CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 54271/00
by Vlado KATANIC
against Switzerland

The European Court of Human Rights (Second Section), sitting on 5 October 2000 as a Chamber composed of

Mr C.L. Rozakis, *President*,
Mr A.B. Baka,
Mr L. Wildhaber,
Mr G. Bonello,
Mrs V. Strážnická,
Mr P. Lorenzen,
Mr M. Fischbach, *judges*,
and Mr E. Fribergh, *Section Registrar*,

Having regard to the above application introduced on 14 January 2000 and registered on 25 January 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, a citizen of Bosnia-Herzegovina born in 1962, resides in Wettingen in Switzerland.

A. The circumstances of the case

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

The applicant entered Switzerland as a seasonal worker in 1987. In the same year he married J.S., a citizen of Bosnia-Herzegovina who arrived in Switzerland in 1983 and is currently working as head of department in a supermarket. As a result of the marriage, the applicant was granted an annual residence permit. Their son S. was born in 1989.

At a date not specified in the application the applicant suffered an accident while at work. Part of his left arm was amputated, and he now draws an invalidity pension.

On 25 January 1995 the Zurzach District Court (*Bezirksgericht*) sentenced the applicant to 33 months' imprisonment, a fine of 4,000 Swiss Francs (CHF) and five years' expulsion from Switzerland, *inter alia*, on account of professional insurance fraud and contravening the War Material Act (*Kriegsmaterialgesetz*), in particular gun-running firearms to Yugoslavia. The expulsion from Switzerland was suspended on probation for a period of five years. No appeal was filed against this judgment.

By letter dated 15 March 1995 the Aliens' Police (*Fremdenpolizei*) of the Canton of Aargau informed the applicant that his annual residence permit (*Aufenthaltsbewilligung*) would only provisionally be prolonged until 31 August 1995, as the judgment of the Zurzach District Court had not yet entered into legal force. On 15 December 1995 the Aliens' Police decided no longer to prolong the applicant's residence permit in view of his criminal conviction. The applicant's appeal against this decision was dismissed by the Government (*Regierungsrat*) of the Canton of Aargau on 3 September 1997.

On 31 July 1997 the Werdenberg District Office (*Bezirksamt*) fined the applicant 300 CHF for having contravened the Narcotics Act (*Betäubungsmittelgesetz*) while in prison.

On 30 September 1997 the applicant was released from prison on probation.

The applicant filed an appeal against the decision of 3 September 1997 which was upheld, on 21 January 1998, by the Administrative Court (*Verwaltungsgericht*) of the Canton of Aargau. The Court noted in particular that the Government of the Canton of Aargau had overlooked that the applicant's wife had obtained as from 1 June 1997 a right to domicile in Switzerland (*Niederlassungsbewilligung*).

On 3 June 1998 the applicant's wife and son were granted the right to domicile in Switzerland.

The applicant's renewed appeals against the refusal to prolong his residence permit were dismissed by the Government of the Canton of Aargau on 16 December 1998 and by the Administrative Court of the Canton of Aargau on 21 April 1999.

The applicant filed an administrative law appeal (*Verwaltungsgerichtsbeschwerde*) which the Federal Court (*Bundesgericht*) dismissed on 8 November 1999. The Court relied in particular on Section 17 § 2 of the Aliens' Domicile and Residence Act (*Bundesgesetz über Aufenthalt und Niederlassung der Ausländer*) according to which a foreigner will lose his right to a prolongation of a residence permit if he breaches public order. The Court then weighed the public interest in not renewing the applicant's residence permit in view of his criminal conviction with his interest in remaining with his family in Switzerland.

The Court considered in particular that the applicant had shown considerable "criminal energy" in that he had regularly committed offences of the same type while in Switzerland. He had furthermore maintained regular contacts with his home country to which he had occasionally returned during his stay in Switzerland.

The Court furthermore found that the applicant's wife would undoubtedly suffer in her professional activities if she followed the applicant to Yugoslavia, though this did not suffice as a reason to prolong his residence permit. Their son was of an adaptable age and could be expected to follow his parents. The issue furthermore arose whether the separation could still be regarded as being disproportionate since the wife had stated during the proceedings that she would in any event remain in Switzerland with their son, even if the applicant left Switzerland.

As a result, the Court did not find it disproportionate that the applicant's residence permit had not been renewed.

On 6 December 1999 the Federal Aliens' Office *(Bundesamt für Ausländerfragen*) informed the applicant that he had to leave Switzerland by 15 January 2000. By decision of the same date the Office prohibited the applicant from entering Switzerland for a period of five years, i.e. until 15 January 2005.

B. Relevant domestic law and practice

Section 17 of the Aliens' Domicile and Residence Act (*Bundesgesetz über Aufenthalt und Niederlassung der Ausländer*) states:

> "1. As a rule the authority shall at the outset only grant a residence permit to the alien, even if the latter envisages permanently to stay in the country. The Federal Aliens' Office shall determine in each case the earliest date as from when it shall grant the right to domicile.
>
> 2. If this date has already been determined, or if the alien is entitled to the right to domicile, the spouse shall be entitled to a residence permit, or to have it prolonged, as long as the spouses live together. After a regular and uninterrupted residence of five years the spouse shall also be entitled to the right to domicile. Unmarried children below 18 years of age shall be included in the right to domicile if they live together with their parents. These rights expire if the entitled person has breached public order."

COMPLAINT

The applicant complains under Article 8 of the Convention that his residence permit has not been renewed. He has served his sentence and has not committed any offences after his release from prison. He claims that his wife cannot follow him to Bosnia-Herzegovina, as their villages lie in the "wrong" part of Bosnia. In any event, his wife could not be expected to follow him. She has developed professionally in Switzerland and is currently applying for Swiss citizenship. Their son has grown up in Switzerland, and the family has its friends there.

THE LAW

The applicant complains under Article 8 of the Convention that the Swiss authorities have not renewed his residence permit. As a result, he will be separated from his wife and son both of whom cannot be expected to follow him to Bosnia-Herzegovina.

The Government submit that the present case discloses no violation of Article 8 of the Convention. Section 17 § 2 of the Aliens Domicile and Residence Act, which has been duly published, provides a sufficient legal basis for the interference. According to this provision, the residence permit will be refused if the person concerned commits serious unlawful behaviour or breaches public order. Given the offences which the applicant committed in Switzerland, there can be no doubt that the measure was called for in the interests of public safety, for the prevention of disorder or crime, and for the protection of the rights and freedoms of others, within the meaning of Article 8 § 2 of the Convention.

The Government further contend that the measure was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention and that the Swiss authorities have not overstepped their margin of appreciation. Elements to be considered here are the nature of the offences committed, the length of the prison sentence, the length of the applicant's stay in Switzerland, and the effects which the refusal to prolong the residence permit will have on the applicant's wife. In the present case, both the Federal Court and the Administrative Court of the Canton of Aargau carefully examined the applicant's situation. Their analysis of the situation cannot be called in question by the fact that the applicant did not commit any offences after his release from prison.

The Government submit that the prison sentence of 33 months imposed on the applicant justified the refusal to renew his residence permit. One and a half years after his arrival in Switzerland he embarked on a criminal career which did not stop even after his accident at work. After his release from prison the applicant did not leave Switzerland, employing all means at his disposal to prolong his stay. The Government recall that the applicant was also convicted of drug offences, and it is submitted that the Court's case-law concerning drug offences applies by analogy also to the present case (see Eur. Court HR, Dalia v. France judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 92, § 54). These offences in themselves justify non-renewal of the applicant's residence permit.

The Government recall that the applicant and his wife spent their youth and early adulthood in former Yugoslavia. While it is true that their relatives live in Switzerland, the applicant, his wife and their child, all citizens of Bosnia-Herzegovina, would have no

difficulty in establishing themselves again there, all the more so as the applicant's invalidity pension will continue to be transferred to him. The applicant has frequently returned to Bosnia-Herzegovina without encountering difficulties. The arguments submitted by the applicant's wife are essentially of an economic nature. Even if she has well-paid employment in Switzerland, she can be expected to lead her family life with the applicant and their child in their home country. The applicant's son is still of an adaptable age.

The applicant submits that he no longer constitutes a concrete danger to security as he has behaved well for a number of year. This has not been contested by the Government. The arguments in favour of not renewing his residence permit are too general and have no relation to reality. Even the District Court found in 1995 that the applicant deserved a further chance. There is, therefore, no objective reason to expel him from Switzerland and to separate him from his family. As he is prohibited to enter Switzerland, he can no longer visit his family and relatives. His wife and child are currently applying for Swiss nationality. His son will be punished in that he will be obliged to grow up without a father. As there is no public interest in his leaving Switzerland, a separation from his family would be disproportionate.

Article 8 of the Convention states, insofar as relevant:

> "1. Everyone has the right to respect for his private and 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 or morals, or for the protection of the rights and freedoms of others."

The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. Nevertheless, 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 § 1 of the Convention (see Eur. Court HR, Moustaquim v. Belgium judgment of 18 February 1991, Series A no. 193, p. 18, § 36).

In the present case, the Court finds that the applicant's obligation to return to Bosnia-Herzegovina and the prohibition to enter Switzerland would interfere with his right to respect for his private and family life within the meaning of Article 8 § 1 of the Convention.

The Court must, therefore, examine whether such interference is justified under Article 8 § 2 of the Convention.

The Court notes that the Federal Court relied in particular on Section 17 § 2 of the Aliens' Domicile and Residence Act according to which a foreigner will lose his right to the prolongation of a residence permit if he breaches public order. The interference is, therefore, "in accordance with the law" within the meaning of Article 8 § 2 of the Convention.

Moreover, when deciding not to renew the applicant's residence permit, the Swiss authorities considered that he had been convicted of criminal offences. The measure was therefore imposed "for the prevention of ... crime" within the meaning of Article 8 § 2 of the Convention.

Finally, the Court has examined whether the measure is "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, as interpreted in the Court's case-law (see Eur. Court HR, Bouchelkia v. France judgment of 29 January 1997, Reports of Judgments and Decisions, 1997-I, p. 65, § 48).

In this respect the Court observes at the outset that the Swiss authorities, in particular the Federal Court and the Administrative Court of the Canton of Aargau, carefully examined the various interests at stake.

The Court recalls that the applicant was sentenced to 33 months' imprisonment on account of, *inter alia*, insurance fraud and gun-running. Moreover, while in prison the applicant contravened the Narcotics' Act. The Court further notes the Federal Court's judgment of 8 November 1999 according to which the applicant had shown considerable "criminal energy" when committing the offences.

Furthermore, during his stay in Switzerland the applicant occasionally returned to Bosnia-Herzegovina without having experienced any difficulties. The Court notes the Government's submissions, not contested by the applicant, that his invalidity pension will continue to be transferred to him even after his departure from Switzerland.

It is true that that the applicant's wife is professionally established in Switzerland and their son has grown up there. The Court considers, however, that she is also a citizen of Bosnia-Herzegovina, and it has not been sufficiently demonstrated that she would encounter undue difficulties of integration when returning to their home country. The Court further notes that the applicant's son, who is now 11, is still of an adaptable age.

Taking into account the margin of appreciation which is left to Contracting States in such circumstances (see Eur. Court HR, Boughanemi judgment of 24 April 1996, Reports of Judgments and Decisions, 1996-II, p. 610, § 41), the Court considers that the interference with the applicant's rights to respect for his private and family life is justified under Article 8 § 2 of the Convention in that it can reasonably be considered "necessary in a democratic society ... for the prevention of crime".

It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Erik Fribergh
Registrar

Christos Rozakis
President