AS TO THE ADMISSIBILITY OF

Application No. 16564/90
by W. and K.
against Switzerland

The European Commission of Human Rights sitting in private on 8 April 1991, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 24 February 1990 by W. and K. against Switzerland and registered on 24 February 1990 under file No. 16564/90;

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 first applicant, a Swiss citizen born in 1950, is a businessman residing at K. in Switzerland. The second applicant, a Swiss citizen born in 1951, is a businessman residing at Seuzach in Switzerland.

A. Particular circumstances of the case

The applicants ran various video rental shops in Switzerland in which they sold and rented videos. Approximately 5% of the turnover derived from business in obscene video films.

On 9 October 1986 the Winterthur District Attorney's Office (Bezirksanwaltschaft) issued a penal order (Strafbefehl) against the applicants in which they were convicted of the continuous offence of publishing obscene material contrary to Section 204 of the Swiss Penal Code (Schweizerisches Strafgesetzbuch, see below Relevant domestic law and practice). The applicants were each sentenced to a fine of 5,000 SFr. Each applicant was further ordered to surrender the illegally obtained profits amounting to 20,000 SFr.

Upon the applicants' objection (Einspruch) the Winterthur Criminal District Court judge (Einzelrichter in Strafsachen des Bezirksgerichts) confirmed the penal order on 28 April 1987, though he reduced the first applicant's fine to 4,000 SFr.

On 10 November 1987 the Court of Appeal (Kantonsgericht) of the Canton of Zurich confirmed the judgment. The applicants' plea of nullity (Nichtigkeitsbeschwerde) was dismissed by the Court of Cassation (Kassationsgericht) of the Canton of Zurich on 23 February 1989.

The applicants then filed a further plea of nullity which the Federal Court (Bundesgericht) dismissed on 30 August 1989.

The applicants also filed a public law appeal (staatsrechtliche Beschwerde) with the Federal Court, complaining mainly of a breach of the principle of equal treatment (Gleichbehandlungsgebot). They claimed that the same films which had led to their conviction could be obtained in virtually every video shop in Zurich. It was therefore arbitrary to prosecute only certain persons.

The Federal Court dismissed the public law appeal on 30 August 1989. The decision was served on the applicants on 25 September 1989.

In its decision the Federal Court first considered that in principle the applicants could invoke the obligation to equal treatment in the context of illegal acts (Gleichbehandlung im Unrecht; see below, Relevant domestic law and practice), since non-intervention by the authorities in such cases proved to be the rule, the conviction the exception.

The Court further noted the decision of the Zurich Court of Cassation according to which the authorities in the Canton of Zurich only prosecuted offences under Section 204 of the Penal Code if a private charge (private Strafanzeige) was brought. To this the Federal Court replied:

<Translation>
"Should this mean that even in cases of Section 204 of the Penal Code, which are generally known also to the prosecuting authorities, there is no intervention except if a private person expressly makes a complaint, this would imply a breach of the obligation to equal treatment derived from Article 4 of the Federal Constitution. Such a manner of proceeding would constitute an illegal deviation from the principle that ex officio offences - to which the offence of Section 204 belongs - must be prosecuted. Otherwise, due to the undisputedly frequent contraventions against this statutory provision and the only exceptionally filed penal complaints, only some persons committing these offences would be punished while the majority would go unpunished. The same applies to a practice of prosecution which intervenes only upon a penal complaint or if obscene publications become known by chance, and does not intervene in numerous other generally known cases. The precise situation in the Canton of Zurich need not be ascertained here since nothing points to the supposition that a possibly illegal practice is being upheld. To the extent that there is an illegal practice of the Zurich investigation and prosecution authorities in the investigation and prosecution of criminal offences according to Section 204 of the Penal Code, the authorities are requested to abandon such a practice. The unequal treatment in the concrete case will be remedied through this request which at least for the future must entail a practice complying with the law. As a result, the applicants are not, for reasons of equality,

entitled to a derogation from the law and an acquittal from the indictment of publishing obscene material."

<German>
"Sollte dies so zu verstehen sein, dass selbst in Fällen des Art. 204 StGB, die allgemein und auch den Strafverfolgungsorganen bekannt sind, nicht eingeschritten wird, ausser ein Privater reiche ausdrücklich Strafanzeige ein, so wäre eine Verletzung des aus Art. 4 BV fliessenden Gleichheitsgebotes zu bejahen. Ein solches Vorgehen würde eine gesetzwidrige Abweichung vom Grundsatz darstellen, dass Offizialdelikte - zu denen der Tatbestand des Art. 204 StGB zählt - in jedem Falle von Amtes wegen zu verfolgen sind, denn wegen der unbestrittenermassen häufigen Widerhandlung gegen diese Gesetzesbestimmung und die nur ausnahmsweise Anzeigeerstattung würden nur einzelne Täter bestraft, die Mehrheit ginge jedoch straffrei aus. Das gleiche gilt für eine Strafverfolgungspraxis, die nur auf Anzeige hin oder bei zufälligerweise konkret bekannt werdenden unzüchtigen Veröffentlichungen einschreitet, in sehr zahlreichen anderen allgemein bekannten Fällen jedoch nicht vorgeht. Es kann

dahingestellt bleiben, wie es sich im Kanton Zürich genau verhält, weil nichts die Vermutung nahelegt, dort würde eine allenfals gesetzwidrige Praxis beibehalten. Soweit eine gesetzwidrige Praxis der Zürcher Untersuchungs- und Anklagebehörden bei der Untersuchung und Verfolgung von strafbaren Handlungen gemäss Art. 204 StGB besteht, werden die Behörden aufgefordert, sie aufzugeben. Die rechtsungleiche Behandlung im konkreten Fall wird durch diese Aufforderung, die jedenfalls für die Zukunft eine gesetzmässige Praxis zur Folge haben muss, behoben, so dass die Beschwerdeführer keinen Anspruch darauf haben, um der Rechtsgleichheit willen in Abweichung vom Gesetz von der Anklage der unzüchtigen Veröffentlichung freigesprochen zu werden."

Meanwhile the applicants had again sold or rented such videos. On 9 May 1989 the Bülach District Court convicted the applicants of the continuous offence of publishing obscene materials contrary to Section 204 of the Penal Code and sentenced them to unconditional imprisonment of two weeks. Each applicant was further ordered to surrender the illegally obtained profits amounting to 10,000 SFr.

B. Relevant domestic law and practice

Article 204 of the Swiss Penal Code provides:

<Translation>
"1. Anyone who makes or has in his possession any writings, pictures, films or other items which are obscene, with a view to trading in them, distributing them or displaying them in public, or who, for the above purposes, imports, transports or exports such items or puts them into circulation in any way, or who openly or secretly deals in them or publicly distributes or displays them or by way of trade supplies them for hire, or who announces or makes known in any way, with a view to facilitating such prohibited circulation or trade, that anyone is engaged in any of the aforesaid punishable activities, or who announces or makes known how or through whom such items may be directly or indirectly procured, shall be imprisoned or fined.

2. Anyone supplying or displaying such items to a person under the age of 18 shall be imprisoned or fined.

3. The court shall order the destruction of the items."

<German>
"1. Wer unzüchtige Schriften, Bilder, Filme oder andere unzüchtige Gegenstände herstellt oder vorrätig hält, um damit Handel zu treiben, sie zu verbreiten oder öffentlich auszustellen, wer solche Gegenstände zu den genannten Zwecken einführt, befördert oder ausführt oder sonstwie in Verkehr bringt, wer solche Gegenstände öffentlich oder geheim verkauft, verbreitet, öffentlich ausstellt oder

gewerbsmässig ausleiht, wer, um die verbotene Verbreitung oder den verbotenen Vertrieb zu fördern, ankündigt oder sonstwie bekannt gibt, dass sich eine Person mit den genannten strafbaren Handlungen befasst, wer ankündigt oder bekannt gibt, wie und durch wen die genannten Gegenstände unmittelbar oder mittelbar bezogen werden können, wird mit Gefängnis oder mit Busse bestraft.

2. Wer solche Gegenstände einer Person unter 18 Jahren übergibt oder vorzeigt, wird mit Gefängnis oder mit Busse bestraft.

3. Der Richter lässt die unzüchtigen Gegenstände vernichten."

According to the Federal Court's case-law (see Arrêts du Tribunal fédéral suisse 108 Ia 212) the principle of the legality of administration (Gesetzmässigkeit der Verwaltung) takes priority over the principle of the equal application of the law. The fact that in certain other cases a law has not, or not properly, been applied does not grant to an individual the right that also in his case the law shall not be applied.

If, however, the authorities refuse to abandon their illegal practice in the other cases, the individual may request that he too shall benefit from the illegal preferential treatment granted to the third person. In such a case the interest of the individual in an equal treatment overrides the interest in the legality of administration.

The Federal Court has derived this so-called obligation to equal treatment in the context of illegal acts (Gleichbehandlung im Unrecht) from the principle of equality enshrined in Article 4 of the Federal Constitution.

COMPLAINTS

The applicants complain that in Switzerland, in particular in the Canton of Zurich, a large number of video film rentals such as the ones which the applicants engaged in are not prosecuted. By arbitrarily prosecuting the applicants but not the other persons, the Swiss authorities have, in the applicants' opinion, breached Article 10 of the Convention.

THE LAW

The applicants complain of having been arbitrarily prosecuted for publishing obscene material. They invoke Article 10 (Art. 10) of the Convention which states:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Commission considers that the applicants' conviction on the basis of Section 204 of the Swiss Penal Code for renting or selling obscene video films constitutes an interference with the applicants' right under Article 10 (Art. 10) of the Convention "to impart information and ideas without interference by public authority". The Commission must therefore examine whether the interference is justified under Article 10 para. 2 (Art. 10-2) of the Convention.

When convicting the applicants for renting or selling obscene material the Swiss courts relied on Section 204 of the Swiss Penal Code. The measure was, therefore, "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. The Commission furthermore considers that the interference at issue was justified "for the protection of ... morals" within the meaning of this provision.

Finally, the Commission must examine whether the interference was "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. This notion implies that the interference corresponds to a pressing social need and that it is proportionate to the legitimate aim pursued (see Eur. Court H.R., Barthold judgment of 25 March 1985, Series A No. 90, p. 24 et seq., para. 55).

In the Commission's opinion, there can be no doubt that under normal circumstances the applicants' conviction for renting or selling the video films at issue would correspond to a pressing social need and would be proportionate to the legitimate aim pursued within the meaning of the Convention organs' case-law.

Referring to the circumstances of the present case, the applicants point out, however, that in the Canton of Zurich a large number of video film rentals, such as the ones which the applicants engaged in, are not prosecuted.

In the Commission's opinion the applicants have failed to demonstrate that their prosecution and conviction stemmed from a specific ground of discrimination stated in Article 14 (Art. 14) of the Convention, such as sex, race, colour, language or other.

It follows that the interference at issue was necessary in a deomcratic society within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

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 Commission President of the Commission

(H. C. KRÜGER) (C. A. NØRGAARD)