AS TO THE ADMISSIBILITY OF

Application No. 23632/94
by Adnan KANAN
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. G.H. THUNE, President
MM. S. TRECHSEL
J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

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

Having regard to the application introduced on 3 December 1993 by Adnan KANAN against Switzerland and registered on 7 March 1994 under file No. 23632/94;

Having regard to:

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

- the observations submitted by the respondent Government on 1 March 1994 and the observations in reply submitted by the applicant on 27 April 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Palestinian born in 1943. He currently resides in Denmark.

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

On 14 August 1992 the applicant was arrested by the police in Geneva and allegedly beaten by several policemen while being handcuffed, and detained on remand. On 16 August 1992 he complained of maltreatment at the time of arrest and underwent medical examination at Champ-Dollon prison. As a result of this visit the police immediately instituted an internal enquiry.

On 9 September 1992 a forensic medicine specialist of the Geneva

University issued a medical certificate, stating that on 16 August 1992 a post-traumatic perforation of the left eardrum and pain in the thorax had been established. A radiological examination effected on that date had not shown any internal injuries.

On 12 October 1992 two prison doctors issued a medical certificate, identical with that of 9 September 1992.

On 13 October 1992 within the framework of the internal investigation a note of the deputy chief officer of the cantonal police to the chief officer was issued, stating that the applicant had been arrested on 14 August 1992. Two policemen, G. and B., questioned and searched the applicant. Subsequently, his car was searched and drugs were found in several places. The applicant was then detained. The report concluded that there was nothing to cast doubt on the credibility of the statements of the policemen concerned and that, as a result, the investigation had not shown that the applicant had been subject to any ill-treatment.

On 19 October 1992, in the course of the internal police enquiry one policeman who had arrested the applicant and five other policemen who had questioned him either on the day of his arrest or later made statements as to the facts concerned. They stated that the applicant had been arrested on 16 August, that he had never been beaten and that later, when questioned during the investigations against him, he had never complained about the alleged ill-treatment.

On 11 November 1992 the applicant requested the institution of criminal proceedings against several police officers, both plainclothes and in uniform.

On 2 December 1992 the applicant was heard by the security police. He stated that he had been hit by one person, in civil clothes. He described this person as being 35 to 38 years old, tall, with dark hair, dressed in jeans and a bluish leather jacket. He had been hit before an interpreter came.

On 11 December 1992 the applicant was heard by the investigating judge of the Canton of Geneva. He stated that he had been beaten by one plainclothes officer. On the same day the judge heard a police officer G. who had participated in the applicant's arrest. On 21 December 1992 the General Public Prosecutor of the Geneva Canton refused to institute criminal proceedings as it had not been established that a criminal offence had been committed ("vu l'absence de toute prévention suffisante"). The Prosecutor referred to the results of the internal police investigation as supporting this conclusion.

On 24 December 1992 the applicant appealed against this decision, indicating that the police interpreter Mr. H. had been a witness to the beating.

On 22 January 1993 the Accusation Chamber (chambre d'accusation) of the Canton of Geneva heard the applicant, who stated that an interpreter, Mr. Z., had seen the incident at issue.

On 5 February 1993 the Accusation Chamber of the Canton of Geneva dismissed the applicant's appeal as it considered that the applicant had contradicted himself in his statements. Thus, in his request for the institution of criminal proceedings he maintained that he had been beaten by several policemen, while during the hearing by the investigating judge he asserted that only one plainclothes officer had beaten him. Moreover, the medical certificate, which referred to a perforation of the left eardrum, did not mention any external injuries which would naturally have appeared if the applicant had been beaten. There was also no indication in the medical certificate that there was a causal link between the alleged maltreatment and the post-traumatic

injury suffered by the applicant.

In a note of 11 February 1993 to the General Prosecutor of the canton of Geneva the chief officer of the security police stated that the applicant's statements of 11 November 1992 and 2 December 1992 were contradictory in that in the former he had failed to specify whether he had been hit by policemen in civil clothes or in uniform, whereas in the latter he had affirmed that he had been hit by one plainclothes officer. The note went on to state that no one of five agents who had arrested the applicant corresponded with the description given by him.

On 17 February 1993 the applicant wrote a letter to the Accusation Chamber of the Canton of Geneva and to the Federal Court (Tribunal fédéral), complaining that he had been ill-treated upon his arrest. The applicant complained about the decision of 5 February 1993 and requested its annulment as the Chamber had wrongly assessed evidence before it.

On 4 October 1993 the Federal Court declared the applicant's public law appeal of 17 February 1993 inadmissible as he had failed to indicate which of his constitutional rights had been breached; thus he had only complained in his appeal statement about the contested decision and the establishment of facts made therein.

COMPLAINTS

The applicant complains under Article 3 of the Convention about ill-treatment by the police while being handcuffed. Under Article 14 of the Convention, taken together with Article 3 of the Convention, he complains that he has been ill-treated due to his Palestinian nationality.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 December 1993 and registered on 7 March 1994.

On 30 November 1994 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 1 March 1995, after an extension of the time-limit fixed for that purpose. The applicant replied on 27 April 1995.

THE LAW

1. The applicant complains under Article 3 (Art. 3) of the Convention about ill-treatment by the police while being handcuffed.

Article 3 (Art. 3) of the Convention reads:

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

The Government first submit that the applicant did not exhaust domestic remedies. They submit that he invoked an alleged violation of the Convention only before the last national court, i.e. in his public law appeal to the Federal Court and failed to give any explanation of his claim. In its judgment the Federal Court found that in his public law appeal the applicant had limited himself to criticising the appealed decision and had failed to indicate which of his constitutional rights had allegedly been breached by the decisions and acts concerned. Thus he had not complied with the requirements of Article 26 (Art. 26) as regards the exhaustion of domestic remedies.

The applicant does not submit any specific comments concerning exhaustion of domestic remedies.

The Commission notes in the first place that it does not appear that the applicant has complied with the obligation contained in Article 26 (Art. 26) of the Convention to exhaust domestic remedies since he has not invoked Article 3 (Art. 3) of the Convention, either in form or in substance, in the domestic proceedings. The Commission need nevertheless not resolve this issue as, even assuming that the domestic remedies have been exhausted, the application is in any event manifestly ill-founded for the following reasons.

The Government submit that on 16 August 1992 the applicant was examined by the medical services at Champ-Dollon. As a result of this visit the police immediately instituted an internal enquiry. In the course of this enquiry one policeman who had arrested the applicant and five policemen who had questioned the applicant made statements about the relevant facts. The enquiry had not shown that the applicant had indeed been a victim of any ill-treatment upon his arrest. The Government submit that there are no grounds for questioning the soundness of the findings of the police enquiry.

The Government find it surprising that the applicant requested the institution of criminal proceedings concerning the events at the time of his arrest as late as on 11 November 1992. They consider that the reasons given by the applicant to justify this delay, namely the fact that he was waiting for the results of medical examinations and that he changed a lawyer several times, are not convincing.

The Government further refer to the discrepancies between the applicant's different submissions. In particular, in his request to institute criminal proceedings of 11 November 1992, the applicant stated that he was beaten by several policemen, both plainclothes and in uniform. On 2 December 1992, when heard by the security police, the applicant stated that he was beaten by one person in civil clothes. The description of this person given by the applicant did not correspond to any of the policemen involved in the applicant's case.

The Government contend that when heard by the security police on 2 December 1992 the applicant said that he was hit only once before the interpreter came, whereas later in the proceedings he maintained that the translator was present during the beating. There are discrepancies between the applicant's submissions as to the identity of the interpreter. The Government refer to the decision of 5 February 1993 of the Accusation Chamber of the Canton of Geneva which highlights the contradictions between the applicant's submissions to the Chamber and his earlier statements in which he had never submitted that he was beaten in the presence of the interpreter. In particular, in his statement of 2 December 1992 he said that he had been hit only once and before the arrival of the interpreter.

The Government further submit that it transpires from the procès-verbal of the questioning of the applicant by the investigating judge on 11 December 1992 that he had not complained about the alleged ill-treatment during the criminal proceedings against him. In particular, he did not complain thereof immediately after his arrest.

The Government finally submit that the medical certificates did not demonstrate that there was a causal link between the applicant's injuries and the alleged beating. They deny that the events of the case constitute a violation of Article 3 (Art. 3) of the Convention.

The applicant contends that the Swiss authorities cooperated in order to conceal the actual course of the events concerned and to let the culprits evade responsibility. He submits that he had informed the investigating judge of the beating immediately, but that his statement

was disregarded. He mentioned the interpreter, Mr. Z. as being present at the beating. He never mentioned Mr. N. who had not been present. He further challenges the credibility of the police report of 11 February 1993.

The Commission recalls that it is not competent to examine alleged errors of fact or law committed by national courts, except where it considers that such errors might have involved a possible violation of the rights and freedoms set forth in the Convention (No. 21283/93, Dec. 5.4.94, D.R. 77-A, p. 81). The Commission further recalls that the national judge, unlike the Commission, has had the benefit of listening to the applicant and a witness and has assessed the credibility and probative value of their statements after careful consideration. Accordingly, in the absence of any new evidence having been brought before the Commission and of any indications that the trial judge incorrectly evaluated the evidence before him, the Commission must base its examination of the Convention issues before it on the facts as established by the national courts (cf. Eur. Court H.R., Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17-18, paras. 29-30).

The Commission observes that in the present case the applicant underwent medical examination by a prison doctor two days after his arrest. While the medical certificate stated that a post-traumatic perforation of the left eardrum and pain at the thorax had been established on this date, it does not mention any external bruises which such maltreatment would have left. Nor did the later report do so.

The Commission furthermore observes that doubts as to the credibility of the applicant's allegations also arise in view of certain contradictions in his statements. Thus, in his appeal of 24 December 1992 the applicant contended that there had been a witness to his ill-treatment by the police, namely an interpreter H. On 22 January 1993 during the hearing before the Accusation Chamber of the Canton of Geneva the applicant referred to the interpreter Z.

Furthermore, when requesting the institution of criminal proceedings on 11 November 1992 the applicant submitted that he had been beaten by several police officers. However, when heard by the investigating judge on 11 December 1992, the applicant stated that it was only one plainclothes officer who had beaten him.

The Commission considers that the authorities conducted a thorough internal police enquiry into the applicant's allegations and seven policemen made statements in the course thereof. Furthermore, the Public Prosecutor investigated the applicant's request to have criminal proceedings instituted. The evidence taken in this investigation did not, however, lend credibility to the applicant's claim as his submissions were contradictory. As a result, the authorities had doubts as to the veracity of the applicant's allegations and those doubts were not dissipated after an investigation. The Commission does not find that the way in which the authorities enquired into the applicant's allegations is open to question. It cannot find prima facie evidence that the applicant was subjected to treatment contrary to Article 3 (Art. 3) of the Convention.

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

2. Insofar as the applicant complains under Article 3 taken together with Article 14 (Art. 3+14) of the Convention, the Commission finds no issue under these provisions of the Convention. The remainder of 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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber