AS TO THE ADMISSIBILITY OF

Application No. 25484/94
by Johann BUCHINGER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, 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 1 June 1994 by Johann BUCHINGER against Austria and registered on 26 October 1994 under file No. 25484/94;

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 they have been submitted by the applicant, may be summarised as follows.

The applicant, born in 1950, is an Austrian national and resident in Vienna. He is receiving a disability pension.

As regards the applicant's previous Application No. 15198/90 concerning the length of civil proceedings, the Commission adopted its Article 31 Report on 1 July 1992, and on 3 February 1994 the Committee of Ministers, in its Resolution DH(94)7, found a violation of Article 6 para. 1 of the Convention. His further Application No. 21210/93 relation to complaints about the lack of fairness of domestic court proceedings was declared inadmissible on 1 April 1993.

On 27 July 1991, at about 8.40 p.m., the applicant entered a Vienna bus and intended to stand behind the driver's seat during the ride. According to the applicant, he suffered pain when getting up from a seat due to his physical handicap and he had therefore usually taken the space behind the driver's seat in a bus in order to stand there during the ride. On the above occasion, the bus driver requested the applicant to sit down or to go to the standing area at the back of

the bus. As the applicant refused, the bus driver stopped after a short drive and called for the police. Some minutes later, police officers U. and G. of the Vienna Federal Police Department (Bundespolizeidirektion) arrived and asked the applicant to choose another place in the bus. When the applicant still refused, the police officers arrested him and by force got him out of the bus, hand-cuffed him and took him to the police car. He was brought to the police station where he was released at 9.45 p.m.

On 10 September 1991 the applicant, assisted by counsel, filed a complaint with the Vienna Independent Administrative Senate (Unabhängiger Verwaltungssenat), claiming that the forced removal from the bus, his subsequent arrest and hand-cuffing by the police officers had violated his right to liberty under Article 5 of the Convention and had subjected him to inhuman and degrading treatment within the meaning of Article 3 of the Convention. According to the applicant, the police officers had dragged him forcibly out of the bus without having pronounced his arrest. When insisting on information about the officers' service numbers, they had hand-cuffed him. The applicant further submitted that he had been entitled to stand behind the driver's seat as he did not hinder the driver in any way and that the police officers had not been entitled to remove him forcibly from the bus and to arrest and hand-cuff him afterwards.

The Vienna Federal Police Department, in its comments on the applicant's complaint, submitted that the Police Officers U. and G. had acted upon the request of the bus driver who had been hindered in driving the bus on the ground of the applicant's choice of place behind the driver's seat. The applicant had refused to comply with the driver's, and later also with the Police Officers' requests to choose another place and had been aggressive. Further the applicant had refused to give his personal data. His conduct had disturbed the regular driving of the bus. At 9.05 p.m., Police Officer U. had, therefore, effected the applicant's arrest in accordance with the relevant provisions of the Austrian law. Upon the applicant's resistance to leaving the bus, he had been hand-cuffed, and the hand-cuffs were taken off upon arrival at the police station. At that time the applicant had not complained about any pain or injuries. Having established the applicant's identity, he had been released.

On 28 January 1992 the Vienna Independent Administrative Senate conducted a hearing on the applicant's complaint. The Senate heard the applicant as well as the bus driver and Police Officers U. and G.

The applicant indicated that on 27 July 1991 he had intended to stand behind the driver's seat as he had usually done because of his physical handicap. He considered that the bus driver had requested him to leave this place in order to take revenge for several complaints which the applicant had lodged about various bus drivers. The bus driver had called for the police. The Police Officers had requested him to sit down or to move to the back of the bus, and, when he refused, had established his identity and then forcibly removed him from the bus. He had then been hand-cuffed, hit in his chest and pushed into the police car. At the police station, he was searched and questioned. He had only been released at 10.10 p.m.

The bus driver stated that he had already previously requested the applicant to leave the area behind the driver's seat as he hindered the driver from properly looking into the rear-view mirror and also hindered the other passengers from entering the bus. In the evening in question, two other passengers had asked him to tell them when to change the bus. He had again asked the applicant to take place elsewhere in the bus and had explained that he could not properly look into the rear-window mirror. When the applicant had refused, stating the outside mirror was sufficient, the bus driver had called for the police. The Police Officers had requested the applicant to leave his place behind the driver's seat and had talked to him politely for about

five to seven minutes. The Police Officers had then firmly requested the applicant to take place at the back of the bus or to leave the bus, and when he refused, rather carefully and cautiously removed him from the bus. The bus driver had left the bus station with a delay of ten minutes.

Police Officer U. stated that he could well remember the events in the evening of 27 July 1991, when he was called with a colleague to a bus which had stopped about 100 meters from the bus stop. They had tried to persuade the applicant to move further to the back of the bus and had explained to him that he hindered the driver and also that the place behind the driver was a security risk in case of accident. The applicant had been unreasonable and aggressive. Police Officer U. had therefore warned the applicant that he would be charged for having disturbed the public order. Upon further resistance and refusal to state his identity, Police Officer U. had effected the applicant's arrest in the bus. When the applicant thereupon held fast to one of the bars, he and his colleague had, as carefully as possible, carried the applicant out of the bus. Outside the bus, the applicant had hit out with his arms. They had therefore hand-cuffed him in order to put him into the police car. At the police station the applicant had finally indicated his name, and following a check with the general register, he was released. Police Officer U. also indicated that before the applicant's release, he had verified that the applicant had suffered any injuries. No injuries could be found, and the applicant himself had not complained about any injuries.

Police Officer G. further explained the circumstances of their mission in the evening of 27 July 1991. He confirmed that they had repeatedly tried to persuade the applicant to move to a place at the back of the bus. The applicant had refused. After five to ten minutes, the other passengers started to get impatient, he and his colleague had therefore carried the applicant out of the bus. The bus had left. The applicant had then refused to show his identity papers. Thereupon, Police Officer U. had effected the applicant's arrest. As the applicant had resisted entering the police car, he had been hand-cuffed. The hand-cuffs had been removed at the police-station, where the applicant indicated his name. He had then been released. Upon questioning Police Officer stated that the applicant had not suffered any injuries, not even due to the hand-cuffing.

On 28 January 1992, following the hearing, the Vienna Independent Administrative Senate dismissed the applicant's complaints.

In its decision, the Senate, considering the applicant's submissions in his complaint and the evidence taken at the hearing, gave credence to the bus driver's and the Police Officers' statements. In this respect the Senate took into account that these witnesses, on account of their professional situation, had a particular duty to tell the truth. Moreover, their statements were clear, conclusive and in themselves not contradictory. There were no contradictions as to the relevant facts. Furthermore, the contradictions in their statements as to some details were of a minor nature and not decisive. The Senate referred in particular to the questions to what extent the applicant's behaviour had been aggressive, the other passengers' reactions, or the exact time when the applicant's arrest was effected. The Senate also noted that the applicant had not mentioned any injuries in his first submissions, and that he had not submitted any evidence such as a medical certificate.

The Senate considered that the applicant's right to liberty had not been violated. The Senate found that the applicant had been arrested in accordance with S. 35 of the Law on Administrative Offences (Verwaltungsstrafgesetz). According to S. 35 (1), the agents of the security forces may, except in the cases specially regulated by law, arrest persons caught in the act of committing an offence, for the purpose of bringing them before the authorities, if, inter alia, the

identity of the person in question is not known and cannot be established and if, despite being warned, the person in question persists in the culpable conduct or attempts to repeat it. The Senate found that the applicant had been reasonably charged with an administrative offence within the meaning of S. IX para. 1 of the Introductory Law of the Administrative Procedure Laws (Einführungsgesetz zu den Verwaltungsverfahrensgesetzen), which relates to offending public decency or causing excessive noise. The Senate also observed that the applicant had failed to comply with the bus driver's request, pursuant to the relevant rules of the Passenger Service Act (Kraftfahrliniengesetz).

Moreover, the Senate concluded that the applicant's removal from the bus was a necessary consequence of his arrest to which the applicant resisted. Likewise, the fact that he was hand-cuffed following his further resistance did not violate his right to liberty.

As regards the alleged violation of Article 3 of the Convention, the Senate found that the applicant's lawful arrest could not as such amount to inhuman and degrading treatment. Referring to the case-law of the Constitutional Court (Verfassungsgerichtshof), the Senate considered that the force used by the Police Officers was proportionate to the aim of removing the applicant from the bus. In this respect, the Senate noted the concurring statements of the bus driver and the Police Officer that the applicant had been carefully carried out of the bus. Furthermore, having regard to the applicant's resistance to his arrest and entering the police car, he had to be hand-cuffed. The Senate found that the applicant had failed to show that the Police Officers had thereby caused any pain or injuries which went beyond the typical inconveniences.

On 14 June 1993 the Constitutional Court refused to entertain the applicant's complaint about the decision of 28 January 1992. The Constitutional Court considered that the complaint did not raise any specific questions of constitutional law. The Constitutional Court referred the case to the Austrian Administrative Court (Verwaltungsgerichtshof), finding that it was not excluded from the competence of that Court. The decision was served on 24 June 1993.

On 20 September 1993 the Administrative Court rejected the applicant's complaint. The Administrative Court, referring to its case-law, considered that the complaint was inadmissible. The Administrative Court found that, pursuant to the relevant procedural provisions, it had no competence to decide on the complaint on the ground that it exclusively concerned questions of constitutional law belonging to the competence of the Constitutional Court, and not at least partly questions of the application of ordinary laws. In this respect, the Administrative Court noted that the Independent Administrative Senate, in its decision of 28 January 1992, had, in accordance with the applicant's complaints, decided on the questions of a violation of his right to liberty under Article 5 of the Convention and his right not to be subjected to inhuman and degrading treatment contrary to Article 3 of the Convention, thus only on matters of a constitutional character. The decision was served on 3 December 1993.

COMPLAINTS

The applicant complains that he was unlawfully ordered to leave his place behind the driver's seat in the bus and that his arrest had therefore been unlawful and arbitrary. He considers that the obviously unlawful arrest of a physically handicapped person amounts to inhuman and degrading treatment. He also appears to complaint that his arrest was effected without due proceedings. He invokes Articles 3, 5 and 6 of the Convention.

THE LAW

1. The applicant complains that in the evening of 21 July 1991 he was deprived of his liberty contrary to Article 5 (Art. 5) of the Convention.

He also invokes Article 6 (Art. 6) in this respect.

The Commission has examined the applicant's complaint about his arrest under Article 5 (Art. 5) of the Convention, which is the relevant provision regarding the matter concerned. Article 5 (Art. 5), as far as relevant, provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> ..."

The question arises whether the contested arrest was founded on laws covered by the Austrian reservation in respect to Article 5 (Art. 5).

The instrument of ratification of the Convention deposited by the Austrian Government on 3 September 1958 contains, inter alia, the following reservation:

> "The provisions of Article 5 (Art. 5) of the Convention shall be so applied that there shall be no interference with measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl. [Federal Official Gazette] No. 172/1950, subject to review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution."

The Commission notes the applicant's allegation that he had been entitled to stand behind the driver's seat in the bus and had not, therefore, committed any offence. However, in its decision of 28 January 1992, the Vienna Independent Administrative Senate, having taken evidence, established that the applicant, had failed to comply with the requests to choose another place during the bus ride in order not to hinder the bus driver in the exercise of his functions and had committed an administrative offence within the meaning of the relevant provisions of the Introductory Law of the Administrative Procedure Laws and the Law on Administrative Offences, respectively.

The Commission recalls that the Austrian reservation in respect of Article 5 (Art. 5) is compatible with Article 64 (Art. 64) of the Convention (Eur. Court H.R., Chorherr judgment of 25 August 1993, Series A no. 266-A, pp. 33-35, paras. 15-21).

In these circumstances, the Commission finds that the applicant's submissions do not disclose any appearance of a violation of Article 5 (Art. 5) 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).

2. The applicant further complains about Article 3 (Art. 3) of the Convention that his arrest amounted to inhuman and degrading treatment.

According to Article 3 (Art. 3) of the Convention, "no one shall be subjected to torture or to inhuman and degrading treatment or punishment."

The Commission recalls that ill-treatment must attain a certain level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim etc. (Eur. Court H.R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 65-67, paras. 162, 167; Tyrer judgment of 25 April 1978, Series A no. 26, pp. 14-15, paras. 29-30; Soering judgment of 7 July 1989, Series A no. 161, p. 39, para. 100).

Such treatment causing, if not actual bodily injury, at least intense physical and mental suffering falls into the category of inhuman treatment within the meaning of Article 3 (Art. 3). It is degrading if it arouses in the person subjected thereto feelings of fear, anguish and inferiority capable of humiliating and debasing this person and possibly breaking his or her physical or moral resistance (Eur. Court H.R., Ireland v. the United Kingdom judgment, loc. cit., p. 68, para. 174; Guzzardi judgment of 6 November 1980, Series A no. 39, p. 40, para. 107; Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 42, paras. 90-91; Soering judgment, loc. cit.).

In the present case, the Commission finds that the applicant failed to show that his arrest amounted to treatment contrary to Article 3 (Art. 3).

The Commission considers in particular that the fact of the applicant's arrest is in itself not sufficient to reach the level of severity for the purpose of Article 3 (Art. 3), even taking his physical handicap into account.

As regards the circumstances of the applicant's arrest, the Commission is confronted with versions differing on various points.

The Commission notes that the Vienna Independent Administrative Senate, when examining the applicant's complaint about the events in question, heard the applicant, the bus driver and the Police Officers U. and G. In its decision of 28 January 1992, the Independent Administrative Senate considered that the force used by the Police Officers was proportionate to the aim of removing the applicant from the bus. In this respect, the Senate noted the concurring statements of the bus driver and the Police Officer that the applicant had been carefully carried out of the bus. Furthermore, having regard to the applicant's resistance to his arrest and entering the police car, he had to be hand-cuffed. The Senate found that the applicant had failed to show that the Police Officers had thereby caused any pain or injuries which went beyond the typical inconveniences.

The Commission, having regard to this evidence obtained at the domestic level and the factual findings of the Independent Administrative Senate as well as the applicant's further submissions in the Commission proceedings, finds no indication that he was subjected to treatment which went beyond the inevitable element of suffering connected with an arrest (cf., Eur. Court H.R., Klaas judgment of 22 September 1993, Series A no. 269, pp. 17-18, paras. 29-30). In this respect, the Commission attaches particular importance to the fact that the applicant's allegations of injuries were not supported by any medical or other evidence.

Accordingly, the applicant's submissions do not disclose any appearance of a violation of Article 3 (Art. 3) of the Convention.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)