AS TO THE ADMISSIBILITY OF

Application No. 18764/91
by Peter HIPPIN
against Austria

The European Commission of Human Rights sitting in private on 5 September 1994, the following members being present:

MM. C.A. NØRGAARD, President
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

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 28 August 1991 by Peter HIPPIN against Austria and registered on 4 September 1991 under file No. 18764/91;

Having regard to :

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 19 February 1993 and the observations in reply submitted by the applicant on 24 March 1993;

- The questions put by the Commission on 11 January 1994 and the Government's replies of 15 February 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1962. He lives in Vienna and is represented before the Commission by Mr. T. Prader, a lawyer practising in Vienna. The facts of the case, which are partly

disputed between the parties, may be summarised as follows.

On 11 February 1988 the applicant took part in the "Opera Ball Demonstration". He was arrested at approximately 10.00 p.m. and taken to Mariahilf police station.

The applicant states that whilst there, a stick was found hidden amongst his clothing. One of the policemen stated that he would show the applicant what one could do with such a stick and proceeded to hit the applicant with the stick several times on his back and his legs. Soon after the applicant was taken by a police vehicle to Innere Stadt police station, where he was again mishandled, being subjected to kicks or punches such that his left eye and collar-bone swelled up and bruised. The beating continued with the applicant being hit some ten times with the stick, some of the blows delivered full force. At the same time the applicant was slapped and insulted. One of the policemen eventually told his colleagues to stop the beating.

The Government emphasise that the Vienna Police Directorate had prohibited the demonstration, one of the grounds for the prohibition being the danger to public safety within the meaning of Article 11 para. 2 of the Convention. They outline the facts of the applicant's arrest, including the way in which he attacked one police officer with a wooden stick, ran away when further police officers came on the scene, and was then caught by a police officer. The applicant beat at the officer with his stick and his free hand and, after both had fallen into a clump of bushes, was arrested and taken into custody, struggling all the time. The Government affirm that the applicant's stick was taken away from him when he was arrested. They state that some reddening of the skin on the applicant's back was noticed by police officers when the applicant was strip searched at the Innere Stadt police station.

A police doctor certified the applicant as fit for detention. The Government state that the doctor did not examine the applicant for injuries, as the applicant stated that he did not need such an examination.

The applicant was questioned the following morning and told that proceedings would be brought against him for attempting to resist the authorities and disturbing the peace. In the course of the questioning, the applicant did not complain about injuries. He was released at 10.50 a.m.

On his release the applicant went to his lawyer, his representative in the present case, who photographed the injuries. The applicant then went to a hospital where a report was made on his injuries and treatment (cold compresses and sage ointment) was prescribed. The report established bloodshot bruising from the right lower eyelid to the base of the nose and above the cheek-bone and upper jaw; a small bloodshot bruise on the lower lip; a bloodshot bruise of approx. 8 by 2 cm. on the right shoulder-blade and a further one at an angle thereto; a bloodshot bruise of 1 by 0.3 cm. on the left side and another of 6 by 2.5 cm. at the edge of the lower right-hand shoulder-blade; scratch marks at the level of the 11th and 12th ribs, and pressure marks on the right upper thigh of approx. 5 by 1 cm. Almost circular pressure marks were found on both wrists, as was a diagonal pressure mark of some 6 by 3 cm. above the right ankle.

The applicant was convicted on 6 April 1988 before the Vienna Regional Court (Landesgericht) of attempting to resist the forces of law, in particular by attacking a policeman from behind with a wooden stick or club whilst the policeman was attempting to ascertain the identity of another demonstrator, and then by resisting arrest after an attempted escape. He was sentenced to seven months' imprisonment, suspended for three years. The conviction related to the period before the applicant was arrested and taken to the police station. The Court

accepted as plausible (nachvollziehbar) the prosecution's explanation that the applicant, who had been turned onto his stomach but had not ceased to resist, received injuries to his face and bruises on his back. The applicant's appeal to the Vienna Court of Appeal (Oberlandesgericht) was rejected on 8 August 1988.

On 10 March 1988 the applicant made a constitutional complaint under Article 144 of the Federal Constitutional Law (Bundes-Verfassungsgesetz), in which he alleged violation of Articles 3 and 14 of the Convention in respect of his being ill-treated by being hit on his legs and back with a stick after his arrest. The Constitutional Court (Verfassungsgerichtshof) put the applicant's complaints to the prosecuting authorities, which on 17 January 1989 sent a note to the Constitutional Court that criminal proceedings against the police had been discontinued because "no criminal behaviour by the police has been proved". The Constitutional Court itself found that an adequate explanation for the events - and thus proof of the alleged ill-treatment - was not possible, in particular given that the applicant had not been able to offer witnesses and no fresh evidence was available. The Constitutional Court rejected the constitutional complaint.

The Government point out that in the investigations into the applicant's allegations of ill-treatment, the applicant refused to make any statement or to give any details as to the allegations. To this the applicant replies that his lawyer had advised him not to give any details to the police as in the lawyer's experience investigations by the police into the conduct of individual police officers do not result in convictions.

On 26 February 1990 the applicant brought an official liability action (Amtshaftungsklage) against the Republic of Austria, requesting compensation of AS 20,000 for the injuries suffered whilst in police custody. The Vienna Regional Court (Landesgericht) rejected the action on 2 October 1990. It accepted the findings of a report prepared for the applicant on 4 October 1989 that the injuries had been caused "with a probability verging on certainty" by a wooden stick or similar object, but found, again in agreement with the report of 4 October 1989, that it could not be established that the injuries were caused by the police after the applicant had been taken into custody. The court found that the injuries could also have been caused whilst the applicant was being arrested. It continued:

[Translation]

> "As to the ... injuries which were caused by a wooden stick or similar object, mistreatment by the police is not the only conceivable cause of injury. A demonstrator such as the plaintiff, bearing a stick and covering his head at a demonstration, that is, who is prepared to use violence to achieve the aims of the demonstration, was not able to convince the court that the basis for his statements is as he claims. It is to be noted that the plaintiff was not able to recognise or describe a single policeman who is alleged to have taken part in the ill-treatment. The court is not convinced by the reasoning proffered, namely that the plaintiff suffered the ill-treatment with his head ducked down. The plaintiff himself refers to ill-treatment whilst being brought from a cell to a police vehicle. It is not very likely that the plaintiff would not have been able, during this or other alleged ill-treatment, to form an impression of the officers who were mishandling him. The plaintiff was also not able to describe in more detail the alleged ill-treatment. Nor could he remember any of the insults or other comments by the policemen, which might have made a motive for the ill-treatment at all plausible. There is thus no reliable reason for aggression on the part

of police officers at two separate police stations which could give a reason for the plaintiff's ill-treatment. The plaintiff had, after all, been taken into custody a long time before. The heat of the action had therefore passed. There is no plausible explanation for any pent-up aggression, whether before or after being taken into custody. On the other hand, the plaintiff's injuries may have come about before his arrest or after his release from custody. The court cannot reliably determine how far a man such as the plaintiff, with the get-up described above, his behaviour at the demonstration and his intentions and aims, was prepared to go. This court makes no assumptions about the plaintiff. One can, however, imagine a frame of mind of the plaintiff which does not exclude falsely accusing police officers of ill-treatment. Therefore the court has not been able to make any finding of fact as to how the injuries of the plaintiff came about, or whether state officials were amongst those responsible for the injuries after the plaintiff had been taken into custody."

[German]

"Was aber die ... Verletzungen betrifft, deren Ursache in Schlägen mit einem Holzknüppel oder einem ähnlichen Gegenstand liegt, ist eine Mißhandldung durch Polizeiorgane nicht die einzige denkbare Verletzungsursache. Ein Demonstrant wie der Kläger, der vermummt und mit einem Prügel bewaffnet an einer Demonstration teilnimmt, also selbst Gewalt zur Erreichung von Demonstrationzielen einzusetzen bereit ist, vermochte dem Gericht nicht jene Überzeugung zu vermitteln, die Grundlage für Feststellungen sein hätte können, wie sie der Kläger anstrebte. Dabei ist zu beachten, daß der Kläger nicht in der Lage war, irgendeinen Beamten wiederzuerkennen oder zu beschreiben, der sich an Mißhandlungen beteiligt haben soll. Die dafür angebotene Erklärung, Mißhandlungsakte immer mit gebeugten Kopf in Abwehrhaltung erduldet zu haben, überzeugt nicht. Der Kläger spricht selbst auch von Mißhandlungen bei der Verbringung von einer Zelle in den Streifenwagen. Es ist nicht sehr wahrscheinlich, daß der Kläger dabei oder auch während der anderen behaupteten Mißhandlungsakte nie Gelegenheit gehabt hätte, sich einen sinnlichen Eindruck von mißhandelnden Beamten zu verschaffen. Der Kläger vermochte such die nähere Art der angeblichen Mißhandlungen nicht zu beschreiben. Ebenso hatte er keine Beschimpfung durch Beamte oder sonstige Erklärungen in Erinnerung, die dem Gericht allenfalls irgendein Mißhandlungsmotiv glaubhaft erscheinen lassen hätte können. Es läßt sich also keine verläßliche Begründung für ein Aggressionspotentiel von Beamten auf zwei verschiedenen Kommissariaten finden, die eine Ursache für Mißhandlungen des Klägers nahelegen könnte, war doch der Festnahmeakt schon längst abgeschlossen. Die Hitze des Geschehens vor Ort war also schon vorbei. Für einen allenfalls später entstandenen oder noch von früher vorhandenen Aggressionsstau bei Polizeibeamten fehlt eine plausible Erklärung. Dagegen können die Schlagverletzungen des Klägers schon vor seiner Festnahme vorhanden gewesen oder erst nach seiner Entlassung aus der Verwahrungshaft entstanden sein. Wie weit ein Mann wie der Kläger mit der oben dargestellten Demonstrationsausrüstung, seinem Demonstrationsverhalten und der diesem zugrunde liegenden Absicht und Gesinnung zu gehen bereit war, läßt sich für das Gericht nicht verläßlich beurteilen. Des Gericht unterstellt daher dem Kläger nichts. Es ist nur auch eine Gesinnung des Klägers vorstellbar, welche eine unrichtige Belastung von Polizeibeamten mit Mißhandlungen nicht

ausschließt. Deshalb vermochte das Gericht keine Feststelleung zu treffen, worauf die dokumentierten Verletzungen des Klägers wirklich zurückgehen und ob zu deren Urhebern auch Organe des Bundes nach Abschluß des Festnahmeaktes gehörten."

The applicant's appeal to the Vienna Court of Appeal (Oberlandesgericht) was rejected on 18 March 1991 (decision received by the applicant's representative on 5 April 1991). The Court of Appeal found that the Regional Court had properly assessed the evidence and convincingly explained why it did not attach sufficient credibility to the applicant's version of events to be able to establish that the applicant's injuries were in fact occasioned at the police station after he had been taken into custody.

COMPLAINTS

The applicant alleges violation of Article 3 of the Convention by virtue of injuries received whilst in police custody.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 August 1991 and registered on 4 September 1991.

On 14 October 1992 the Commission decided to communicate the application to the respondent Government and to invite the parties to submit observations on its admissibility and merits.

The respondent Government submitted their observations after two extensions of the time limit on 19 February 1993. The applicant submitted his observations in reply on 24 March 1993.

On 6 April 1993 the Commission decided to grant legal aid to the applicant, and on 14 May 1993 the Government submitted a translation of their observations.

The Commission considered the case on 11 January 1994 and decided to put further questions as to the facts of the case. The Government replied on 15 February 1994 and submitted a translation on 16 March 1994. On 6 April 1994 the applicant informed the Commission that he had no comments to make on the Government's submissions.

THE LAW

The applicant alleges a violation of Article 3 (Art. 3) of the Convention in respect of various injuries received after his arrest on 11 February 1988. Article 3 (Art. 3) of the Convention provides as follows:

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

The Government consider that the applicant has failed to exhaust domestic remedies in that he failed to make an administrative complaint to the Administrative Court (Verwaltungsgerichtshof). The applicant points out that he was able, in his constitutional complaint, to put his complaints under Article 3 (Art. 3) of the Convention to the Constitutional Court, and that this court dealt with those matters.

The Commission notes that the prosecution authorities considered that it was not possible to prove criminal behaviour on the part of the police, that the applicant alleged a violation of his constitutional rights, including Article 3 (Art. 3) of the Convention, before the Constitutional Court, and that he brought civil proceedings against the State by way of an official liability action. The Government have not suggested in what way a complaint to the Administrative Court could

have remedied the applicant's position, nor have they suggested that he could in any way have raised substantially the same matters before the Administrative Court as he now raises before the Commission. The Commission finds that the applicant has exhausted remedies which were sufficient and effective as regards his allegations of ill-treatment contrary to Article 3 (Art. 3). It follows that he has complied with the condition as to the exhaustion of domestic remedies contained in Article 26 (Art. 26) of the Convention.

As to the substantive allegations, the Government do not accept the factual allegations made by the applicant, nor do they accept the conclusions he draws therefrom. They point out that the domestic courts were unable to draw any conclusions from the facts available, and they reject the suggestion that there may have been a conspiracy on the part of police officers - they see the suggestion as an indication that the applicant has no valid arguments.

The applicant maintains his complaints. He underlines that the civil courts established that he had been hit by a stick, and only left open the question of how and when the injuries were inflicted. He points out that persons detained at police stations can never have independent witnesses of events after arrest, as they are detained and only in the presence of the police. He explains the police readiness to use excessive violence in the wake of the "Opera Ball Demonstration" by the degree of publicity and general tension involved. He states that in the criminal proceedings against him he did in fact recognise one of the police officers involved, but was advised against making formal accusations. He emphasises that he did not need to identify individual police officers in the constitutional or in the civil proceedings.

The Commission recalls that ill-treatment must reach a certain level of severity if it is to fall within the scope of Article 3 (Art. 3) (cf, for example, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 65-67, paras. 162, 167). The facts constituting a violation of the Convention must be proved "beyond reasonable doubt", although the concept of burden of proof is not strictly applicable before the Convention organs (above-mentioned Ireland v. the United Kingdom judgment, pp. 64, 65, paras. 160, 161).

The mere possibility that the injuries were sustained in a manner other than that alleged by the applicant is not sufficient reason for rejection of a complaint (cf. Tomasi v France, Comm. Rep. 11.12.90, Eur. Court H.R., Series A no. 241-A, p. 52, para. 100). It must, however, be established that the injuries in question actually occurred in the way alleged by the applicant, and it is not normally for the Convention organs to substitute their own assessment of the facts for that of the domestic courts (Eur. Court H.R., Klaas judgment of 22 September 1993, Series A no. 269, para. 29). Cogent reasons are needed before the Convention organs depart from the findings of fact of the national courts (above-mentioned Klaas judgment, para. 30)

The injuries sustained by the applicant are, in themselves, sufficiently severe to fall within the scope of Article 3 (Art. 3) of the Convention if it is established that the injuries were intentionally and unnecessarily inflicted whilst he was in police custody, rather than in the course of the events leading up to his arrest.

The Commission notes that on 6 April 1988 the applicant was convicted of resisting arrest. Although there was no reference to third parties having sticks, there was a skirmish before the applicant was arrested, when he received some degree of injury to his face and back.

The Commission recalls that the domestic courts accepted the expert evidence adduced by the applicant both as to the nature of his

injuries, and as to how they came about. The domestic courts found, however, that the applicant had not been able to give a satisfactory detailed description of the events. The Regional Court, in the applicant's official liability action, cast doubt on his credibility. The courts in the applicant's official liability action, which were under a duty pursuant to Article 272 of the Code of Civil Procedure (Zivilprozessordnung) to establish the facts of the case on the basis of the evidence before them, did not accept that the applicant had established that the injuries had been caused in the police stations, as alleged.

The Commission has not been supplied with information which could permit it, independently of the domestic courts, to establish that the applicant's injuries were inflicted in the manner he alleges. Neither of the medical reports prepared when at the time of the incident - the report prepared by the hospital the applicant attended on 12 February 1988, and the police doctor's certificate that the applicant was fit to be detained - gives any indication of the timing of the injuries. Even the applicant's own report of 4 October 1989, which he had had prepared for the purposes of the official liability action, expressly states that it could not be ascertained when the applicant received his various injuries.

Taking all the circumstances of the case together, the Commission finds that it has not been established "beyond reasonable doubt" that the facts in the present case were as alleged by the applicant.

It follows that the application is 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)