AS TO THE ADMISSIBILITY OF

Application No. 23829/94
by Nosa Dickson OVIAWE
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 17 May 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

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 24 March 1994 by Nosa Dickson OVIAWE against Austria and registered on 11 April 1994 under file No. 23829/94;

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 submitted by the applicant may be summarised as follows.

The applicant, a Nigerian national born in 1962, was, at the relevant time, remanded in detention with a view to his expulsion by the Vienna Federal Police Department. Before the Commission he is represented by Mr. W. Rainer, a lawyer practising in Vienna.

On 28 April 1993 at 9.00 hours Mr. Lengauer, a member of Amnesty International who assisted the applicant in his asylum case, visited the applicant at the Police Prison.

According to the applicant a prison warden woke him while he was still sleeping in his cell. He was naked. The prison warden did not leave him enough time to get properly dressed but rushed the applicant to accompany him to the visitor's room. The applicant could only put on his shirt and his shoes but neither underwear nor trousers. The prison warden pushed the applicant and shouted "gemma gemma, Neger" ("move on move on, negro"). The applicant appeared in the visitors room half naked and had to meet his representative in this state.

On 18 July 1993 the applicant through his representative filed

a disciplinary complaint (Dienstaufsichtsbeschwerde) in which he complained about the events of 28 April 1993. He requested that disciplinary measures be taken against the responsible prison warden and that he be granted compensation of 5,000 AS.

On 22 September 1993 the Federal Ministry for Internal Affairs (Bundesministerium für Inneres) replied to the disciplinary complaint. It expressed regret for the incident occurred and for the fact that the responsible prison warden could not be traced. It stated further that prison wardens had no competence to check whether in-mates were properly dressed. The requested compensation could not be granted because compensation for non-pecuniary damage was not provided for in the relevant law. As regards the alleged use of the expression "negro", this expression as such was not objectionable since it was a word to be found in common dictionaries.

COMPLAINTS

The applicant complains that the events on the morning of 28 ,April 1993 constituted inhuman and degrading treatment contrary to Article 3 of the Convention. The applicant submits that he did not file a compensation claim in official liability proceedings regarding the events on 28 April 1993 as such proceedings had no prospect of success given that his detention had been lawful and no compensation could be awarded for non-pecuniary damage resulting from the treatment he had suffered.

THE LAW

The applicant complains that the events on the morning of 28 April 1993 constituted inhuman and degrading treatment contrary to Article 3 (Art. 3) of the Convention.

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

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

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 3 (Art. 3) of the Convention as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.

The Commission recalls that Article 26 (Art. 26) of the Convention requires the exhaustion of remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress (No. 11660/85, Dec. 19.1.89, D.R. 59 p. 85).

The Commission recalls further that in a previous case it has found that with regard to the allegation of treatment contrary to Article 3 (Art. 3) of the Convention, a complaint to the Independent Administrative Senate (Unabhängiger Verwaltungssenat) concerning the exercise of direct administrative authority and coercion constituted a sufficient and effective remedy within the meaning of Article 26 (Art. 26) of the Convention, while compliance with Article 26 (Art. 26) did not require the filing of an official liability action (see No. 18896/91, Dec. 20.10.93).

The Commission notes that the applicant did not lodge a complaint with the Independent Administrative Senate but, on 18 July 1993, merely filed a disciplinary complaint. However, a disciplinary complaint does not constitute an effective remedy within the meaning of Article 26 (Art. 26) of the Convention (see No. 6701/74, Dec. 8.3.76, D.R. 5 p.

69; No. 7987/77, Dec. 13.12.79, D.R. 18 p. 31).

It follows that the applicant did not comply with the requirement of exhaustion of domestic remedies stipulated by Article 26 (Art. 26) of the Convention. The application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

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)