AS TO THE ADMISSIBILITY OF

Application No. 25037/94
by Claudia and Hasan MARHAN
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 29 July 1994 by Claudia and Hasan Marhan against Switzerland and registered on 31 August 1994 under file No. 25037/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 20 December 1994 and the observations in reply submitted by the applicants on 13 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

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

The first applicant is a Swiss citizen born in 1964. The second applicant is a Turkish citizen born in 1968. Both applicants reside at Aesch in Switzerland. Before the Commission they are represented by Mr. Andreas Brunner, a lawyer practising in Reinach.

A. Particular circumstances of the case

On 22 July 1987 the second applicant entered Switzerland and applied for asylum.

On 2 December 1990 the applicants became engaged.

On 27 February 1991 the second applicant was arrested on suspicion of having contravened the Narcotics Act (Betäubungsmittelgesetz) and remanded in custody.

On 11 April 1991 the applicant's request for asylum was dismissed.

On 18 July 1991, while the second applicant was in detention, the applicants got married.

On 15 August 1991 the Criminal Court (Strafgericht) of the Canton Basel-Landschaft convicted the second applicant of contraventions of the Narcotics Act and sentenced him to 27 months' imprisonment.

On 5 February 1992 the second applicant applied to the Aliens' Police of the Canton Basel-Landschaft (Fremdenpolizei des Kantons Basel-Landschaft) for a residence permit. On 17 February 1992 the Aliens' Police refused this request and ordered his expulsion after his release from imprisonment.

The second applicant was released on probation on 26 August 1992 after having served two thirds of his prison sentence.

On 26 January 1993 the applicants' joint appeal (Beschwerde) against the decision of 5 February 1992 was granted by the Government (Regierungsrat) of the Canton Basel-Landschaft which found that expulsion was an inadequate measure. The case was referred back to the Aliens' Police who were ordered to grant a residence permit to the second applicant.

The Aliens' Police then intended to issue a residence permit to the first applicant. However, on 11 August 1993 the Federal Office for Aliens' Affairs (Bundesamt für Ausländerfragen) refused to give its consent thereto and ordered the second applicant's expulsion from Switzerland for a period of five years.

On 22 April 1994 the Federal Department of Justice and Police (Eidgenössisches Justiz- und Polizeidepartement) dismissed the applicants' joint appeal against the decision of the Federal Office for Aliens' Affairs.

The applicants' administrative law appeal (Verwaltungsgerichts-beschwerde) was dismissed by the Federal Court (Bundesgericht) on 30 June 1994.

In its decision the Federal Court found that Article 7 para. 1 of the Federal Act on the Residence and Domicile of Aliens (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer, see below, Relevant domestic law) did not grant to foreign spouses of Swiss citizens a right to a residence permit in Switzerland if there was a ground for expulsion within the meaning of Article 10 of the Federal Act. Nevertheless, expulsion could only be ordered if it was proportionate to the circumstances of the case. In balancing the interests account had to be taken inter alia of the seriousness of the offences committed, the detrimental effects on the second applicant and his family, and the period of time which he had spent in Switzerland. The decision continues:

<Translation>

> "The interest of (the first applicant) in being able to live her marriage in Switzerland is eminent. She suffers from epilepsy and draws half an invalidity pension. If she followed her husband to Turkey, she would not only be confronted with social and cultural differences, but she would also have to make sure that adequate medical help would be available when establishing residence there. To this extent, the applicants' residence in the native country of the husband, who is a Kurd, would have to be excluded. Nevertheless, the Department rightly points out

that the applicants would not necessarily have to take up residence in a Kurdish area; the wife would also not be obliged to stay in Turkey during the military service of her husband. However, even if (the first applicant's) health problems do not exclude life in Turkey altogether, emigration to that country would nevertheless involve quite considerable difficulties for her. Of course, it must also be considered that the Swiss wife at the time of marriage knew of the misconduct of her foreign partner. She could therefore be expected to have considered that she might not be able to live her marriage in Switzerland ... , even if it must be pointed out that on 2 December 1988 when their engagement was celebrated (the first applicant) knew nothing of (the husband's) offences.

On the whole, the applicants have a considerable private interest in living their marriage in Switzerland. This cannot outweigh the public interest in refusing a residence permit. As has already been demonstrated, (the second applicant) has been sentenced to 27 months' imprisonment. The seriousness of his criminal activities can hardly be questioned ... ."

<German>

"Das Interesse (der Beschwerdeführerin), ihre Ehe in der Schweiz leben zu können, ist gewichtig. Sie leidet an Epilepsie und bezieht ein halbe Rente der Invalidenversicherung. Wenn sie ihrem Mann in die Türkei folgen würde, wäre sie nicht nur mit sozialen und kulturellen Unterschieden konfrontiert, sie müsste überdies bei der Wohnsitznahme Bedacht darauf nehmen, dass die medizinische Versorgung sichergestellt ist. Insofern dürfte ausser Betracht fallen, dass (die Beschwerdeführer) in der engeren Heimat des Ehemannes, welcher Kurde ist, leben könnten. Das Departement weist allerdings mit Recht darauf hin, dass die Beschwerdeführer nicht notwendigerweise in kurdischem Gebiet Wohnsitz nehmen müssten; ebensowenig ist die Ehefrau gezwungen, sich während des Militärdienstes ihres Mannes in der Türkei aufzuhalten. Auch wenn demnach die gesundheitlichen Probleme (der Beschwerdeführerin) ein Leben in der Türkei nicht geradezu ausschliessen, so bleibt es doch dabei, dass für sie eine Übersiedlung in dieses Land mit ganz erheblichen Schwierigkeiten verbunden wäre. Zu beachten gilt es freilich auch, dass die schweizerische Ehefrau zum Zeitpunkt der Heirat vom Fehlverhalten ihres ausländischen Partners Kenntnis hatte und sie folglich damit rechnen musste, ihre Ehe nicht in der Schweiz leben zu können ..., wenngleich immerhin festzuhalten ist, dass (die Beschwerdeführerin) von den Delikten noch nichts wusste, als am 2. Dezember 1990 ihre Verlobung gefeiert wurde.

Das insgesamt erhebliche private Interesse (der Beschwerdeführer), ihre Ehe in der Schweiz leben zu können, vermag allerdings das öffentliche Interesse an der Verweigerung der Aufenthaltsbewilligung nicht aufzuwiegen. Wie schon dargelegt, ist (der Beschwerdeführer) zu einer Freiheitsstrafe von 27 Monaten verurteilt worden. Die Schwere seiner deliktischen Tätigkeit lässt sich kaum relativieren ... ."

The Court also found that even if the second applicant's conduct in prison had been good and he had meanwhile become integrated both professionally and socially, there nevertheless remained the risk of his committing a new offence. The Court concluded that in the present case the interests of public order and security prevailed over the

applicants' interest in a residence permit for the second applicant.

B. Relevant domestic law

1. Article 7 para. 1 of the Federal Act on the Residence and Domicile of Aliens states:

<Translation>

> "The foreign spouse of a Swiss citizen has a right to be granted a residence permit or to have it prolonged ... This right no longer exists if there is a ground for expulsion."

<German>

> "Der ausländische Ehegatte eines Schweizer Bürgers hat Anspruch auf Erteilung und Verlängerung der Aufenthaltsbewilligung ... 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 criminal offence."

<German>

> "Der Ausländer kann aus der Schweiz ... nur ausgewiesen werden:
>
> <a> wenn er wegen eines Verbrechens oder Vergehens gerichtlich bestraft wurde."

2. According to the Swiss Citizenship Act (Bürgerrechtsgesetz) applicable at the time of the applicants' marriage, a foreign woman who married a Swiss citizen acquired Swiss citizenship, whereas Swiss citizenship was not acquired by a foreign man who married a Swiss woman. Such a provision is no longer contained in the revised Act which has been in force since 1 January 1992.

COMPLAINTS

1. The applicants complain under Article 8 of the Convention that the second applicant has not been granted a residence permit in Switzerland. They submit that the first applicant who suffers from epilepsy and draws half an invalidity pension cannot be expected to live in Turkey. Reference is also made to the social and cultural differences in Turkey, to the fact that the first applicant does not speak the second applicant's mother tongue, and that the second applicant's conduct in prison was good.

2. Under Article 14 of the Convention the applicants complain that, if the husband had been Swiss and at that time had married a Turkish woman, she could not be expelled as she would have automatically obtained Swiss nationality.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 July 1994.

On 3 August 1994 the President of the Commission decided not to apply Rule 36 of the Rules of Procedure.

Following further correspondence, the application was registered on 31 August 1994.

On 18 October 1994 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 20 December 1994. The applicants replied on 13 February 1995.

THE LAW

1. The applicants complain under Article 8 (Art. 8) of the Convention that the second applicant has not been granted a residence permit in Switzerland. 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 or morals, or for the protection of the rights and freedoms of others."

The Government submit with reference to the Convention organs' case-law that the complaint is manifestly ill-founded. Thus, a residence permit is as a rule not granted if a person has been punished with imprisonment of more than two years. According to the Federal Court's case-law, the more serious an offence is, the more it can be expected from the family to live outside Switzerland. In the present case, the second applicant was convicted of a serious drug offence. In respect of the first applicant it is submitted that she may obtain medical treatment in many parts of Turkey, albeit not in the Kurdish area. Moreover, at the time of marriage, she was aware of the criminal proceedings pending against her husband; she had therefore to expect that she could not lead her family life in Switzerland.

The applicants recall that the second applicant's conduct after entering Switzerland was for a long time good. It could not be said that the offences of which he was convicted were very serious. In any event, there can be no absolute limit according to which residence permits must always be refused if the sentence exceeds two years, particularly as the pressing social need in each case must be considered. Moreover, it could not be expected from the second applicant, a Kurd, to live elsewhere in Turkey than in the Kurdish area. The first applicant would be prevented from establishing family life with her husband. On the whole, the second applicant's expulsion would be disproportionate and contrary to Article 8 (Art. 8) of the Convention.

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).

In the present case, the Commission notes that the applicants are a married couple, and that the first applicant is a Swiss citizen. Thus, the refusal to grant a residence permit to the second applicant in Switzerland interfered with the applicants' right to respect for their 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, i.e. whether it was in accordance with the law and necessary in a democratic society for one of the aims mentioned in that provision.

The Commission observes that the Swiss authorities, when refusing to grant a residence permit to the second applicant, relied on Articles 7 and 10 of the Federal Act on the Residence and Domicile of Aliens. According to these provisions, the second applicant as the spouse of the first applicant no longer had a right to a residence permit in view of his conviction of a criminal offence, the latter constituting 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 a residence permit to the second applicant, the Swiss authorities noted that he had been convicted of serious criminal offences. The Commission notes in particular that he was convicted of contraventions of the Narcotics Act and sentenced to 27 months' imprisonment.

It is true that according to the applicants' submissions the second applicant's conduct in prison was good. However, the Commission notes that the Federal Court decided on the second applicant's case in the last resort, after having considered all circumstances of the case. It found that even if the second applicant's conduct in prison had been good and he had meanwhile become integrated both professionally and socially, there nevertheless remained the risk of his committing a new offence. It concluded that the interests of public order and security prevailed over the applicants' interest in a residence permit for the second applicant in Switzerland.

Furthermore, the applicants married while the second applicant was remanded in custody. They had therefore to expect that, upon his conviction by the Criminal Court and his release from prison, they might have to continue their married life outside 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, which refused a residence permit, acted unreasonably when balancing the interests involved.

The Commission therefore considers that the interference with the applicants' right to respect for their 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".

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.

2. The applicants complain under Article 14 (Art. 14) of the Convention taken together with Article 8 of the Convention that, had the marriage involved a Swiss husband and a Turkish wife, she could not have been expelled as she would have automatically obtained Swiss nationality.

The Government submit that the applicants have not sufficiently substantiated this complaint. Moreover, they have not complied with the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention as they failed to raise their complaint before the Federal Court. The complaint would be manifestly ill-founded as the Convention does not guarantee a right to citizenship. In any event, in respect of the request for a residence permit of

5 February 1992, filed after the Swiss Citizenship Act was revised, the applicants were treated without any discrimination based on sex.

In respect of the requirements under Article 26 (Art. 26) of the Convention the applicants submit that the Federal Court itself should have examined whether the second applicant's discrimination contradicted the Convention. In fact, the Swiss authorities were given the opportunity to examine the alleged violation. In any event, it would be untenable to uphold the second applicant's discrimination in the present case on the basis of his sex.

The Commission has noted the Government's arguments on the question of exhaustion of domestic remedies as required by Article 26 (Art. 26) of the Convention. However, the Commission finds it unnecessary to resolve this issue since this part of the application is in any event inadmissible for the following reasons.

The Commission observes that the difference complained of stems from a particularity of the Swiss Citizenship Act in the version applicable at the time when the applicants married. At that time, a foreign woman who married a Swiss citizen acquired Swiss nationality, whereas a foreign man who married a Swiss woman did not acquire Swiss citizenship.

The Commission recalls that Article 14 (Art. 14) of the Convention can only be invoked in connection with another right guaranteed by the Convention or its Protocols.

However, the right to obtain the citizenship of a foreign state is not as such guaranteed by the Convention. The fact that, at the time of marriage, different rules prevailed as to the acquisition of Swiss nationality, does not therefore raise an issue under Article 14 (Art. 14) of the Convention (see mutatis mutandis Beldjoudi v. France, Comm. Report 6.9.90, para. 79, Series A no. 234-A, p. 46).

In any event, the Commission considers that, when the applicants married, they were aware that their position differed from that of a Swiss man marrying a foreign woman. The second applicant was in particular aware that he had not automatically obtained Swiss nationality. In the Commission's opinion, the applicants cannot now, upon the second applicant's expulsion, complain that the latter has not obtained Swiss nationality. Rather, any complaint about discrimination in obtaining nationality upon marriage should have been raised at the time of marriage itself.

The remainder of the application is therefore 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)