AS TO THE ADMISSIBILITY OF

Application No. 22206/93
by Tamas and Heidi LANG-LÜSSI
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 6 September 1995, 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 15 June 1993 by Tamas and Heidi Lang-Lüssi against Switzerland and registered on 12 July 1993 under file No. 22206/93;

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 applicants, may be summarised as follows.

The applicants are a married couple residing at Guttannen in Switzerland. They have Swiss and apparently also Hungarian citizenship. The first applicant, born in 1939, is a parson. The second applicant, born in 1944, is a housewife. Before the Commission they are represented by Mr P. Nobel, a lawyer practising in Zürich.

The applicants married in 1973. Their only son, born in 1975, died in 1989 as a result of an accident.

In 1989 the applicants expressed interest in adopting a child. Two expert opinions prepared in 1990 stated that the applicants were suitable in this respect. At that time, the applicants refused an offer by the Colombian authorities to adopt a nine year old boy.

The applicants then contacted a Brazilian adoption agency. When the second applicant heard that X., a girl born in 1988, was free for adoption in Sao Paulo, the second applicant travelled to Brazil in February 1991.

On 5 March 1991 the first applicant requested the Cantonal Youth

Office (Jugendamt) of the Canton of Bern to authorise the placing of X. in their care for purposes of adoption (zur Aufnahme zwecks Adoption). The Youth Office informed the applicants that further inquiries would be necessary in view of the age difference between parents and child.

On 27 March 1991 the Brazilian authorities authorised the applicants' adoption of X. It appears that the Hungarian authorities also granted such an authorisation.

On 4 April 1991 the applicants travelled with X. from Brazil to Switzerland.

On 12 April 1991 the Youth Office ordered the applicants to place X. elsewhere.

The applicants filed a complaint before the Administrative Court (Verwaltungsgericht) of the Canton of Bern. As the result of a friendly settlement, X. was provisionally placed in the V. family.

The Youth Office then requested the Adoption Counselling Service of the Caritative Women's Association (Beratungsstelle für Adoption des Schweizerischen gemeinnützigen Frauenvereins) to examine the situation. In its report of 24 July 1991 the Counselling Service concluded that X. should not be placed with the applicants. The Counselling Service referred in particular to the difference of age between X. and the applicants; the motives given by the applicants for adoption; the difficulties which could be expected during puberty; and the health problems of the second applicant who suffered from adiposity.

As a result, the Youth Office on 6 September 1991 refused to authorise the placing of X. in the applicants' care for the purpose of adoption. The Youth Office relied in particular on the Federal Ordinance on the placing of foster children (Eidgenössische Verordnung über die Aufnahme von Pflegekindern). According to Section 5 of this Ordinance, a child may only be placed in a foster family if the personality, health and educational abilities of the foster parents ensure good care and education of the child; placing a child in a foster family for the purpose of adoption may only be authorised if it is to be expected that adoption will later be authorised.

The applicants' appeal against this decision was dismissed by the Directorate of Justice (Justizdirektion) of the Canton of Bern on 18 November 1991.

Their further appeal was dismissed by the Administrative Court on 19 February 1992. The Court found that there was a difference in age of 50 and 44 years between X. and the first and the second applicant, respectively. While the applicants were currently in a situation where they could raise X., it was open to doubt in the Court's opinion whether they would offer the necessary adaptability once X. entered puberty. There was further a risk that X., who would have been a single child, would grow up overly protected and spoiled. The manner in which the applicants had dealt with the authorities although they should have known that they could not necessarily bring X. to Switzerland, did not demonstrate parental love; rather, the applicants had put their own interests before those of the child.

The applicants then filed an administrative law appeal (Verwaltungsgerichtsbeschwerde) which the Federal Court (Bundesgericht) dismissed on 20 January 1993.

In its decision the Court first dealt with the applicants' complaints under Swiss law and the Convention that the facts had been incorrectly and insufficiently determined and that the Administrative Court had abused its margin of appreciation. The Court considered that the proceedings at issue had a direct influence on the constitution and

continuation of a family (Begründung und Bestand von familienrechtlichen Verhältnissen) and therefore concerned the determination of the applicants' civil rights and obligations within the meaning of Article 6 para. 1 of the Convention for which reason this provision was applicable. The judgment continues:

<Translation>

> "In the present case the question of an authorisation to place the child in care for purposes of a subsequent adoption was decided in first instance by the Cantonal Youth Office and upon appeal by the Cantonal Directorate of Justice. These authorities are administrative bodies and do not meet the requirements of Article 6 para. 1 of the Convention; the cantonal Administrative Court could itself only examine the contested decision from a legal, not from a factual point of view, and there was not even a control of appreciation. The administrative law appeal to the Federal Court also does not permit a full control of the determination of the facts and therefore of the appreciation of evidence, if the appeal is directed against the decision of a cantonal court.
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> According to Section 108 para. 2 of the Organisation of Justice Act the administrative law appeal must contain inter alia the request and the grounds therefor. According to the Federal Court's case-law, no strict requirements should be made in this respect ... Nevertheless, it must transpire from the grounds given which aspects of the contested decision are being criticised ... In the present case the facts are contested; however, the applicants have not criticised with one word the proceedings in which the decisions were taken, and in particular they have nowhere requested proceedings complying with Article 6 para. 1 of the Convention. As there is absolutely no such ground mentioned in the appeal, the cantonal proceedings shall not be examined as to their compliance with Article 6 para. 1 of the Convention."

<Original>

> "Im vorliegenden Fall wurde die Frage der Aufnahmebewilligung des Kindes zur Pflege zwecks späterer Adoption erstinstanzlich vom kantonalen Jugendamt, auf Beschwerde hin von der kantonalen Justizdirektion entschieden. Diese Behörden genügen als Verwaltungsbehörden den Anforderungen von Art. 6 Abs. 1 EMRK nicht; das kantonale Verwaltungsgericht konnte seinerseits den angefochtenen Entscheid nur in rechtlicher, nicht aber in tatsächlicher Hinsicht überprüfen, wobei sogar die Ermessenskontrolle entfiel. Auch die Verwaltungsgerichtsbeschwerde an das Bundesgericht erlaubt keine volle Kontrolle der Sachverhaltsfeststellungen und damit auch der Beweiswürdigung, wenn sie gegen den Entscheid eines kantonalen Gerichts eingereicht wurde.
>
> Gemäss Art. 108 Abs. 2 OG hat eine Verwaltungsgerichtsbeschwerde u.a. die Begehren und deren Begründung zu enthalten. An diese sind nach bundesgerichtlicher Rechtsprechung keine strenge Anforderungen zu stellen ... Immerhin muss die Begründung erkennen lassen, weshalb und in welchen Punkten der angefochtene Entscheid beanstandet wird ... Im vorliegenden Fall ist der Sachverhalt umstritten; die Beschwerdeführer haben aber das Verfahren, in dem die Entscheide getroffen wurden, mit keinem Wort beanstandet und haben insbesondere ein Art. 6 Abs. 1 EMRK entsprechendes Verfahren nirgends gefordert. Mangels jeglicher diesbezüglicher Begründung in der Beschwerde ist

das kantonale Verfahren nicht auf seine Verträglichkeit mit Art. 6 Ziff. 1 EMRK zu überprüfen."

Insofar as the applicants had submitted new factual information after filing their administrative law appeal, the Court found that it was not competent to admit this information which "in any event, as shall still be shown, was not relevant for the decision" (es wäre im übrigen, wie noch zu zeigen ist, auch nicht entscheiderheblich).

Insofar as the applicants complained that they had not been able to consult one particular report prepared by Mrs V., the Court noted that the Administrative Court had also not been aware of the file; the Court also ordered the report to be taken out of its own file.

The Court then dealt with the applicants' complaint that the Administrative Court had not sufficiently considered the opinion of a Guardianship Office; that the first applicant was a Hungarian citizen and had been born in Hungary; and that the Hungarian authorities had also dealt with the applicants' request for adoption. The Court noted in particular that neither the applicants nor X. lived in Hungary, and that the applicants were Swiss citizens residing in Switzerland. Insofar as the applicants maintained that according to Brazilian law X. was their adoptive child, the Federal Court found that Swiss law did not attach weight to whether the home country of the adopted child had already authorised the child's adoption. The applicants were moreover themselves responsible for the fact that the legal situation of X. was unsatisfactory, as they had brought X. into Switzerland despite a warning by the Youth Office, and without possessing any official authorisation by the Swiss authorities. They had then instituted adoption proceedings both in Brazil and in Hungary, though these decisions were not accepted in Switzerland.

The Federal Court further dealt with the applicants' complaint of a breach of Article 8 of the Convention, inter alia in that the Administrative Court had abused its discretion and that one particular report was useless and could not serve as a basis for a decision. The Court found that the report at issue was not the only element on which the Administrative Court had relied when concluding that a relationship between X. and the applicants would not serve the child's interests. The Court considered that the notion of the child's interests had to be interpreted according to Swiss conditions, and it did not suffice to conclude that the child was better off merely because it had Swiss adoptive parents. The Federal Court found that the Administrative Court had carefully examined the applicants' personalities, their age and health situation, their views, their relationship to X., and also the situation in the future.

COMPLAINTS

1. Under Article 6 para. 1 of the Convention the applicants complain that the various authorities dealing with their case could only examine it from a legal, not a factual point of view.

2. Under Article 8 of the Convention the applicants complain that they have been separated from X., and that the Swiss authorities have not recognised the adoptions granted under Hungarian and Brazilian law.

THE LAW

1. Under Article 6 para. 1 (Art. 6-1) of the Convention the applicants complain that the various authorities dealing with their case could only examine it from a legal, not a factual point of view.

Article 6 para. 1 (Art. 6-1) of the Convention states, insofar as relevant:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing ... by (a) tribunal ..."

The Commission recalls the case-law of the Convention organs according to which the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (Art. 6-1) of the Convention, or they do not so comply, but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (Art. 6-1) (see Eur. Court H.R., Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 16, para. 29: Zumtobel judgment of 21 September 1993, Series A no. 268, p. 13, para. 29).

a) The Commission considers that the proceedings at issue, concerning the adoption of X., had a direct influence on the constitution and continuation of a family and therefore concerned the determination of the applicants' civil rights and obligations within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

b) The Commission observes that the Federal Court in its decision of 20 January 1993 identified in the present case the issue of a lack of access to court. However, it decided not to resolve the issue as the applicants had failed to raise any such complaint in their administrative law appeal before the Federal Court. The applicants have not therefore complied with the requirement as to the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

This part of the application must therefore be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

2. Under Article 8 (Art. 8) of the Convention the applicants complain that they have been separated from X., and that the Swiss authorities have not recognised the adoptions granted under Hungarian and Brazilian law.

Article 8 (Art. 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."

An issue arises whether the authorities' refusal to place X. in the applicants' care for the purpose of adoption amounted to an interference with their right to respect for their private and family life within the meaning of Article 8 (Art. 8) of the Convention. The Commission need not resolve this issue since such an interference would in any event have been justified within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

Thus, when refusing to place X. in the applicants' care for the purpose of adoption, the Swiss authorities relied on the Federal Ordinance on the placing of foster children which mentions the conditions for the placing of a child in a foster family in particular for the purpose of adoption. The interference was therefore "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission further accepts that the authorities' refusal to

place X. in the applicants' care served "the protection of health (and) of the rights and freedoms of others", in particular of the child, within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

Moreover, when considering whether or not to place X. in the applicants' care, the Swiss authorities considered the different interests at stake. Thus, they examined, with reference to an expert opinion, the applicants' personalities, their age and health situation, their views, their relationship with X. and the situation in the future. As a result, they found that the adoption would not be in the interests of the child.

The Commission further notes that the Swiss authorities were aware that the applicants' adoption had been accepted by both the Brazilian and the Hungarian authorities. However, the Federal Court found in its decision of 20 January 1993 that as the applicants were Swiss citizens and lived in Switzerland the child's interests had to be interpreted according to Swiss conditions, and that it did not suffice to conclude that the child was better off merely because it had Swiss adoptive parents.

In the Commission's opinion, it cannot be said that the decision of the Swiss authorities went beyond the margin of appreciation left to national authorities. The interference with the applicants' right to respect for private and family life could therefore reasonably be considered "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

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, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)