AS TO THE ADMISSIBILITY OF

Application No. 17544/90
by Anita RIBITSCH
against Austria

The European Commission of Human Rights sitting in private on 4 May 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI

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 3 August 1990 by Anita RIBITSCH against Austria and registered on 10 December 1990 under file No. 17544/90;

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 parties, may be summarised as follows.

The applicant, born in 1958, is an Austrian national and resident in Vienna. She is a nurse by profession. Before the Commission she is represented by Mr. H. Pochieser, a lawyer practising in Vienna.

A. Particular circumstances of the case

a. The investigations against the applicant and her husband

On 21 May 1988, in the context of criminal investigations concerning the death of two persons due to opium poisoning, the applicant's and her husband's apartment was searched by police officers of the Vienna Federal Police Department (Bundespolizeidirektion).

On 31 May 1988, at 15 h., police officers of the Vienna Federal Police Department arrested the applicant on the suspicion of drug trafficking. She asked her sister to take care of her two children, then twelve and two years old. Subsequent to her arrest, and again on 1 and 2 June 1988 the spouses' apartment was searched. The applicant and her husband were kept in police detention until the morning of 2 June 1988.

She gives the following account of events in the course of her detention: After her arrest, her personal particulars were recorded. She was then detained. She was first questioned about the suspicion against her and her husband on 1 June 1988, at 12 h. In the course of the questioning, the police officers addressed the applicant in an overfamiliar way ("duzen"), and also insulted her ("Kärntner Schwein", "du grande Dame, du", "du Trampel", "depate Alte"). Upon her statements concerning the charges, the police officers declared that her "story would stink to high heaven", that they "would now put the screw on her", that they "had lost their patience". The police officers threatened her that her children would be taken into public care. As a result of this treatment, she was unfit for work for several days and had to undergo psychiatric treatment.

b. The proceedings before the Austrian Constitutional Court

On 28 September 1988 the applicant, assisted by counsel, lodged a complaint under S. 144 of the Federal Constitution (Bundesverfassungsgesetz) with the Austrian Constitutional Court (Verfassungsgerichtshof) about her arrest on 31 May 1988 and subsequent detention, about the searches of her home and about having been insulted by police officers in the course of her detention. In this respect, she recounted in detail her version of events on the occasion of her questioning and argued that the conduct of the police officers amounted to a violation of Article 3 of the Convention.

On 28 November 1989 the Constitutional Court, upon the applicant's complaint, held that her arrest by police officers of the Vienna Federal Police Department on 31 May 1988, and her subsequent detention until 2 June 1988 had violated her right of liberty, and that the searches of her home had violated her right to respect for her home. The Constitutional Court rejected the remainder of the applicant's complaint about having been insulted by police officers in the course of her detention.

The Constitutional Court found that the applicant's arrest and detention, which had not been ordered by a court, had been unlawful, as the Federal Police Department had failed to show any immediate danger of collusion which could have justified a police action without a warrant of arrest. Likewise, the three searches of the applicant's home had been carried out without a search warrant, no immediate danger exceptionally justifying such action.

As regards the alleged insults committed by police officers in the course of the applicant's detention, the Constitutional Court referred to its constant case-law according to which mere insults as such did not amount to an administrative act relating to the exercise of direct administrative authority and coercion, even if such insulting remarks were allegedly made in the course of an official act. Thus there was no act which could be challenged before the Constitutional Court, and this part of the complaint was inadmissible.

The decision was served on 8 February 1990.

c. The criminal proceedings against police officers as regards the alleged ill-treatment of the applicant's husband

The applicant's husband had, shortly after his release, raised

accusations of ill-treatment against police officers involved in his and his wife's questioning, whereupon criminal proceedings had been instituted against Police Officers M., T. and G.

On 13 October 1989 the Vienna District Court (Strafbezirksgericht) convicted Police Officer M. of bodily assault (Körperverletzung), and sentenced him to two months' imprisonment on probation. Police Officers T. and G. were acquitted for lack of proof. The Vienna District Court found M. guilty of having beaten and kicked the applicant's husband and having pulled his hair and thereby caused haematomas on his right upper arm as well as on his thigh and also a cervical syndrome.

On 14 September 1990 the Vienna Regional Court (Landesgericht), upon the appeal (Berufung) of Police Officer M., quashed the District Court's judgment of 13 October 1989 and acquitted M. The Regional Court, having heard several witnesses and in particular taken recourse to expert evidence, found that, on balance, the version of the accused could not be refuted, nor could at least parts of the allegations made by the applicant's husband be proven with the certainty necessary for a criminal conviction.

B. Relevant domestic law

S. 115 of the Austrian Penal Code (Strafgesetzbuch) provides in particular that anyone who in public or in the presence of several persons insults, ridicules, or assaults another person or threatens him with assault, shall be liable to imprisonment not exceeding three months or a fine ..., if he is not liable to stricter punishment under another provision. Such an act is committed in the presence of several persons, if it is committed in the presence of more than three persons other than the offender and the victim, who could perceive the act concerned.

According to S. 117 of the Penal Code, offences against the honour are only prosecuted upon a charge by the victim concerned. The victim is entitled to bring private prosecution proceedings in accordance with SS. 2 and 46 of the Code of Criminal Procedure (Strafprozessordnung).

The competence of the Constitutional Court to receive complaints about the violation of constitutionally guaranteed rights is laid down in S. 144 para. 1 of the Federal Constitution (Bundesverfassungsgesetz), and relates to complaints against formal decisions of administrative authorities or complaints concerning the exercise of direct administrative authority and coercion against a particular individual (Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt gegen eine bestimmte Person).

COMPLAINTS

1. The applicant complains that her arrest and detention, in particular the insulting remarks by police officers in the course of her detention, amount to inhuman and degrading treatment contrary to Article 3 of the Convention.

2. Furthermore, the applicant complains under Article 13, in conjunction with Article 3 of the Convention, that in the proceedings before the Austrian Constitutional Court she could not effectively lodge her complaints about ill-treatment by police officers.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 August 1990 and registered

on 10 December 1990.

On 30 March 1992 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 15 July 1992, after an extension of the time-limit, the Government submitted their observations. The observations in reply by the applicant were submitted on 8 October 1992.

THE LAW

1. The applicant complains that, in the course of her arrest and detention, police officers subjected her to ill-treatment, in particular in the form of insulting remarks, contrary to Article 3 (Art. 3) of the Convention.

Article 3 (Art. 3) of the Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The Government maintain that the applicant failed, as required by Article 26 (Art. 26) of the Convention, to exhaust the domestic remedies at her disposal under Austrian law. They submit in particular that the applicant did not bring private prosecution proceedings against the police officers concerned for insult within the meaning of S. 115 of the Penal Code. They further consider that she failed properly to reason her constitutional complaint as regards the alleged insults so as to enable the Constitutional Court to assume its competence to entertain this complaint.

The applicant considers that her ill-treatment amounted to bodily assault which had to be prosecuted ex officio and therefore could not be the subject of private prosecution proceedings. Furthermore, she contends that in her complaint to the Constitutional Court she had in detail recounted the events and their consequences.

According to Article 26 (Art. 26) of the Convention, the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.

The Commission observes that the basis of the rule of exhaustion of domestic remedies under Article 26 (Art. 26) of the Convention is that, before proceedings are brought in an international court, the state made answerable must have had an opportunity to redress the alleged damage by domestic means within the framework of its own legal system (cf. No. 5964/72, Dec. 29.9.75, D.R. 3 p. 57). In respect of alleged ill-treatment contrary to Article 3 (Art. 3) of the Convention, the Commission has held that raising criminal charges against the officials concerned or filing a civil action for compensation are effective remedies to be exhausted pursuant to Article 26 (Art. 26) (No. 11208/84, Dec. 4.3.86, D.R. 46 p. 182; No. 10078/82, Dec. 13.12.84, D.R. 41 p. 103; No. 5964/72, Dec. 29.9.75, D.R. 3 p. 57).

In the present case, the applicant did not bring private prosecution proceedings against the police officers concerned for insult, or, assuming that the alleged acts had to be prosecuted ex officio, lay any criminal charges against the police officers requesting their prosecution. In this context, the Commission had regard to the criminal proceedings instituted against three police officers upon accusations of ill-treatment raised by the applicant's husband, which the applicant's husband joined as a private party claiming compensation. In the course of these proceedings, the allegations of the applicant's husband were carefully examined at two court levels.

The applicant did not institute civil proceedings either, with a view to claiming compensation in particular as regards the alleged detrimental consequences of the events in question.

The Commission notes that the applicant, in her complaint to the Austrian Constitutional Court lodged almost four months after the relevant incidents, also referred to the alleged insults, arguing ill-treatment contrary to Article 3 (Art. 3) of the Convention. The competence of the Constitutional Court to receive complaints about the violation of constitutionally guaranteed rights is limited under S. 144 para. 1 of the Federal Constitution to formal decisions of administrative authorities or the exercise of direct administrative authority and coercion against a particular individual. The Constitutional Court, in its decision of 28 November 1989, declared the applicant's complaint about the alleged insults committed by police officers in the course of her detention inadmissible in accordance with its constant case-law, according to which mere insults as such did not amount to an administrative act relating to the exercise of direct administrative authority and coercion, even if such insulting remarks were allegedly made in the course of an official act.

In these circumstances, the Commission finds that the applicant's complaint to the Constitutional Court about ill-treatment does not constitute an effective and sufficient remedy for the purposes of exhaustion of domestic remedies, as required by Article 26 (Art. 26) of the Convention.

The applicant's submissions do not disclose any special circumstance which might have absolved her according to the generally recognised rules of international law from exhausting the effective domestic remedies at her disposal.

It follows that this part of the application must be rejected under Article 27 para. 3 in conjunction with Article 26 (Art. 27-3+26) of the Convention.

2. Furthermore, the applicant complains under Article 13 (Art. 13), in conjunction with Article 3 (Art. 3) of the Convention, that in the proceedings before the Austrian Constitutional Court she could not effectively lodge her complaint about ill-treatment by police officers.

The Commission refers to its above findings that under Austrian law, the applicant could have brought criminal charges against the police officers concerned, or filed a civil action for compensation as regards the alleged detrimental consequences of the events for her health.

It follows that this complaint 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)