AS TO THE ADMISSIBILITY OF

Application No. 25161/94
by S. Z.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 30 November 1994, the following members being present:

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

Mr. K. ROGGE, 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 10 September 1994 by S. Z. against Switzerland and registered on 16 September 1994 under file No. 25161/94;

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

The applicant, born in 1954, is a Slovenian citizen, having previously resided in Jona in Switzerland and now apparently residing in Slovenia. The applicant is married to a citizen of former Yugoslavia who has been residing in Switzerland where she has the right to domicile (Niederlassungsbewilligung) since 1968. The couple have four children, born in 1978, 1980, 1984 and 1986 respectively, who also have the right to domicile in Switzerland. Before the Commission the applicant is represented by Mr. M. Bleuler, a lawyer practising in Basel.

A. Particular circumstances of the case

In 1977 the applicant entered Switzerland with a seasonal authorisation (Saisonbewilligung). He was expelled on 13 February 1978 for having outstayed the permitted time. Later in 1978 he was again granted a seasonal authorisation. On 17 June 1978 he married, whereupon he obtained a residence permit (Aufenthaltsbewilligung).

On 31 August 1981, after the expiration of his residence permit the Aliens' Police (Fremdenpolizei) of the Canton of St. Gallen ordered the applicant's expulsion from Switzerland. The decision stated that

the applicant had neglected his financial obligations towards his family; that he had contravened regulations of the Aliens' Police; and that he was involved in criminal proceedings.

On 28 May 1985 the See District Court (Bezirksgericht) sentenced the applicant to 15 months' imprisonment for repeated fraud (Betrug), theft (Diebstahl), receiving stolen goods (Hehlerei) and drunken driving (Fahren in angetrunkenem Zustand).

On 18 July 1985 the applicant applied for a new residence permit. The Aliens' Police of the Canton of St. Gallen decided that his presence should be tolerated (Toleranzbewilligung) after drawing his attention to the consequences of any further contraventions of the Aliens' Police regulations.

In July 1988 the applicant was granted a regular residence permit.

On 23 February 1990 the Mendrisio Jury Court convicted the applicant of contraventions of the Narcotics Act (Betäubungsmittel-gesetz) and drunken driving and sentenced him to imprisonment of three years and nine months.

While in prison the applicant applied for a prolongation of his residence permit. On 15 November 1991 the Aliens' Police refused the request and ordered that the applicant should after his release from prison be expelled to Slovenia.

The applicant was released on probation on 11 December 1991, after having served two and a half years of his sentence.

An appeal against the decision of 15 November 1991 was dismissed on 8 September 1992 by the Council of State (Regierungsrat) of the Canton of St. Gallen which relied on Section 9 para. 2 subpara. (b) and Section 10 para. 1 subparas. (a), (b) and (d) of the Federal Act on the Residence and Domicile of Aliens (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer, see below, Relevant domestic law).

The applicant's administrative law appeal (Verwaltungsgerichts-beschwerde) was dismissed by the Federal Court (Bundesgericht) on 9 February 1994.

The Court noted that the applicant had been sentenced to altogether five years' imprisonment, that his culpability was severe, and that he had clearly contravened public order within the meaning of Section 17 para. 2 of the Federal Act on Residence and Domicile of Aliens (see below Relevant domestic law). Moreover, the applicant had committed new offences despite an admonition by the Aliens' Police. While the applicant was not a drug addict himself, the Court noted that he had brought 1 kg of heroin into Switzerland. It could also not be said that the applicant had become closely integrated in Switzerland. The decision continues:

<Translation>

> "... his wife has already spent approximately 25 years in Switzerland. In view of the advanced integration of (his wife) and the children, who were born and have grown up here, a return to their home country would imply much bigger difficulties. It may nevertheless remain open whether they can hardly, as the previous deciding authority assumed, or not at all, as the applicant submits, be expected to return. In view of the severe and repeated offences which the applicant has committed and the frequent admonitions of the Aliens' Police, the public interest in the refusal to prolong the residence permit outweighs necessarily the opposing private interests. In any event, if the family members do not want to follow the applicant abroad, they

can be expected to continue their relationship by means of mutual visits, a possibility which also remains for the applicant."

<German>

"... seine Ehefrau (lebt) seit rund 25 Jahren in der Schweiz. Für sie und die hier geborenen und aufgewachsenen Kinder wäre eine Ausreise ins Heimatland angesichts ihrer fortgeschrittenen Integration in der Schweiz mit erheblich grösseren Schwierigkeiten verbunden. Ob ihnen eine Rückkehr, wie die Vorinstanz annimmt, kaum oder, wovon der Beschwerdeführer ausgeht, nicht zumutbar ist, kann jedoch offenbleiben. Angesichts der schweren und wiederholten Straffälligkeit des Beschwerdeführers und der mehrfachen fremdenpolizeilichen Warnungen, überwiegen so oder anders die öffentlichen Interessen an einer Nichtverlängerung der Aufenthaltsbewilligung die entgegenstehenden privaten Interessen. Es ist der Familie jedenfalls zumutbar und möglich, sofern die Familienangehörigen dem Beschwerdeführer nicht ins Ausland folgen wollen, ihre Beziehungen mittels gegenseitigen Besuchen zu pflegen, eine Möglichkeit, die auch dem Beschwerdeführer verbleibt."

The Court concluded that the refusal to prolong the applicant's residence permit was proportionate to the aim pursued, i.e. to maintain public order.

The Aliens' Police requested the applicant to leave Switzerland before 31 March 1994. Upon his request the time-limit was extended to 30 April 1994.

In June 1994 and in September 1994 the applicant was permitted to enter Switzerland for three days to visit his wife and children.

B. Relevant domestic law

Section 9 para. 2, subpara. (b) of the Federal Act on the Residence and Domicile of Aliens states:

<Translation>

"A residence permit may be revoked:

(b) if a condition attached to it is not fulfilled or the foreigner's conduct is a ground for serious complaint."

<German>

"Die Aufenthaltsbewilligung kann widerrufen werden:

(b) wenn eine mit ihr verbundene Bedingung nicht erfüllt wird oder wenn das Verhalten des Ausländers Anlass zu schweren Klagen gibt."

Section 10 para. 1 subparas. (a), (b) and (d) of the Act state:

<Translation>

"A foreigner may be expelled from Switzerland ... only if:

(a) he has been punished by a court for a criminal offence;

(b) it transpires from his behaviour in general or from his actions that he is not willing or not able to comply with the order of the guest state; ... [or]

(d) he, or a person for whom he has to care, continuously and considerably depends on social welfare."

<German>

"Der Ausländer kann aus der Schweiz ... nur ausgewiesen werden:

(a) wenn er wegen eines Verbrechens oder Vergehens gerichtlich bestraft wurde;

(b) wenn sein Verhalten im allgemeinen oder seine Handlungen darauf schliessen lassen, dass er nicht gewillt oder nicht fähig ist, sich in die im Gaststaat geltende Ordnung einzufügen: ... [oder]

(d) wenn er oder eine Person, für die er zu sorgen hat, der öffentlichen Wohltätigkeit fortgesetzt und in erheblichem Masse zur Last fällt."

Section 17 para. 2 of the Act states, insofar as relevant:

<Translation>

"(i)f the foreigner has the right to domicile, his or her spouse has the right to obtain, or to have prolonged, a residence permit, as long as the spouses live together. ... These rights expire if the entitled person has contravened public order."

<German>

"... ist der Ausländer im Besitz der Niederlassungsbewilligung, so hat sein Ehegatte Anspruch auf Erteilung und Verlängerung der Aufenthaltsbewilligung, solange die Ehegatten zusammen wohnen. ... Die Ansprüche erlöschen, wenn der Anspruchsberechtigte gegen die öffentliche Ordnung verstossen hat."

COMPLAINTS

The applicant complains under Article 8 of the Convention that the refusal to prolong his residence permit will separate him from his wife and children who have the right to domicile in Switzerland. He points out that the Mendrisio Jury Court did not order his expulsion (Landesverweisung) from Switzerland and that his good conduct in prison led to his provisional release. He also submits that since his release from prison he has behaved well and was able to assist his wife in earning a living for the family. If he is expelled from Switzerland his wife would no longer be able to raise the children and earn a living.

THE LAW

The applicant complains that the refusal to prolong his residence permit will separate him from his wife and his children who have the right to domicile in Switzerland. He relies on Article 8 (Art. 8) of the Convention which 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 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 applicant's wife and his children have the right to domicile in Switzerland. By refusing to prolong the applicant's residence permit, the Swiss authorities interfered with his right to respect for 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.

The Commission observes that the Swiss authorities, when refusing to prolong the applicant's residence permit in Switzerland, relied on Sections 9 para. 2, 10 para. 1 and 17 para. 2 of the Federal Act on Residence and Domicile of Aliens. 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 prolong the applicant's residence permit, the Swiss authorities considered that the applicant had been convicted of various criminal offences.

In this respect, the Commission notes that the applicant was convicted of serious offences, in particular of contraventions of the Narcotics Act, and sentenced to altogether five years' imprisonment. Moreover, these offences were committed despite an admonition by the Aliens' Police.

Furthermore, in its decision of 9 February 1994 the Federal Court carefully balanced the various interests. It considered, on the one hand, that the applicant's wife and children had the right to domicile in Switzerland and were fully integrated in Switzerland. On the other hand, it considered that the applicant constituted a danger to public order, and that it could not be said that he had become closely integrated in Switzerland.

The Federal Court also noted that, following his expulsion, the applicant could visit his family in Switzerland, a possibility of which he has availed himself in the meantime.

The Commission notes the applicant's submissions that the Mendrisio Jury Court in its judgment of 23 February 1990 did not order his expulsion from Switzerland, and that his good conduct in prison led to his provisional release. However, the Federal Court decided on the applicant's case in the last resort, and after having considered all circumstances of the case. It concluded that the refusal to prolong the applicant's residence permit was proportionate to the aim pursued, i.e. to maintain public order.

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, when refusing to prolong his residence permit, acted unreasonably in balancing the various interests involved.

The Commission therefore considers that the interference with the applicant's right to respect for family life could reasonably be considered justified under Article 8 para. 2 (Art. 8-2) of the Convention as being "necessary in a democratic society ... for the prevention of disorder or crime".

The application is therefore 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	Acting President of the Second Chamber
(K. ROGGE)	(H. DANELIUS)