 May 1986 the Unterrheintal District Council (Bezirksamt) sentenced the applicant to a fine of 800 SFr for having disregarded a speed limit.

On 31 August 1990 the applicant requested the prolongation of his residence permit which had expired on 15 July 1986. On 10 September 1990 the Aliens' Police of the Canton of St. Gallen granted him a provisional permit to stay with his wife during pending criminal proceedings against him.

On 22 October and 6 December 1990 the Cantonal Court (Kantonsgericht) of St. Gallen convicted the applicant of repeated and continuing contraventions of the Narcotics Act and sentenced him to three and a half years' imprisonment. The Court also revoked the suspension of his earlier sentence of 19 February 1986.

During his detention the applicant filed an application for a residence permit which the St. Gallen Aliens' Police refused on 6 October 1992.

On 23 October 1992 the applicant was released on probation; his expulsion was suspended on probation.

On 19 February 1993 the Werdenberg District Council sentenced the applicant to a fine of 120 SFr for assault (Tätlichkeit).

On 16 March 1993 the Council of State of the Canton of St. Gallen dismissed the applicant's appeal against the decision of the Aliens' Police of 6 October 1992. It 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).

On 21 April 1993 the applicant filed an administrative law appeal (Verwaltungsgerichtsbeschwerde) which the Federal Court (Bundesgericht) dismissed on 11 February 1994.

The Court found that Section 7 para. 1 of the Federal Act on the Residence and Domicile of Aliens did not grant foreign spouses of Swiss citizens a right to a residence permit in Switzerland if there was a ground for expulsion within the meaning of Section 10 of the Federal Act on the Residence and Domicile of Aliens. The decision further noted that the applicant had been convicted of various serious offences and constituted a danger to public order. The decision continued:

<Translation>

> "The applicant's wife, formerly an Austrian citizen, obtained Swiss citizenship through marriage. As far as it is known, she has always lived in Central Europe - in particular in Austria and in Switzerland. It would hardly be possible for her to come to terms with the applicant's native country. She can therefore hardly be expected to follow him to Turkey. It is of no relevance whether or not she still has the Austrian citizenship today. For, even if this were to be the case, it would not be certain whether the applicant could live with her in Austria. On the other hand, it is relevant that the applicant

was refused a prolongation of his residence permit already before the marriage and that a residence permit was only granted after the marriage for the time being. Therefore, it also became clear to the wife that a future life together in Switzerland was uncertain."

<Original>

"Die Ehefrau des Beschwerdeführers erhielt als ursprünglich österreichische Staatsangehörige durch Heirat das Schweizer Bürgerrecht. Sie hat, soweit bekannt, immer in Mitteleuropa - namentlich in Österreich und in der Schweiz - gelebt. Es dürfte ihr kaum möglich sein, sich im Heimatland des Beschwerdeführers zurechtzufinden, weshalb es ihr auch kaum zuzumuten ist, diesem in die Türkei zu folgen. Ob sie heute noch über die österreichische Staatsbürgerschaft verfügt, ist nicht wesentlich, denn, selbst wenn dies zuträfe, stünde nicht fest, dass der Beschwerdeführer mit ihr zusammen in Österreich leben könnte. Hingegen fällt in Betracht, dass ihm bereits vor der Heirat die Verlängerung der Aufenthaltsbewilligung verweigert und nach der Heirat nur auf Zusehen hin erteilt worden war. Damit war auch der Ehefrau erkennbar, dass das künftige Zusammenleben in der Schweiz nicht gesichert war."

The Court concluded that the refusal to grant the applicant a new residence permit was proportionate in view of the public interest in removing the applicant from Switzerland.

B. Relevant domestic law

Article 7 para. 1 of the Federal Act on the 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."

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 he has been refused a prolongation of his residence permit in Switzerland and that he will therefore be separated from his wife. He

submits that she cannot be expected to follow him abroad as she is a Swiss citizen who does not speak his mother tongue. Thus, his personal interest to stay in Switzerland and live his marital life outweighs the interests of public order and security. The applicant also submits that since his release from prison he has behaved well.

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 ... 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 and 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 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 residing in Switzerland. Thus the refusal to prolong his residence permit interfered with his right to respect for 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 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 four years and nine months.

Furthermore, in its decision of 11 February 1994 the Federal Court carefully balanced the various interests involved. It considered, on the one hand, that the applicant was married to a Swiss citizen who could not be expected to follow him to Turkey. On the other hand, it considered that the applicant had committed serious criminal offences and that he constituted a danger to public order.

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 was

proportionate in order to maintain public order.

Moreover, the applicant married after he had been refused a prolongation of his residence permit for the first time. After the marriage a new residence permit was granted only for the time being. The applicant and his wife therefore knew that they might not be able to continue their married life in Switzerland.

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 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 unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber	Acting President of the Second Chamber
(K. ROGGE)	(H. DANELIUS)