AS TO THE ADMISSIBILITY OF

Application No. 27043/95
by Beat JENNY
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 16 January 1996, the following members being present:

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

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 1 March 1994 by Beat JENNY against Switzerland and registered on 18 April 1995 under file No. 27043/95;

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 is a Swiss national born in 1948. He is a physicist and resides in Künten.

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

The particular circumstances of the case

The applicant's employment at the Federal Institute of Technology (Eidgenössische Technische Hochschule) in Zurich was terminated in 1990. The applicant appealed against this decision to the Swiss Schools Council (Schulrat). On 5 November 1991 W., the applicant's superior, contacted the Secretariat of the Schools Council by telephone. A file note was drawn up of the conversation.

On 18 March 1992 the applicant lodged an action with the Zurich District Court (Bezirksgericht). He accused W. of defamation according to Section 174 of the Federal Criminal Code and claimed damages. He expressly referred to the following part of the file note:

[Original]

"W. warnt dringend, dem Beschwerdeführer entgegenzukommen. Der

> Schulrat habe nur Akten vor sich, doch er und seine Mitarbeiter hätten persönliche Erfahrungen mit ihm, die ebenfalls berücksichtigt werden sollten. ... er [der Beschwerdeführer] würde nach einem solchen "Schuldeingeständnis" der ETH eine Reihe von nicht enden wollenden Prozessen in die Wege leiten. Es werde ihm dann nicht mehr um die Arbeitsstreitigkeit selber gehen, sondern um einen Schadenersatz wegen angeblicher Persönlichkeitsschädigung."

[Translation]

> "W. strongly advises against accepting the applicant's claims. The Schools Council has only the file before it, but W. and his colleagues have personal experience with him that should also be taken into account. ... in case of an "acknowledgment of liability" he [the applicant] would involve the Federal Institute of Technology in an endless series of proceedings. He would then no longer be concerned about the labour dispute as such, but he would seek damages for the alleged injury to his personality".

On 25 May 1992 the acting President of the Zurich District Court declared the action inadmissible as it did not meet the objective criteria of defamation under the Swiss law. In his view the only factual allegation in the statement at issue was that the defendant and his colleagues had personal experience with the applicant, and this statement was not defamatory.

The President of the District Court further considered the defendant's opinion that the applicant would involve the school in a series of proceedings to be a hypothesis about which there was no certainty. It could therefore not have been considered as a statement made in full knowledge of the fact that it was untrue (wider besseres Wissen) within the meaning of Section 174 of the Criminal Code. The court found that the statement at issue was neither an insult (üble Nachrede) nor did it attack the applicant's honour and reputation.

The applicant appealed against this decision. He claimed, inter alia, that the District Court had not been impartial, that it had not established the relevant facts, had applied the law erroneously, had decided arbitrarily and had not sufficiently substantiated its decision.

On 11 December 1992 the Criminal Chamber of the Canton of Zurich Court of Appeal (Obergericht) dismissed the appeal. It held that the first instance decision was lawful as there was no doubt about the lack of elements of the alleged offence. Neither the first instance court nor the other party was asked for observations.

On 12 January 1993 the applicant lodged a public law appeal and a plea of nullity with the Federal Court (Bundesgericht). In the public law appeal he complained, inter alia, that two Court of Appeal judges and the legal secretary were biased and that the courts had failed to take the evidence as required and had decided arbitrarily.

In the plea of nullity the applicant alleged that the Court of Appeal should have established the contents of the telephone conversation of 5 November 1991 and that the decision was unlawful since his right to honour and a good name had not been protected.

On 2 April 1993 the Federal Court dismissed the public law appeal. It found that it had only jurisdiction to examine the complaint about partiality of the Court of Appeal judges and of the legal secretary. This complaint was dismissed on the ground that those persons could not be considered as biased because of their earlier participation in different proceedings with a similar subject-matter.

On 23 June 1993 the applicant requested the exclusion of the

Federal Court judges who had earlier dealt with his cases.

On 26 August 1993 the Federal Court rejected the applicant's request for exclusion of its judges and dismissed the plea of nullity. It found that it had jurisdiction only to examine the complaint that federal law had been violated and found, with reference to the reasons given by the lower courts, that the decisions at issue could not be challenged from that point of view. The judgment was served on 2 September 1993.

The applicant tried to have criminal proceedings brought against officials who had dealt with his case. On 8 February 1994 the Federal Attorney General decided not to commit the officials for trial and on 30 January 1995 the Federal Department of Justice and of the Police upheld this decision.

The relevant domestic law and practice

Pursuant to Section 174 para. 1 of the Federal Criminal Code anybody who knowingly brings false accusations against another person before a third person or imputes to a person dishonest behaviour or any other fact calculated to diminish the esteem others have for that person, and anybody who spreads such accusations or suspicions while he or she is aware of their nature shall be punished by a prison sentence or by a fine.

By Section 28 para. 1 of the Civil Code anybody whose personality has been unlawfully impaired can take legal proceedings to protect himself or herself against the persons involved in such infringement.

Pursuant to Section 49 para. 1 of the Code of Obligations a person whose personality rights have been unlawfully impaired is entitled to damages provided that it is justified by the gravity of the interference unless he or she obtained satisfaction by other means.

Pursuant to Section 313 of the Canton of Zurich Code of Criminal Procedure the District Court's President is entitled to declare a charge inadmissible if the facts invoked by the person who attempts to bring the prosecution do not meet the objective criteria of an offence (i.e. if the accused would have to be acquitted even if the alleged facts were established). However, when doubts can arise whether or not the invoked facts meet the elements of an offence, the case has to be submitted to the court for examination.

COMPLAINTS

The applicant complains that his action against W. was not allowed and that he did not have a fair and public hearing before an impartial tribunal in this respect. In particular, he considers that the courts failed to establish the relevant facts and decided arbitrarily because they did not examine all his arguments and did not hear the participants in the telephone conversation at issue. The applicant also complains that the Swiss authorities refused to prosecute the officials who had dealt with his case. He alleges a violation of Article 6 para. 1 of the Convention.

The applicant also alleges a violation of Articles 1, 13 and 14 of the Convention.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention which reads, so far as relevant, as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial

tribunal established by law."

The Commission does not find it necessary to decide whether Article 6 (Art. 6) applies to the proceedings in which the applicant's action against W. was disallowed as this part of the application is in any event inadmissible for the following reasons.

a) To the extent that the applicant complains of the fact that he failed in his attempt to have his former superior punished for defamation and that the courts did not establish all relevant facts and decided arbitrarily the Commission recalls that it is not competent to examine alleged errors of fact or law committed by domestic courts, except where it considers that such errors might have involved a possible violation of the rights and freedoms guaranteed by the Convention (cf. No. 12013/86, Dec. 10.3.89, D.R. 59 p. 100).

In the present case the acting President of the District Court declared the applicant's request to bring private criminal prosecution inadmissible pursuant to the relevant provisions of the Code of Criminal Procedure. He held, for reasons laid down in the judgment, that the facts submitted by the applicant did not meet the objective criteria of an offence against honour or reputation as defined by Swiss law. As the accused would in any event have to be acquitted, the court did not establish the facts alleged by the applicant.

The Court of Appeal and the Federal Tribunal upheld this position, and the Commission does not find these decisions arbitrary.

The applicant further complains that the Court of Appeal judges and the Federal Court judges who dealt with his case, including the clerical staff, lacked impartiality. He refers to their participation in earlier proceedings with a similar subject-matter to which he was an unsuccessful party.

The Commission recalls that the fact that a judge participated earlier in different proceedings with a similar subject-matter is not in itself reasonably capable of giving rise to legitimate doubts as to his or her impartiality (cf. Eur. Court H.R., Gillow judgment of 24 November 1986, Series A no. 109, p. 28, para. 73). The Commission finds no indication that the judges and officials who dealt with the applicant's case lacked impartiality.

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.

b) To the extent that the applicant alleges that there was no public hearing in his case the Commission notes that the applicant failed to raise this issue before the Federal Court. Furthermore, it does not appear from the documents submitted that he asked the Federal Court to hold an oral hearing.

In this respect the applicant has failed to comply with the requirement as to the exhaustion of domestic remedies laid down in Article 26 (Art. 25) of the Convention.

It follows that this part of the application has to be rejected pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

2. To the extent that the applicant complains that no criminal proceedings were brought against officials involved in his case, the Commission recalls that Article 6 (Art. 6) of the Convention does not guarantee a right to have criminal proceedings instituted against third

persons (cf. No. 16734/90, Dec. 2.9.91, D.R. 72 p. 236).

It follows that this part of the application is incompatible ratione materiae with the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further alleges a violation of Article 13 (Art. 13) of the Convention which reads as follows:

> "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."

The Commission recalls that as regards the alleged interference with the applicant's honour and reputation, the applicant was free to seek redress by means of civil proceedings pursuant to Section 28 of the Civil Code and Section 49 para. 1 of the Code of Obligations. He did not avail himself of this possibility.

In any event, the guarantees of Article 13 (Art. 13) apply only to a grievance which can be regarded as "arguable" (cf. Eur. Court H.R., Powell and Rayner judgment of 21 February 1990, Series A no. 172, p. 14, para. 31, with further references). In the present case the Commission has rejected the substantive claims either as disclosing no appearance of a violation of the Convention or for non-exhaustion of domestic remedies or as being incompatible ratione materiae with the Convention. For similar reasons, they cannot be regarded as "arguable".

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.

4. Finally, the Commission has examined the applicant's complaints under Articles 1 and 14 (Art. 1, 14) of the Convention but finds that insofar as they have been substantiated and are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in 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.

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)