AS TO THE ADMISSIBILITY OF

Application No. 34295/96
by V. K.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 26 February 1997, the following members being present:

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

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 6 December 1996 by V. K. against Switzerland and registered on 19 December 1996 under file No. 34295/96;

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, born in 1960, is of Croat origin and a citizen of former Yugoslavia. He resides in Subotica in Yugoslavia. Before the Commission he is represented by Mr St. Fraefel, a lawyer practising in Bern.

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

A. Particular circumstances of the case

The applicant was married to a citizen of former Yugoslavia. They have a son born in 1987. The applicant and his wife obtained the authorisation briefly to enter and reside in Switzerland (Kurzaufenthalts-Bewilligung).

In 1990 the applicant's wife and their son entered Switzerland and in 1992 they obtained an annual residence authorisation (Jahresaufenthalts-Bewilligung).

The applicant who had entered Switzerland in 1991 obtained a

restricted residence authorisation in 1993 in order to enable him to stay with his wife and son. The authorisation was granted until 31 August 1995. The applicant lived with his wife and son.

On 24 August 1994 the applicant attacked and injured his wife and damaged her clothes. The applicant's wife was hospitalised for nine days.

On 20 June 1995 the applicant was convicted of having committed simple bodily injury and damage to property (einfache Körperverletzung und Sachbeschädigung) and sentenced to three months' imprisonment, suspended on probation.

On 23 June 1995 the applicant and his wife were divorced. The son was placed under the parental authority of the applicant's wife. The applicant was granted the right to visit his son on Saturdays and Sundays on the first and third weekend of every month.

On 25 August 1995 the Aliens' Police (Fremdenpolizei) of the Canton of Bern dismissed the applicant's request for a prolongation of his residence authorisation. Reference was made in particular to the divorce and his criminal conviction. The applicant's appeal was dismissed by the Police and Military Directorate (Polizei- und Militärdirektion) of the Canton of Bern on 7 November 1995.

The applicant's administrative law appeal (Verwaltungsgerichts-Beschwerde), in which he relied on Article 8 of the Convention, was rejected by the Administrative Court (Verwaltungsgericht) of the Canton of Bern on 6 March 1996. In its decision the Court referred in particular to the established case-law of the Federal Court (Bundesgericht) on Article 8 of the Convention. Thus, family members could only join a person in Switzerland if the latter had either Swiss nationality or the authorisation to establish domicile (Niederlassungs-bewilligung), while a mere residence authorisation did not suffice. As the applicant's wife and son had neither Swiss nationality nor a permission to establish domicile, the applicant was not entitled to invoke Article 8 of the Convention in order to have his residence authorisation prolonged.

The applicant's further administrative law appeal was dismissed by the Federal Court on 14 May 1996, the decision being served on the applicant on 7 June 1996. With reference to its case-law the Court found that the applicant's wife and son did not have a consolidated right to stay (gefestigtes Anwesenheitsrecht) in Switzerland and that, therefore, Article 8 of the Convention did not entitle him to a prolongation of the residence authorisation.

The applicant left Switzerland in September 1996.

B. Relevant domestic law

According to S. 1 of the Federal Act on Residence and Domicile of Foreigners (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer), foreigners may only stay in Switzerland if they have a residence authorisation or the right to domicile in Switzerland.

S. 5 para. 1 of the Act provides that a foreigner may be expelled from Switzerland if he has been punished by a court for a criminal offence.

According to S. 38 of the Federal Ordinance on the Limitation of the Number of Foreigners (Verordnung über die Begrenzung der Zahl der Ausländer), the Cantonal Aliens' Police may permit the spouse and unmarried children under 18 years of age to join a foreigner in Switzerland.

COMPLAINTS

The applicant complains under Article 8 of the Convention that the Swiss authorities did not prolong his residence authorisation. As a result, he has been separated from his son.

The applicant contests the Federal Court's case-law, according to which Article 8 of the Convention can only be invoked when there is a consolidated right to stay in Switzerland. He submits that this case-law does not comply with the Convention organs' case-law under Article 8 of the Convention. He claims that he had intensive contacts with his son; indeed, he was granted the right regularly to visit him. His former wife, on the other hand, has been living in Switzerland since 1990 and has regular employment.

The applicant points out that his son came to Switzerland when he was three and a half years old. He started school there and is now in the fourth grade. He has integrated into Switzerland and speaks German better than Serbo-Croat. The applicant submits that it cannot be expected from his son to leave his mother and to follow him to war-torn former Yugoslavia. The applicant himself is currently without employment and cannot afford trips to Switzerland.

The applicant complains that the measure is disproportionate and is in particular not justified in view of his criminal conviction. He points out that he once lost control over himself and injured his wife. This was a single occurrence; in view of his good conduct, his sentence was suspended on probation. Since then he has had normal relations with his former wife and no further such events occurred. He also never gave rise to any other complaints while in Switzerland where he had regular employment.

THE LAW

The applicant complains under Article 8 (Art. 8) of the Convention that his residence authorisation has not been prolonged and that he has therefore been separated from his son. Article 8 (Art. 8) 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 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 his private and family life guaranteed in Article 8 para. 1 (Art. 8-1) of the Convention (see Eur. Court HR, Moustaquim v. Belgium 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).

The Commission has examined whether the refusal of the Swiss authorities to prolong the applicant's residence authorisation in Switzerland will separate him from close members of the family and thus infringe his right to respect for family life within the meaning of Article 8 (Art. 8) of the Convention.

According to the Convention organs' case-law, from the moment of a child's birth and by the very fact of it, there exists between the child and its parents a bond amounting to "family life", even if the

parents are not then living together (see Eur. Court HR, Berrehab v. Netherlands judgment of 21 June 1988, Series A no. 138, p. 14, para. 21).

In the present case, the applicant had a son with whom he lived in Switzerland from 1993 until 1995. After his divorce, the applicant was granted the right regularly to visit his son. As a result, the refusal to prolong the applicant's residence authorisation interfered with his right to respect for his private and 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.

S. 1 of the Federal Act on Residence and Domicile of Foreigners provides that foreigners may only stay in Switzerland if they have a residence authorisation or the right to domicile in Switzerland. S. 5 of the Act provides that a foreigner may be expelled from Switzerland if he has been punished by a court for a criminal offence. S. 38 of the Federal Ordinance on the Limitation of the Number of Foreigners states that the Cantonal Aliens' Police may permit the spouse and unmarried children under 18 years of age to join a foreigner in Switzerland.

According to these provisions, after the applicant's criminal conviction and his divorce, he no longer had a right to stay in Switzerland. 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 the applicant a new residence permit, the Swiss authorities, in particular the Aliens' Police of the Canton of Bern in its decision of 25 August 1995, based their decisions on the fact that the applicant had been convicted of a criminal offence. The interference was therefore imposed "for the prevention of disorder or crime" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

Finally, the Commission has examined whether the measure was "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention, as interpreted in the Convention organs' case-law (see Eur. Court HR, Berrehab judgment, loc. cit., p. 15, para. 27).

The Commission considers, on the one hand, that the applicant's son, who is under the parental authority of his mother and has integrated well in Switzerland, cannot be expected to follow the applicant.

Moreover, as in the Berrehab case, the present applicant has had close ties with his son for many years. The Commission finds this to be confirmed by the fact that the Swiss authorities, when pronouncing the divorce of the applicant and his wife, granted the applicant the right to visit his son on two weekends every month. Furthermore, the applicant has lawfully lived in Switzerland for some time where he had regular employment (see Eur. Court HR, Berrehab judgment, loc. cit., p. 16, para. 29).

On the other hand, the present case differs from the Berrehab case in that the present applicant has committed a criminal offence which, in fact, was directed against a family member.

Moreover, other than referring to financial difficulties, the applicant has not shown, or even claimed, that he will not be able to visit his son in Switzerland on the basis of a short term temporary visa or that the son would be unable to visit him in Yugoslavia.

Taking into account the margin of appreciation which is left to Contracting States in such circumstances (see Eur. Court HR, Berrehab judgment, loc. cit., p. 15, para. 28), the Commission considers that the interference with the applicant's right to respect for his private and 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".

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

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber