CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF WIESER v. AUSTRIA

(Application no. 2293/03)

JUDGMENT

STRASBOURG

22 February 2007

FINAL

22/05/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Wieser v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 1 February 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 2293/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Ewald Wieser ("the applicant"), on 14 July 2001.

2. The applicant was represented by Mrs Julia Hagen and Mr Martin Künz, lawyers practising in Dornbirn. The Austrian Government ("the Government") were represented by their Agent, Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged that he had been subjected to treatment contrary to Article 3 of the Convention.

4. By a decision of 11 April 2006 the Court declared the application admissible.

5. Neither the applicant nor the Government each filed further written observations (Rule 59 § 1)

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1958 and lives in Dornbirn.

7. Upon criminal information laid by the applicant's wife, the Feldkirch Regional Court, on 9 February 1998, issued an arrest warrant against the

applicant and a search warrant of his house. The applicant was suspected of having bodily assaulted and raped his wife, of having threatened her with a firearm, of having sexually assaulted his minor stepdaughter and of being in possession of child pornographic videos. The arrest warrant pointed out that there were reasons to assume that the applicant would react with "massive resistance" upon his arrest and would "try to escape prosecution".

8. On 9 February 1998 at around 23.45 hours six police officers of the special task force (*Sondereinsatzgruppe*) of the Altach gendarmerie entered the applicant's house. The officers were equipped with bullet-proof vests and shields. Further, they wore masks.

9. The applicant submits that before the police entered his house, he had observed two suspicious persons, namely two of the officers, lingering around his parking. He had, therefore, armed himself with a kitchen knife However, when the police entered his house he immediately dropped the knife and held his hands up.

10. The police officers forced the applicant to the ground and handcuffed him.

11. The applicant submits that he had recognised the police officers on their emblems and had declared at once that he would not do anything and collaborate with the police. An officer allegedly replied to him that he would better do so otherwise he would be "picked off".

12. The applicant was subsequently laid on a table where he was stripped naked, searched for arms and dressed again. According to the applicant he was blindfolded during this time. Upon the shock of his arrest the applicant had urinated in his clothes. The police officers, despite the applicant's repeated requests, refused to let him change his clothes.

13. The applicant submits that he was then again forced to the ground where he remained for about 15 minutes while some of the police officers searched his house. According to the applicant he was lying face down while a police officer pressed his knee on the back of his neck. This police officer allegedly told the applicant: "Don't move, otherwise you are dead." He further submits that it was only when he was lifted up that, without giving any further reasons, he was told that he was arrested.

14. The applicant was subsequently taken to the Altach police station where he was questioned until about 3.40 a.m. when he was released and taken back to his house.

15. During all of the time of his arrest and detention the applicant remained handcuffed. Upon his request, however, the handcuffs were covered with a garment when leaving the house and were later attached in his front instead behind his back.

16. On 10 February 1998 the applicant was again heard by the gendarmerie. On 11 February 1998 he prepared a note for the file in which he described the events at issue. He made, however, no reference to the fact that he had been blindfolded while stripped.

17. The criminal proceedings against the applicant were discontinued on 25 June 1998.

18. Meanwhile, on 3 March 1998, the applicant complained to the Vorarlberg Independent Administrative Panel (*Unabhängiger Verwaltungs-senat*) that the treatment he had suffered during his arrest and at the police station amounted to inhuman and degrading treatment contrary to Article 3 of the Convention. He referred to his stripping by the police officers, the forcing to the ground while an officer pressed his knee against the back of his neck, the threats by the officers and the refusal to let him change his wet clothes. He finally complained that his handcuffing had not been necessary as he had been cooperative and had not shown any sign of resistance during all of the time.

19. The Independent Administrative Panel held two hearings on 8 and 28 July 1998. It questioned the applicant, the director of the Vorarlberg Public Security Authority (*Sicherheitsdirektor*), the police officer who had headed the mission, another police officer who had assisted the applicant's arrest and the police officer who had questioned the applicant at the Altach police station. The police officers submitted that the applicant's wife had informed them that the applicant was violent, regularly consumed alcohol, was in possession of a fire-arm and had attended training for hand-to-hand combat for several years. He had allegedly received his wife several times with a weapon in his hand when she was entering the house. The applicant's wife had warned the police that the applicant "was up to do anything".

20. The two officers who had participated in the applicant's arrest confirmed that the applicant had been strip-searched. One officer explained that this had been done for their and the applicant's safety and in order to find the weapon. The applicant had been informed about the arrest and search warrant before being undressed. After the strip search the applicant had been seated on a sofa. The other officer stated that after the strip search the applicant had been laid and held on the floor. He denied, however, that somebody had approached the applicant's neck with his knee. Both officers confirmed that the applicant had not shown any sign of resistance and denied that the applicant had been threatened to "be picked off". The officer who had heard the applicant at the police station submitted that he had not lessened the applicant's handcuffs because during some of the time he had been alone with the applicant at the police station.

21. On 6 November 1998 the Independent Administrative Panel rejected the applicant's complaints. It found that the police officers had acted on the basis of an arrest warrant and had not exceeded the instructions of the investigating judge. The handcuffing of the applicant had been a necessary accompanying measure to the applicant's arrest because of the applicant's assumed resistance and escape. Against this background also the stripping of the applicant could not be regarded as excessive, especially as the applicant was suspected to be in the possession of weapons. The applicant's

further complaints about the threatening, the holding down by pressing a knee against the back of his neck and the refusal to let him change his wet clothes were, even assuming that the applicant's allegations were true, of no relevance for the proceedings at issue as they concerned merely the way of proceeding during an authorised arrest and were attributable to the court. A review of lawfulness did not fall within the Independent Administrative Panel's competence.

22. On 22 February 1999 the Constitutional Court declined to deal with the applicant's complaint.

23. The applicant filed a complaint with the Administrative Court in which he repeated his submissions made before the Independent Administrative Panel. He further complained about the fact that the intervening officers had been masked.

24. On 21 December 2000 the Administrative Court partly granted the applicant's complaint. It quashed the Independent Administrative Panel's decision insofar as the refusal of the police officers to let the applicant change his clothes was concerned and remitted the case back to the Panel for further examination.

25. The Administrative Court dismissed the remainder of the applicant's complaint. It noted that the police officers had been confronted with a person suspected of severe crimes who was allegedly in possession of a firearm and was trained in hand-to-hand combat and who, furthermore, was holding a knife when meeting them. The handcuffing and complete stripping of the applicant and the alleged fixation and threatening by the police officers did not, therefore, exceed the instructions of the investigating judge. The court did not consider the applicant's detention for some four hours and his handcuffing during this period of time as excessive either. It noted in the latter regard that, despite the applicant's calm and cooperative behaviour, there was reason to believe that the applicant once liberated from his handcuffs would try to escape or use force. The Administrative Court finally noted that the applicant had not raised the complaint that the officers had been masked before the Independent Administrative Panel. This complaint was, however, inadmissible in any way as it did not concern an act of direct administrative authority and coercion (*Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt*).

26. On 3 May 2001 the Vorarlberg Independent Administrative Panel found that the police officers' refusal to let the applicant change his wet clothes had not been covered by the instructions of the investigating judge who had ordered the applicant's arrest and constituted inhuman or degrading treatment in breach of Article 3 of the Convention. The applicant subsequently received compensation in the amount of approximately 2,400 euros.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. Sections 139 to 149 of the Code of Criminal Procedure (*Strafprozeß-ordnung)* concern the search of premises and persons and the seizure of objects.

28. Section 139 § 2 stipulates that a search of a person and his clothes is *inter alia* admissible when this person is suspected of a crime.

29. According to section 140 §§ 1 and 2, a search should in general only be carried out after the person concerned has been heard, and only if the person or objects searched are not voluntarily rendered and if the reasons leading to the search have not been eliminated. It is not required to hear persons of bad reputation, or to have such a hearing where there is danger in delay.

30. Section 140 § 3 states, as a rule, that a search may only be carried out on the basis of a reasoned search warrant issued by a judge.

31. Section 142 § 1 stipulates that when searches of premises and persons are carried out any disturbance and harassment of the person concerned which is not strictly necessary has to be avoided. Searches have to be carried out in respect of the rules of decency.

By virtue of section 67a § 1 of the General Administrative Procedure Act (*Allgemeines Verwaltungs-verfahrensgesetz*), Independent Administrative Panels have jurisdiction, *inter alia*, to examine complaints from persons alleging a violation of their rights resulting from act of direct administrative compulsion (*Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt*). According to relevant jurisprudence and doctrine acts of administrative organs which are based on a court order are not attributable to the administrative authorities, but to the courts. Such an act is, however, attributable to the administrative authorities when the judicial order has been manifestly exceeded.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

32. The applicant complained that his arrest had been carried out by six police officers who entered his house with firearms pulled out. The police officers had been masked so that the individual police officer could not be identified as author of a particular action. Furthermore, a police officer had threatened him to “pick him off”. He had been laid on a table and stripped, and then forced to the ground where he remained for some 15 minutes while one of the officers pressed his knee on the back of his neck and some other

officers searched his house. Finally, he had remained handcuffed during all the time of his arrest and subsequent detention despite his calm and cooperative attitude. He submitted that this treatment amounted to inhuman and degrading treatment contrary to Article 3 of the Convention which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

33. The Government endorsed the domestic authorities' findings that in the light of the specific circumstances of the case the impugned measures were proportionate. They stressed that *ex ante* there was reason to assume that the applicant was a very dangerous person who was furthermore experienced in hand-to-hand combat. Moreover, the applicant had confronted the intervening police officers while holding a knife. The statement of a participating officer before the Independent Administrative Panel indicated that the applicant had been informed about the reasons of the police intervention at its very beginning. As regards the alleged blindfolding during the strip search, the Government pointed out that the applicant had alluded to his blindfolding for the first time in his complaint with the Independent Administrative Panel but had not mentioned it as a reason for his complaint. Therefore neither the Independent Administrative Panel nor the Administrative Court had to dwell on this issue. In any event, the strip search had lasted only for some minutes so that an eventual blindfolding happened during a very short time. Nor could it be established that a police officer had actually pressed his knee against the applicant's neck while he was lying on the ground. Furthermore, the applicant had admitted that he could – albeit with difficulty – watch the police officers during the search of his house which indicates that no pressure had been placed on his neck. In the view of the background of the intervention and its relatively short duration it could be assumed that the police officers proceeded with utmost care until they could be sure that the applicant would not attempt an act of violence or try to escape. They made efforts not to tear the applicant's clothes during the strip search, did not cause any disorder in the applicant's flat and brought him back home after his release. As regards the applicant's complaint about the handcuffing, the Government pointed out that the handcuffs were covered when he was taken to the police car. In the light of the massive reproaches against the applicant, his interrogation lasting three hours did not appear excessive either. The Government concluded that the intervention did not reach the minimum threshold of Article 3 of the Convention.

34. The applicant contested the Government's submissions. He argued that the fact that he was blindfolded while being strip-searched was part of his complaint before the Independent Administrative Panel which, in any event, had to establish the relevant facts *ex officio*. The applicant further contested that the police intervention could be regarded as proportionate. He pointed out that he had remained calm and cooperative since the very beginning of the police intervention and had not offered any resistance. Even if the intervening officers had to assume in the beginning that they had to face a dangerous and violent person, they could convince themselves swiftly of the contrary as he was overwhelmed without any difficulties. In the view of his calm behaviour, the quantitative superiority of the police officers and the fact that he was obviously unarmed his being handcuffed during four hours was excessive. This was even more humiliating for him as during all this time he had to remain in his stained clothes. Furthermore, it is not discernable why it was necessary to undress him completely: in order to search for firearms simple patting would have been sufficient. Stripping by six police officers after being laid on a table was clearly humiliating. The applicant finally complains about the fact that the Austrian authorities did not even deal with his allegations that he had been threatened to be "picked off".

B. The Court's assessment

35. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of the minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim (see as a recent authority *Wainwright v. the United Kingdom*, no. 12350/04, § 41, 26 September 2006, with further references).

36. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, Commission's report of 8 July 1993, Series A no. 280, p. 14, § 67), or when it was such as to drive the victim to act against his will or conscience (see, for example, *Denmark, Norway, Sweden and the Netherlands v. Greece* ("the Greek case"), nos. 3321/67 *et al.*, Commission's report of 5 November 1969, Yearbook 12, p. 186; *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III). Furthermore, in considering whether treatment is "degrading" within the meaning of

Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, pp. 2821-22, § 55; *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III; *Price*, cited above, § 24). In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita*, cited above, § 120).

37. Turning to the particular circumstances of the present case, the Court observes that the police, as a result of the suspicion against the applicant and further information given by his wife, had reason to believe that they were preparing the arrest of a person who was violent, dangerous, and, furthermore, in possession of a firearm and trained in hand-to-hand combat. In this context, the Court finds that the intervention of six specially equipped, masked, police officers does not in itself raise an issue under Article 3 of the Convention. Furthermore, the Court does not find that in the light of these circumstances the applicant's handcuffing during all the time of his arrest – some four hours –which did not entail public exposure and had not caused any physical injuries or long-term effects on the applicant's mental state attained the threshold of Article 3 (see *mutatis mutandis Raninen v. Finland*, cited above, §§ 56-59).

38. The Court notes that the applicant further submitted that in the course of the intervention he was threatened to be "picked off" and forced to the ground where he remained lying face down while a police officer pressed his knee on the back during some 15 minutes. However, these facts were disputed by the police officers in the domestic proceedings and neither the domestic courts nor the Government made any conclusive statement on that issue. There being no further information before the Court, the question of whether the applicant had in fact been subjected to the described treatment remains a matter for speculation and assumption. Accordingly, the Court cannot establish, beyond reasonable doubt, that the impugned treatment allegedly contrary to Article 3 of the Convention had actually taken place (see *mutatis mutandis Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Furthermore, the Court finds that the domestic authorities by questioning the police officers in the domestic proceedings carried out sufficient investigation in this matter and, therefore, no issue arises under the procedural aspect of Article 3 either (see *mutatis mutandis Boicenco v. Moldova*, no. 41088/05, §§ 120-27, 11 July 2006)

39. The applicant next complained about the fact that he was strip searched. The Court notes that it has already had occasion to apply the principles of Article 3 of the Convention set out above in the context of strip and intimate body searches. A search carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose (see *mutatis mutandis*, *Yankov v. Bulgaria*, no. 39084/97, §§166-67, ECHR 2003-XII where there was no valid reason established for the shaving of the applicant prisoner's head) may be compatible with Article 3. However, where the manner in which a search is carried out has debasing elements which significantly aggravate the inevitable humiliation of the procedure, Article 3 has been engaged: for example, where a prisoner was obliged to strip in the presence of a female officer, his sexual organs and food touched with bare hands (*Valašinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII) and where a search was conducted before four guards who derided and verbally abused the prisoner (*Iwańczuk v. Poland*, no. 25196/94, § 59, 15 November 2001). Similarly, where the search has no established connection with the preservation of prison security and prevention of crime or disorder, issues may arise (see, for example, *Iwańczuk*, cited above, §§ 58-59 where the search of the applicant, a remand prisoner detained on charges of non-violent crimes, was conducted on him when he wished to exercise his right to vote; *Van der Ven v. the Netherlands*, no. 50901/99, §§ 61-62, ECHR 2003-II, where the strip-searching was systematic and long term without convincing security needs). Finally, in a case concerning the strip search of visitors to a prisoner which had a legitimate aim but had been carried out in breach of the relevant regulations, the Court found that this treatment did not reach the minimum level of severity prohibited by Article 3 but was in breach of the requirements under Article 8 § 2 of the Convention (see *Wainwright v. the United Kingdom,* no. 12350/04, 20 September 2006).

40. In the present case, the Court notes first that the applicant in the present case was not simply ordered to undress, but was undressed by the police officers while being in a particular helpless situation. Even disregarding the applicant's further allegation that he was blindfolded during this time which was not established by the domestic courts, the Court finds that this procedure amounted to such an invasive and potentially debasing measure that it should not have been applied without a compelling reason. However, no such argument has been adduced to show that the strip search was necessary and justified for security reasons. The Court notes in this regard that the applicant, who was already handcuffed was searched for arms and not for drugs or other small objects which might not be discerned by a simple body search and without undressing the applicant completely.

41. Having regard to the foregoing, the Court considers that in the particular circumstances of the present case the strip search of the applicant during the police intervention at his home constituted an unjustified

treatment of sufficient severity to be characterised as "degrading" within the meaning of Article 3 of the Convention.

42. It follows that there has been a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

44. The applicant claimed 3,600 euros (EUR) under the head of non-pecuniary damage.

45. The Government argued that when assessing the amount of compensation the Court should have regard to the facts that strip searches may be necessary to prevent crime and that the police officers' refusal to let the applicant change his wet clothes had already been taken into account by the Administrative Court.

46. The Court considers that the applicant must have suffered feelings of distress which cannot be compensated solely by the finding of a violation. Having regard to the awards made in other strip search cases, the Court awards 3,000 EUR, including any tax chargeable, to the applicant.

B. Costs and expenses

47. The applicant claimed reimbursement of the costs of the domestic proceedings in the amount of 96,698 Austrian Schillings (ATS, i.e. 7,027.38 EUR) and of the costs of the Convention proceedings in the amount of 2,985.26 EUR. Both amounts include value-added tax (VAT).

48. The Government argued that the amount claimed for the Convention proceedings was excessive according to the Austrian Autonomous Remuneration Guidelines for Lawyers. They did not comment on the costs of the domestic proceedings.

49. As to the costs of the domestic proceedings, the Court finds that they were actually and necessarily incurred and reasonable as to the quantum. It, therefore, awards the full amount claimed namely 7,027.38 EUR. This amount includes VAT. The costs of the Convention proceedings were also necessarily incurred. Having regard to the sums awarded in comparable cases, the Court finds that they are also reasonable as to the quantum. It

therefore awards the full amount claimed, namely 2,985.26 EUR inclusive VAT.

50. Consequently a total amount of 10,012.64 EUR, inclusive of VAT, is awarded under the head of costs and expenses.

C. Default interest

51. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 3 of the Convention in respect of the applicant's strip search;

2. *Holds* by four votes to three
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 10,012.64 (ten thousand and twelve euros sixty-four cents) in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount[s] at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

(a) dissenting opinion of Mr Loucaides;

(b) dissenting opinion of Mr Jebens joined by Mr Hajiyev.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the majority as regards their finding that Article 3 of the Convention was violated in the present case.

The majority concluded that the applicant's strip search constituted unjustified treatment of sufficient severity to be characterised as "degrading" within the meaning of Article 3 of the Convention. The majority found that this search amounted "to such an invasive and potentially debasing measure that it should not have been applied without a compelling reason." They went on to state that no argument was adduced to show that the strip search was necessary and justified for security reasons. In this regard they noted that "the applicant was searched for arms and not for drugs or other small objects which might not be discerned by a simple body search and without undressing the applicant completely".

In my opinion the strip search in the circumstances of the present case did not amount to a degrading or debasing measure, taking into account the context in which it was carried out and especially in light of the following:

a) The criminal information against the applicant showed that he was a violent person who had used a firearm in threatening his wife. There was also evidence that he regularly consumed alcohol and had attended training for hand-to-hand combat for several years and that he "was up to do anything". The competent court issued an arrest warrant against the applicant and a search warrant of his house. In these circumstances the police were justified in handcuffing the applicant upon their entry into his house. Only male policemen were present in carrying out the strip search of the applicant and none of them behaved in any improper way.

b) The aim of the strip search was not to humiliate or debase the applicant but to carry out a thorough search for security reasons. The majority assessed the situation and found that "the strip search was [not] necessary and justified for security reasons". I do not think that the Court can substitute its own judgment for that of the police in a situation like the present one, in order to judge whether a particular manner of search was or was not an appropriate way of implementing a search warrant. The police are entitled to exercise their own discretion and apply their own judgement as to the best way of carrying out such search, guided by their knowledge and experience and in the light of the particular circumstances before them. The Court should only interfere in cases where the police have acted illegally or arbitrarily. To accept the contrary would, in my opinion, amount to an unnecessary obstruction to the performance of the duties and responsibilities of the police in protecting the rights of others. I do not think that there is any element of illegality or arbitrariness in this case. The police

were entitled to handcuff the applicant and carry out a thorough search. After handcuffing he could not undress himself. The strip search was not carried out for any motive or purpose other than security reasons on the basis of the available information concerning the applicant and, in particular, his criminal behaviour.

On the basis of the above, I cannot agree with the majority that the applicant was subjected to any inhuman or degrading treatment contrary to Article 3 of the Convention.

DISSENTING OPINION OF JUDGE JEBENS JOINED BY JUDGE HAJIYEV

I disagree with the majority in their finding of a violation of Article 3 in the present case. In my view, the police officers' treatment of the applicant did at no point amount to torture or inhuman or degrading treatment or punishment.

It is important to notice the background of the case: The Feldkirch Regional Court issued an arrest warrant against the applicant and a search warrant of his house because he was suspected of bodily assault, rape and threats with a firearm, all of it directed against his wife. The arrest warrant pointed out that there was reason to expect "massive resistance" upon arrest and attempts to "escape prosecution". According to information given by his wife, the applicant was trained in hand-to-hand combat, and "up to anything". The latter characterization was probably based on the fact that he had on several occasions approached his wife with weapon in hand. Last, but not least, the applicant was, according to his wife, in possession of a firearm.

In my opinion, there was nothing that could give reason for the police to question the truth of the information provided by the applicant's wife. On the contrary, the fact that the police officers were met by the applicant with a knife in his hand when they entered his house, must have had the effect of strengthening the veracity of his wife's information, in addition to being a reminder of the seriousness of the situation.

The majority have deemed it unnecessary by the police to strip the applicant naked in order to search for a weapon, and have argued that frisking him would have been sufficient. I disagree to this view, because it is, in my opinion, not based on a realistic assessment of the risks involved in police actions like the present one.

First of all, having been informed that the applicant was in possession of a firearm, it was necessary for the police officers to make a bodily search of him. Even without such information, this would have been necessary, in order to check for other objects, like for instance a knife. Second, the search had to be carried out in an effective and secure way, in addition to causing as little harm as possible. Bearing in mind that the applicant was reported to be trained in hand-to-hand combat and "up to anything", he might easily have acted violently, even though he was handcuffed. Thus, frisking him would have been a clearly inadequate measure. A strip search therefore remained as the only realistic option. However, being handcuffed, which was obviously necessary in the present circumstances, it is hard to imagine how the applicant could have been able to undress himself. The strip search therefore had to be carried out by the police.

One of the police officers stated before the Independent Administrative Panel that the strip search was applied "for their and the applicant's safety and in order to find the weapon". I see no reason to question the truth of this statement. However, in addition to explaining why this method was used, it clearly indicates that using the ordinary method of body search might have caused the applicant (and the police) injuries, if he had resisted the search. This was a possibility that could in my opinion by no means be excluded.

It is furthermore important to note that the strip search was carried out by police officers who were all male persons. No physical or verbal abuse of the applicant was applied. Finally, the strip search seems to have been carried out within few minutes. The applicant's human dignity and bodily integrity was therefore, in my opinion, respected, as far as possible in the circumstances.

Bearing in mind that the threshold of Article 3 in cases involving police treatment depends on the circumstances of the case, see *Wainwright v. the United Kingdom*, cited above; that a strip search which serves a legitimate purpose and is carried out with respect for human dignity is not in itself incompatible with the Convention, see *Yankow v. Bulgaria*, cited above, and that the effects of a legitimate treatment must exceed the inevitable element of suffering or humiliation if it is to create a violation of Article 3, see *Labita v. Italy*, cited above, I must conclude, on the basis of the factual elements which I have explained above, that there has been no violation in this case.

I would like to add that in cases like this, it is important to examine whether the police have acted without having had the necessary reasons for it, or performed in a way that has shown lack of respect of the arrested person's human dignity or caused him bodily harm. However, when deciding in such cases, one must also keep in mind the difficult role of the police in cases like this, and make a balanced evaluation. Protecting victims and taking care of people's security should not be unnecessarily hampered by the Court. In my opinion, the judgment in the present case might have just that effect.