AS TO THE ADMISSIBILITY OF

Application No. 23269/94
by Edgar and Anita VON ARX-DERUNGS
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 28 June 1995, the following members being present:

Mr. H. DANELIUS, President
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

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 December 1993 by Edgar and Anita Von Arx-Derungs against Switzerland and registered on 19 January 1994 under file No. 23269/94;

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, as submitted by the applicants, may be summarised as follows.

The applicants, born in 1944 and 1942, respectively, are Swiss citizens residing in Walde in Switzerland. They are the directors of an old persons' home. Before the Commission they are represented by Mr R. Schaller, a lawyer practising in Geneva.

Particular circumstances of the case

The old persons' home run by the applicants since 1986 is located outside the village of Biberstein in Switzerland. Approximately 30-40 persons live there. There are also various animals, including a number of dogs, taken care of by the residents.

On 19 June 1989 the Biberstein municipal council (Gemeinderat) reprimanded the applicants on the basis of Section 16 of the General Police Regulations of the Biberstein municipality (Allgemeines Polizeireglement; see below, Relevant domestic law) for having let the dogs run around freely and disturbing neighbours.

On 19 August 1991 the municipal council, again relying on Section 16, fined the applicants 200 SFr on account of noise nuisance caused by their dogs (Ruhestörung durch Hunde) in April and August 1991. The

order stated inter alia that "on the basis of the first reprimand in the year 1989 and the presently renewed complaints, it has unequivocally been established that the police regulations have been breached" ("Durch die erste Verwarnung im Jahre 1989 und die heute erneut vorliegenden Klagen ist der Tatbestand der Verletzung von Polizeivorschriften eindeutig erfüllt"). A penal order issued on 22 August 1991 on the applicants stated that any fines which were culpably not paid could be converted into imprisonment.

Following the applicants' objection, the municipal council issued a decision confirming the fine.

The applicants' appeal against this decision was dismissed by the Aarau District Court (Bezirksgericht) on 11 March 1992. The Court relied on incriminating statements of neighbours who had reported the applicants to the authorities. The applicants who were only aware of the contents of the statements, not of the authors, unsuccessfully requested the District Court to have the witnesses heard. In these and the subsequent proceedings the applicants were represented by a lawyer.

The applicants' public law appeal (staatsrechtliche Beschwerde) was partly upheld by the Federal Court (Bundesgericht) on 14 August 1992 as in view of the case-law of the European Convention organs the applicants were entitled to put questions to incriminating witnesses.

Proceedings were resumed before the Aarau District Court which heard two persons who had reported the applicants to the authorities. The witnesses referred in their statements to noise nuisance caused in 1991. On 9 December 1992 the District Court confirmed the fine of 200 SFr. In its judgment the Court concluded that there could be no doubt that the applicants had not complied with Section 16 of the Biberstein General Police Regulations. The Court thereby referred to the many credible complaints of the neighbours; to the fact that the applicants had previously already been reprimanded; and to its appreciation of the statements made by the witnesses.

The applicants' public law appeal, in which they complained of a breach of their constitutional and Convention rights, was dismissed by the Federal Court on 15 June 1993, the decision being served on 1 July 1993.

Insofar as the applicants complained under Article 2 of Protocol No. 7 that they had not had their case reviewed by a higher tribunal, the Court found that the offence of which the applicants had been convicted, amounting to a misdemeanour (Übertretung), constituted a minor offence prescribed by law within the meaning of Article 2 para. 2 of Protocol No. 7.

The Federal Court further found that neither the interpretation of Section 16 of the Biberstein General Police Regulations nor the assessment of the facts and the taking of evidence had been arbitrary. Insofar as the applicants complained under Article 8 of the Convention of a breach of their right to respect for family life, the Court found that the interference was justified under Article 8 para. 2 of the Convention as being in the interest of the neighbours concerned.

The Court then dealt with the applicants' complaint under Article 4 of Protocol No. 7 that the Biberstein municipal council had on 19 June 1989 and on 19 August 1991 convicted the applicants twice for the same offence. The Court found that the Aarau District Court in its judgment of 9 December 1992 had merely considered the earlier reprimand as an aggravating factor when considering the determination of the fine, and that it did not transpire from the judgment that the applicants had been convicted a second time for the previous occurrences.

Relevant domestic law

Section 16 of the Biberstein General Police Regulations (Allgemeines Polizeireglement) lays down principles for keeping animals. According to para. 1, "animals must be kept in such a manner that nobody is disturbed and that neither human beings nor animals or things are endangered or damaged" ("Tiere sind so zu halten, dass niemand belästigt wird und weder Menschen noch Tiere oder Sachen gefährdet werden oder zu Schaden kommen"). According to para. 3, dogs shall not run around without supervision. Section 20 of the General Police Regulations stipulates as a sanction a reprimand or a fine of up to 200 SFr.

COMPLAINTS

Under Article 6 para. 1 of the Convention the applicants complain that the legal provision on the basis of which they were convicted was too vague. Moreover, the courts arbitrarily assessed the facts; reference is made to the noise from a neighbouring road which is much more disturbing. The applicants also maintain in this respect a breach of the presumption of innocence according to Article 6 para. 2 of the Convention.

Under Article 8 of the Convention the applicants complain of a breach of their right to respect for private and family life, as the animals assist them in accomplishing a mission in the old persons' home.

The applicants complain under Article 2 of Protocol No. 7 that they did not have a tribunal to review their case.

The applicants also complain under Article 4 of Protocol No. 7 that they were twice punished for the same offence in that the Biberstein municipal council on 19 August 1991 invoked the reprimand dated 19 June 1989. Reference is also made to the judgment of the Aarau District Court of 9 December 1992.

THE LAW

1. The applicants complain under Article 6 para. 1 (Art. 6-1) of the Convention that the domestic courts arbitrarily assessed the facts. This provision states, insofar as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal."

Insofar as the applicants complain that the decision of the Aarau District Court was incorrect, the Commission recalls that in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its established case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

The Commission has examined the applicants' complaint about the assessment of evidence under Article 6 para. 1 (Art. 6-1) of the Convention.

According to the Convention organs' case-law, it is for the national courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings considered as a whole,

including the way in which evidence was taken, were fair (see Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

In the present case the Aarau District Court convicted the applicants after hearing two witnesses. The applicants have not alleged that they were denied the right to put questions to these witnesses. There is no indication that in these proceedings the applicants, who were represented by a lawyer, could not put forward their point of view or any evidence which they considered pertinent, or that the proceedings were otherwise unfair.

Insofar as the applicants complain of a breach of the presumption of innocence under Article 6 para. 2 (Art. 6-2) of the Convention, the Commission finds no issue under this provision.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants complain that the legal provision on the basis of which they were convicted was too vague. The Commission has examined this complaint under Article 7 para. 1 (Art. 7-1) of the Convention which states, insofar as relevant:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national ... law at the time when it was committed."

The Commission recalls that Article 7 para. 1 (Art. 7-1) of the Convention embodies the principle that only the law can define a crime and prescribe a penalty, and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision what acts and omissions will make him liable (see Eur. Court H.R., Kokkinakis judgment of 25 May 1993, Series A no. 260 A, p. 22, para. 52).

In the present case Sections 16 and 20 of the Biberstein General Police Regulations envisage a punishment of up to 200 SFr inter alia if animals disturb persons.

The wording of this provision thus makes it sufficiently clear which acts and omissions are liable, and which punishment is envisaged. As the Federal Court confirmed in its decision of 15 June 1993, it does not appear that these provisions were arbitrarily interpreted or applied when the applicants were fined 200 SFr because their dogs had caused noise nuisance.

This part of the application is therefore also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Under Article 8 (Art. 8) of the Convention the applicants complain of a breach of their right to respect for private and family life, as the animals assist them in accomplishing a mission in the old persons' home. Article 8 (Art. 8) of the Convention states, insofar as relevant:

> "1. Everyone has the right to respect for his private ... 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 its case-law according to which it has held that the keeping of a domestic pet does not fall within the sphere of the owner's private life for the purposes of Article 8 (Art. 8) of the Convention (see No. 6825/74, Dec. 18.5.76, X. v. Iceland, D.R. 5, p. 86; No. 25517/94, Dec. 3.4.95, unpublished). The Commission does not find it necessary to determine whether the present case may be distinguished on the basis of the applicants' submissions. Even assuming that there was an interference under Article 8 (Art. 8) of the Convention, it would be justified under Article 8 para. 2 (Art. 8-2) of the Convention.

Thus, the measure complained was based on Sections 16 and 20 of the Biberstein General Police Regulations and, therefore, "in accordance with the law" as requested by Article 8 para. 2 (Art. 8-2) of the Convention. It was also clearly taken "for the protection of the rights and freedoms of others" within the meaning of this provision.

Moreover, in view of the applicants' previous reprimand and the comparatively small amount of the fine imposed, the Commission considers that the measure, aimed at protecting the applicants' neighbours from noise nuisance, could reasonably be considered as being "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

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.

4. The applicants complain under Article 2 of Protocol No. 7 (P7-2) that they did not have a tribunal to review their case. This provision states, insofar as relevant:

"1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law ...."

The Commission need not examine whether the applicants' public law appeal to the Federal Court, in which they complained of a breach of their constitutional and Convention rights, brought about a review by a higher tribunal within the meaning of Article 2 para. 1 of Protocol No. 7 (P7-2-1) (see No. 19028/91, Dec. 9.9.92, D.R. 73 p. 239).

In the Commission's opinion, the offence of which the applicants were convicted - noise nuisance caused by their dogs - constitutes a "minor" offence as confirmed by the fine of 200 SFr. According to the Federal Court's judgment of 15 June 1993, domestic law qualified the offence as a misdemeanour and thus also regarded it as a minor one.

The Commission therefore considers that the exception to the right to a review by a higher tribunal, pursuant to Article 2 para. 2 of Protocol No. 7 (P7-2-2), applies.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. Finally, the applicants complain under Article 4 of Protocol

No. 7 (P7-4) that they were twice punished for the same offence in that the Biberstein municipal council on 19 August 1991 invoked the reprimand dated 19 June 1989. Reference is also made to the judgment of the Aarau District Court of 9 December 1992. Article 4 para. 1 (P7-4-1) states:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

The Commission notes that the Aarau District Court convicted the applicants on 9 December 1992 of offences committed in 1991. These offences undoubtedly occurred after the reprimand issued on 19 June 1989.

It is true that the Aarau District Court in its judgment of 9 December 1992 referred to the reprimand in 1989. However, it did so in order to confirm its conclusion in respect of the subsequent offence at issue. In its judgment of 15 June 1993, the Federal Court, which merely saw an aggravating factor in this reference when determining the fine, confirmed that it did not transpire that the applicants had been convicted for occurrences for which they had already been reprimanded.

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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)