AS TO THE ADMISSIBILITY OF

Application No. 24544/94
by Alain HENZI
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 17 May 1995, the following members being present:

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

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 24 January 1994 by Alain Henzi against Switzerland and registered on 6 July 1994 under file No. 24544/94;

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 applicant, a Swiss national born in 1950, resides in Coulanges, France. Before the Commission he is represented by Mr. François Boudry, a lawyer practising in Lausanne.

Particular circumstances of the case

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

Between 1983 and 1986 the applicant ran a stable for ponies in Aveyron, France and since 1986 continued his activities in Neyex à Bex, Switzerland. He worked at the stable with his wife and also used the help of trainees, whom he recruited through advertisements in the newspapers. The trainees, all of them girls between fifteen and twenty years old, lived in rooms at the stable.

On 17 August 1990, after nearly eleven months of preliminary investigation, the Aigle District judge (Juge informateur de l'arrondissement d'Aigle) committed the applicant for trial on charges of sexual abuse. The bill of indictment listed numerous events, which had happened between 1983 and 1989 and concerned the applicant's sexual relationships with two and his assaults against ten of the trainees. On these grounds the applicant was indicted for aggravated indecent assault against children of less than sixteen years of age and indecent

assault against minors of more than sixteen years of age under Section 191 paras. 1 and 2 and Section 192 para. 2 of the Penal Code as applicable at that time.

On 1 July 1991 the Aigle District Court (Tribunal correctionnel du district d'Aigle) convicted the applicant. On 4 November 1991 this judgment was quashed by the Vaud Cantonal Cassation Court (Cour de cassation pénale du Tribunal cantonal du canton de Vaud) and the case was sent to the Nyon District Court (Tribunal correctionnel du district de Nyon).

On 29 January 1992, before the Nyon District Court had begun the examination of the case, the prosecution authorities submitted to the Court and to the applicant's defence counsel a request for the aggravation of the accusation.

The request stated inter alia that the facts of the case, as described in the bill of indictment, were conclusive also of a crime under Section 192 para. 1 of the Penal Code. This was so as some of the trainees between 16 and 20 years of age were in fact entrusted to the applicant by their parents and therefore the sexual assaults qualified as aggravated. Furthermore, one of the incidents with the trainee E., as described in the evidence obtained at the preliminary investigation, had all the elements of rape and therefore Section 187 para. 1 of the Penal Code had to be applied. Also, some of the assaults had to be qualified under Section 191 para. 2 instead of Section 192 para. 2 because the victims were less than 16 years old at the time of the assaults. Finally, the evidence obtained at the preliminary investigation disclosed that the applicant had again assaulted the trainee C. in 1986, whereas the indictment referred only to a period of time between 1984 and 1985.

On 13 April 1992, upon the opening of the hearing before the Nyon District Court, the representative of the prosecution authorities repeated the request of 29 January 1992. In response the applicant's lawyer stated that the case should be returned to the investigating judge because the accusation had been aggravated in the proceedings before the Aigle District Court; and also because the applicant had been entitled to an examination by the investigation judge of any new charges, to a new decision for committal to trial and to an appeal against such a decision. The Court dismissed these arguments by stating that the proceedings before the Aigle District Court were annulled and without any legal effect; that the prosecutor's request concerned only new legal qualifications of facts already examined at the preliminary investigation; and that therefore the applicant's defence rights were not affected. Based on this reasoning and on the conclusion that the relevant procedural requirements had been met, the Court accepted the amendment of the bill of indictment as requested by the prosecution authorities. Thereupon the president of the Court asked the applicant whether he wanted the case adjourned for the preparation of his defence. The applicant replied that he did not wish to avail himself of this opportunity.

The hearing continued with the examination of the victims. At a certain point the prosecutor requested another modification of the accusation. This was necessary because after one of the victims had been heard before the Court, it had become clear that an incident with her amounted to an attempt to have a full sexual relationship with a child under sixteen years of age and therefore qualified under another section of the Penal Code. The applicant's lawyer repeated the objections he had against the first amendment of the accusation. Thereupon the Court admitted the aggravation referring to its previous reasoning on the issue and again invited the applicant to state whether he would need some time to defend himself against the modified charges. As the applicant again answered in the negative, the Court continued with the examination of the case.

During the next day of the hearing a third similar modification of the accusation occurred, again followed by the applicant's refusal to have the case adjourned for purposes of his defence.

On 21 April 1992 the Nyon District Court convicted the applicant and sentenced him to four years' imprisonment. On 31 October 1992 the Vaud Cantonal Cassation Court rejected the applicant's appeal.

On 12 February 1993 the applicant submitted a public law appeal before the Federal Court (Tribunal Fédéral). He stated that the modification of the indictment breached his defence rights, because new facts and new legal qualifications had been brought against him without a decision for committal to trial and hence without giving him the opportunity to defend himself and to appeal against such a decision. Furthermore, the fact that the Nyon District Court accepted the amendment of the indictment and immediately afterwards convicted him was contrary to the principle of impartiality. This was so because by accepting the motion for aggravation of the accusation, the judges had in fact formed a preconceived opinion on the case. The applicant invoked, inter alia, Article 6 of the Convention.

On 28 July 1993 the Federal Court rejected the applicant's public law appeal. The Court stated that there had been no change in the facts of the indictment as the facts which served as grounds for the aggravation request had been described either in the original indictment or elsewhere in the evidence, contained in the case-file. Moreover the applicant had been heard on all of those facts during the preliminary investigation. It was only the legal qualification of known facts which had been modified and as the applicant had not availed himself of the opportunity to have the case adjourned for the preparation of the defence, there had been no violation of the applicant's defence rights.

Addressing the applicant's argument about the partiality of the judges, the Federal Court stated that the mere acceptance by the Nyon District Court of the motion for aggravation of the accusation could not cast doubts as to its impartiality. Furthermore, the Court had not acted ex officio, but on the request of the prosecution authorities. To return the case for a new decision to commit the applicant for trial would have been a mere formality.

Relevant domestic law

The relevant provisions of the Penal Code, in their version in force at the time of the events at issue, state as follows:

Section 187

"(1) Celui qui en usant de violence ou de menace grave, aura contraint une femme à subir l'acte sexuel hors mariage sera puni de la réclusion;

(...)"

Section 191

"(1) Celui qui aura fait subir l'acte sexuel ou un acte analogue à un enfant de moins de seize ans sera puni de la réclusion ou de l'emprisonnement pour six mois au moins;

(2) La peine sera la réclusion pour deux ans au moins si la victime est l'élève, l'apprenti ou le domestique du délinquant, ou si elle est son descendant, son enfant adoptif, l'enfant de son conjoint, son pupille ou un enfant confié à ses soins."

Section 192

"(1) Celui qui aura commis l'acte sexuel avec une personne mineure âgée de plus de seize ans qui est son enfant adoptif, l'enfant de son conjoint, qui a été confié à ses soins, ou qui est son pupille, son élève ou son apprenti, ou avec son domestique âgé de plus de seize ans, mais de moins de dix-huit ans, sera puni de la réclusion pour cinq ans ou plus ou de l'emprisonnement pour trois mois au moins;

(2) Celui qui aura commis un autre acte contraire à la pudeur sur une personne mineure âgée de plus de seize ans qui est son descendant, son enfant adoptif, l'enfant de son conjoint, qui a été confié à ses soins, ou qui est son pupille, son élève ou son apprenti, ou avec son domestique âgé de plus de seize ans, mais de moins de dix-huit ans, celui qui aura entraîné une de ces personnes à commettre un acte contraire à la pudeur, sera puni de la réclusion pour trois ans ou plus ou de l'emprisonnement."

COMPLAINTS

The applicant complains under Article 6 paras. 1 and 3(b) of the Convention that new facts and new legal qualifications had been accepted for examination by the Nyon District Court without a fresh decision for committal to trial. As a result, the applicant's right to be heard on all accusations at a preliminary investigation stage was violated. Also, he was deprived of the opportunity to appeal against the aggravation of the accusation, an opportunity which he would have had if the case had been returned for a decision for committal to trial.

Furthermore, the fact that the Nyon District Court accepted the amendment of the indictment and immediately afterwards convicted the applicant was contrary to the principle of a double examination by the investigation authorities and the trial court and to the principle of division between the judge who commits for trial and the trial judge. As a result, there were doubts as to the impartiality of the Court. This was so because by accepting the motion for aggravation of the accusation, the judges had in fact formed an opinion on the case.

THE LAW

1. The applicant complains under Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention of the alleged violation of his defence rights and the lack of impartiality of the Nyon District Court. Article 6 paras. 1, 3 (a) and (b) (Art. 6-1, 6-3-a, 6-3-b) of the Convention, insofar as relevant, state as follows:

"1. In the determination of (...) any criminal charge against him, everyone is entitled to a fair (...) hearing (...) by an independent and impartial tribunal (...)

(...)

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly (...) and in detail of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

(...)"

2. As the requirements of paragraph 3 of Article 6 (Art. 6-3) are to be seen as particular aspects of the right to a fair trial guaranteed

by paragraph 1, the Commission will examine the complaints under both paragraphs taken together (cf. F.C.B. v. Italy judgment of 28 August 1991, Series A no. 208-B, p. 20, para. 29).

The Commission recalls its case-law according to which an accused person has the right to be informed not only of the grounds for the accusation, that is, not only of the acts with which he is charged and on which the indictment is based, but also of the nature of the accusation, namely the legal classification of the acts in question. In addition, because of the logical link between subparagraphs 3(a) and (b) of Article 6 (Art. 6-3-a, 6-3-b), the information about the nature and cause of the accusation must be adequate to enable the accused to prepare his defence accordingly (No. 524/59, Dec. 19.12.60, Yearbook 3 pp. 322, 344; No 8490/79, Dec. 12.3.81, D.R. 22 p. 140). One element to be considered is whether the accused himself has requested adjournment of the hearing in order adequately to prepare his defence (Eur. Court H.R., Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 45, para. 98).

In the present case the applicant was informed of the aggravation of the accusation at least two months before the hearing of the case and, in respect of two additional changes, in the course of the hearing. The Commission notes that the changes concerned exclusively a new legal qualification of known evidence, albeit, as regards only the two supplementary modifications, prompted by the version of the facts presented by the victims before the Court. Insofar as the amended accusation contained facts, which were not stated in detail in the initial bill of indictment, these facts had been derived from the evidence in the case-file. The applicant does not contest that he had full knowledge of the case-file.

Furthermore, the Court expressly asked the applicant whether he wished to have the case adjourned for the preparation of his defence, but he declined, insisting that the case should be returned back to the investigation authorities.

The applicant, therefore, had the possibility adequately to defend himself.

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 applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the Nyon District Court was not impartial because it formed a preconceived opinion on the case while examining the requests for aggravation of the accusation and soon thereafter convicted the applicant.

The Commission recalls the Convention organs' case law, according to which the guarantee of impartiality under Article 6 para. 1 (Art. 6-1) of the Convention may be assessed by means of a subjective approach, by endeavouring to ascertain the personal conviction of a given judge in a particular case, or by an objective approach, by determining whether he offered sufficient guarantees to preclude any legitimate doubt in this respect (Eur. Court H.R., Piersack judgment of 1.10.1982, Series A no. 53, pp. 14-15, para. 30).

In the present case the applicant has not expressly questioned the judges' personal impartiality in any way. The applicant nevertheless claims that the Nyon District Court could not have been objectively impartial as it convicted him after having decided on the motions for modification of the accusation. The Commission must therefore analyse the role of the Court when accepting the prosecution's requests for aggravation of the accusation and the extent to which the decisions taken on these requests could indicate a preconceived opinion on the guilt of the accused (see Eur. Court H.R.,

De Cubber judgment of 26.10.1984, Series A no. 86, pp. 14, para. 26; Ben Yaacoub judgment of 27.11.1987, Series A no. 127, pp. 11-16, paras. 98-114).

The Commission notes that the admission of the motions for aggravation of the charges concerned exclusively new legal qualifications of known evidence. This act of the Court was not and could not have been the result of any assessment of the reliability of the relevant evidence or any opinion of the Court on the applicant's guilt in respect of the charges against him.

It follows that the remainder of the application is also 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 — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)