AS TO THE ADMISSIBILITY OF

Application No. 18896/91
by Ronald RIBITSCH
against Austria

The European Commission of Human Rights sitting in private on 20 October 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
B. MARXER
M.A. NOWICKI
B. CONFORTI
N. BRATZA

Mr. M. de SALVIA, Deputy 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 5 August 1991 by Ronald RIBITSCH against the Republic of Austria and registered on 3 October 1991 under file No. 18896/91;

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. He is a student. Before the Commission he is represented by Mr. H. Pochieser, a lawyer practising in Vienna.

A. Particular circumstances of the case

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

On 31 May 1988, at 12 h., police officers of the Vienna Federal Police Department arrested the applicant on the suspicion of drug trafficking. Subsequent to his arrest, and on 1 and 2 June 1988 the

spouses' apartment was again searched. The applicant was kept in police detention until the morning of 2 June 1988.

He gives the following account of events in the course of his detention: After his arrest, his personal particulars were recorded. He was first questioned about the suspicion against him from 21.15 h. until 22.10 h., further at the next day from 16 h. until 18.30 h. and on 2 June 1988 for twenty minutes as from 8.10 h. At the questioning, four to five police officers were present, three of them cross-examined the applicant. They allegedly suggested various versions of admissions to him, and then grossly insulted him ("Kärntner Sau", "Drogenschwein", Schweinepriester", "Arschloch"). As these police activities did not show the intended results, he was punched at his head (Kopfnuß), and was beaten with fists into the renal region and the right upper arm. He was also kicked into his thighs and into the renal area. He was pulled by his hair to the floor, and his head was beaten against the floor. The police officers allegedly also threatened him not to release his wife, who was detained at the same time, in case he would not admit his guilt. After his release, he had haematomas at his right upper arm and one thigh, and he had a cervical syndrome, and suffered from vomiting, diarrhoea and bad headache.

The applicant told several persons, inter alia a journalist, about the above events in the course of his police detention. He was examined at a hospital on 2 June and by a medical practitioner on 3 June 1988, and the injuries were confirmed.

Following reports in a public broadcast on 7 June 1988 about the applicant's accusations of ill-treatment by the police, the Vienna Federal Police Department opened investigations against the police officers concerned. The results of these investigations were submitted to the Vienna Public Prosecutor's Office (Staatsanwaltschaft) on 25 October 1988. On 22 November 1988 the applicant, represented by counsel, joined these criminal proceedings as a private party under S. 47 of the Code of Criminal Procedure (Strafprozeßordnung) in respect of his compensation claims.

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. He was ordered to pay the applicant AS 1,000. The two other Police Officers T. and G. were acquitted.

The Vienna District Court found M. guilty of having beaten and kicked the applicant and having pulled his hair on 1 June 1988 and thereby caused several haematomas at his right upper arm as well as at his thigh and also a cervical syndrome.

The Vienna District Court had heard several witnesses, namely the applicant and his wife, Police Officer F. who had been present at the applicant's and his wife's questioning, Police Officer P., Chief of the three units at the Vienna Federal Police Department competent for drug offences, as well as six further witnesses, two of them physicians who had seen the applicant's injuries and whom he had told about the alleged ill-treatment.

In the reasons of its judgment, the District Court stated that the three accused were members of one of three units of the Vienna Federal Police Department competent for drug offences; Police Officer G. was the head of this unit. The District Court then described the main course of the criminal investigations concerning two cases of death due to opium poisoning, which were first conducted by another unit at the Federal Police Department, and later transferred to the unit the accused were working in. Due to the publicity of the two cases of death, their unit had been under a particular pressure to complete the inquiries, and therefore done many hours of overtime.

The District Court stated that both the applicant and his wife had been charged by third persons with having sold heroine to one of the two persons who had died. Inquiries were started against the applicant and his wife, their apartment was searched. On 31 May 1988 they were arrested and questioned by Police Officer M. in the presence of the witness F., the co-accused G. and other police officers. They were insulted by the police officers, except by F. Police Officer G. grasped the applicant's moustache and pulled him through the room, M. also beat him. The applicant was again questioned by M. on 1 June 1988. In order to obtain an admission of guilt, M. grasped the applicant's hair, shook his head forward and backward, beat him with his fist on his right upper arm, threw him to the ground and kicked him. Other officers, whom the applicant could not recognise, then also kicked him.

The District Court established the facts on the basis of the applicant's allegations as confirmed in particular by one of the witnesses, namely the journalist, whom he had already on 2 June 1988 told in detail about the events and who had taken notes. Furthermore, on the occasion of a confrontation with various persons one year after the events, the applicant had immediately recognised M. and other participants in his questioning.

The District Court found that the applicant's statements were credible and refuted the partly incoherent allegations of the accused M. and other police officers who mainly tried to discredit the applicant. The defence of the accused M. that the injuries had been accidentally caused was not credible. His version according to which the applicant, who had been brought for a test, had climbed out of the police car on a crowded car park and fallen onto the door frame and then to the ground, while M. attempted to hold him, was unlikely and did not correspond to the applicant's injuries.

Finally, the District Court found that it had not been proven that the two other accused had caused any of the applicant's injuries.

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. As regards his compensation claims, the applicant was referred to the civil courts, in accordance with S. 366 para. 1 of the Code of Criminal Procedure.

With regard to the applicant's credibility, the Regional Court noted that on 6 October 1988 the Vienna District Court had convicted him of drug trafficking. For several years the applicant had been unemployed, and he was living with two minor children of his wife's earnings and social security benefits. As consumer of drugs and for various private purposes, he had a considerable need of money.

As regards the relevant events, the Regional Court noted that, according to the findings of the District Court which were solely based on the applicant's account, Police Officer M. had already insulted and beaten him, without, however, causing any injuries. On the next day, the questioning had escalated, the applicant's wife had been insulted and threatened, and he himself had also been insulted, hit on his head and been kicked. In this respect, the Regional Court also referred to the submissions of the applicant and his wife in proceedings which they had meanwhile instituted before the Constitutional Court (Verfassungs-gerichtshof). The District Court had assumed that the public pressure to solve the case of murder in question was the reason for such escalation. The applicant, upon detailed questioning at the hearing before the Regional Court, could not explain the escalation in question, as he had acted perfectly correctly. According to the applicant's further accusations, M. had repeatedly pulled him by his hair to the floor, and had ill-treated and kicked him together with other police officers. Had not Police Officer F. calmed M. down, he could have been killed by M. He had also had the impression that the

police officers had taken drugs. The statements of the applicant's wife were on the same line.

This account of events was contradicted by the statements of Police Officer M. and also of Police Officer F. whom the applicant himself had called correct in his behaviour. According to the statements of the Police Officers, the applicant had threatened that he would create difficulties and ridicule them.

The Regional Court considered that neither the applicant's nor his wife's statements could logically explain the escalation of the questioning which resulted in allegedly criminal behaviour. Furthermore, the identity of the other police officers who had allegedly kicked him remained unclear. In this respect, the Regional Court noted in particular the applicant's allegations that only four police officers had been present and also conducted the questioning of his wife, that he himself had exonerated Police Officers T. and G. and never reproached Police Officer F.

Moreover, the Regional Court considered that the applicant's summary of events did not correspond to his injuries, which in any way varied in the applicant's submissions and the statements of witnesses. Had his head been repeatedly hit and had he been kicked, numerous injuries, in particular in his face, were to be expected. His further submission that he had been beaten in such a manner as to leave few signs, would suggest a careful planning on the part of the accused, whereas the applicant recounted that they had lost any self-control in their intention to obtain a confession.

As regards haematomas on the applicant's right upper arm, the Regional Court, having regard to the opinion of the forensic expert Prof. M., found that the explanation given by the accused M., as confirmed by Police Officer F., namely an accident on the occasion of the applicant's transport in a police car, could not be excluded.

The Regional Court, having regard to a forensic expert opinion, further considered that the symptoms, namely pain in the neck, numbness of his fingers and, a week later, stiffness of his neck, moreover diarrhoea, which the applicant's physician viewed as cervical syndrome suggesting ill-treatment, could also have resulted from a general infection. The Regional Court noted in this respect that the applicant had previously had stomach problems and had only drunk water in the course of his detention.

The Regional Court rejected the applicant's requests to take further evidence, on the ground that these requests related to the question whether or not particular witnesses had considered his statements credible, i.e. were irrelevant assumptions and conclusions.

The Regional Court finally noted that the applicant had not laid information against the police officers concerned, but raised charges in public in the context of a broadcast. There were altogether serious reasons not to trust his allegations.

The Regional Court concluded that, on balance, the version of the accused could not be refuted, nor had at least parts of the applicant's allegations be proven with the certainty necessary for a criminal conviction.

On 26 November 1990 the Constitutional Court, upon the applicant's complaint under S. 144 of the Federal Constitution (Bundes-verfassungsgesetz), held that his arrest by police officers of the Vienna Federal Police Department on 31 May 1988 at about 12h30, and his subsequent detention until 2 June 1988 at 9h30 had violated his right to liberty, and that the searches of his home had violated his right to respect for his home. The Constitutional Court rejected the

remainder of the applicant's complaint about having been insulted and ill-treated by police officers in the course of his 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.

With regard to the applicant's allegations that he had been assaulted by police officers, the Constitutional Court noted that the accused Police Officer T. had been acquitted by the Vienna District Court on 13 October 1988, and the accused Police Officer M. by the Vienna Regional Court on 14 September 1990. The Constitutional Court considered that, in view of this outcome of the criminal proceedings, where evidence had been taken on a broad basis, it could not accept the applicant's allegations. Thus it could not accept the alleged ill-treatment as proven beyond doubt. In these circumstances, seen as a whole, a further examination of the relevant facts and thus proof of a violation of Article 3 of the Convention was no longer possible for the purposes of the complaint proceedings.

The decision was served on 22 February 1991.

B. Relevant domestic law

Under S. 83 para. 1 of the Austrian Penal Code (Strafgesetzbuch), bodily assault is punishable by imprisonment not exceeding six months or by a fine of an amount not exceeding 360 daily rates (Tagessätze). According to S. 313 of the Penal Code the maximum punishment may be increased by one half, if the offence was committed by a public official taking advantage of his position.

S. 47 of the Austrian Court of Criminal Procedure (Strafprozeß-ordnung) concerns the right of the victim of a criminal offence to be a private party (Privatbeteiligter) claiming damages in the context of the criminal proceedings. The private party is in particular entitled to supply the public prosecutor and the investigating judge with anything likely to find the accused guilty and, to establish the compensation claim, to have access to the files, and to be summoned for the trial. According to SS. 222 and 249 the private party may request the hearing of witnesses or experts, and put questions to them.

SS. 365 to 379 of the Code of Criminal Procedure regulate the competence of criminal courts in respect of civil rights. S. 365 provides that the criminal court must, ex officio, consider the damage resulting from a criminal offence. Pursuant to S. 366, the private party is referred to the civil courts regarding any compensation claims, if the accused is not convicted.

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 (Bundesverfassungsge-setz). It 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 his arrest and detention, in particular the insults and bodily assaults by police officers in the course of his detention, amount to inhuman and degrading treatment contrary to Article 3 of the Convention.

2. The applicant complains under Article 6 para. 1 of the Convention that, in the course of the criminal proceedings against three police officers, his legal situation as a private party to the proceedings prevented him from pursuing effectively his compensation claims.

3. Furthermore, the applicant complains under Article 13, in conjunction with Article 3, of the Convention, that in the proceedings before the Austrian Constitutional Court he could not effectively lodge his complaints about ill-treatment by police officers. He submits in particular that the Constitutional Court, sitting in camera, declared these complaints inadmissible without having taken evidence.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 August 1991 and registered on 3 October 1991.

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

On 4 May 1993 the Commission decided to invite the parties to a hearing on the admissibility and merits of the applicant's complaint about treatment contrary to Article 3 of the Convention.

At the hearing which was held on 20 October 1993 the parties were represented as follows:

The Government

Mr. Okresek	Head of International Affairs Division, Constitutional Service, Federal Chancellery, Agent;
Mr. Szymanski	Head of Legal Department, Federal Ministry for the Interior, Adviser;
Mr. Schmidt	Human Rights Division, International Law Department, Federal Ministry for Foreign Affairs, Adviser.

The applicant

Mrs. Haase	Rechtsanwaltsanwärterin, for the Representative Mr. Pochieser, Rechtsanwalt.

THE LAW

1. The applicant complains that in the course of his arrest and detention he was ill-treated by police officers contrary to Article 3 (Art. 3) of the Convention.

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

a. The Government maintain that the applicant failed, as required by Article 26 (Art. 26) of the Convention, to exhaust the domestic remedies at his disposal under Austrian law. They submit in particular that the applicant did not himself bring criminal proceedings against the police officers concerned, but only raised accusations about ill-treatment in public and at a later stage joined the proceedings instituted ex officio by the Vienna Federal Police Department. He did not bring a prosecution against the police officers as regards the alleged insults. Moreover, he did not file an official liability action. He also failed properly to reason his constitutional complaint as regards the alleged insults so as to enable the Constitutional Court to assume its competence to entertain this complaint.

The applicant submits that proceedings against the police officers concerned had been instituted ex officio. He further considers that an official liability action would not have been effective.

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 to 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).

The Commission notes that in the context of the criminal proceedings against three police officers which the applicant joined as a private party in respect of his possible compensation claims, his accusations of assault committed by police officers in the course of his detention were examined by the Austrian criminal courts. The criminal courts also had regard to his allegations that the police officers concerned had insulted him. The Regional Court, in its judgment of 14 September 1990, concluded that the applicant's version of events had altogether not been established. The applicant further repeated his allegations of ill-treatment in his complaint proceedings before the Constitutional Court.

The Commission, having regard to both the criminal proceedings against the police officers accused by the applicant and the proceedings before the Constitutional Court, finds that he exhausted remedies which were sufficient and effective as regards his allegations of ill-treatment contrary to Article 3 (Art. 3). It follows that he complied with the condition as to the exhaustion of domestic remedies under Article 26 (Art. 26) of the Convention.

b. The Government contest the applicant's allegations of ill-treatment. They refer to the findings of the criminal courts in the proceedings against the three police officers involved in the applicant's questioning. As regards the alleged insults, the Government further submit that the minimum level of severity required for these insults to fall within the scope of Article 3 (Art. 3) was not attained.

The applicant submits that the injuries which he suffered in the

course of his detention as a result of ill-treatment by police officers had been seen by several witnesses and recorded in a medical report. The Regional Court only quashed Police Officer M.'s conviction and the findings of the first instance court because of the gaps in his memory at the time of the appeal proceedings, i.e. two years after the events in question. He considers that the Regional Court's judgment is inconsistent and arbitrary and intended to protect the police officers and a deplorable administrative practice.

The Commission finds that the applicant's complaints under Article 3 (Art. 3) of the Convention raise difficult issues of fact and of law which are of such complexity that their determination should depend upon a full examination of the merits. These complaints cannot, therefore, be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring them inadmissible has been established.

2. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention that, in the course of the criminal proceedings against three police officers, his legal situation as a private party to the proceedings prevented him from effectively pursuing his compensation claims.

Article 6 para. 1 (Art. 6-1), so far as relevant, provides that, in the determination of his civil rights and obligations, everyone is entitled to a fair hearing.

The Commission notes that the applicant joined the criminal proceedings which had been instituted against the three police officers as a private party under S. 47 of the Code of Criminal Procedure in respect of his possible compensation claims. Under the relevant provisions, the private party has various procedural rights in the course of the investigations and at the trial, and the criminal court has to consider the damage resulting from a criminal offence in case of conviction. However, in the present case, the accused were acquitted and the Vienna Regional Court, therefore, did not take any decision on the merits of the applicant's claims, but referred him to the civil courts. There is no indication that the applicant could not have effectively raised any such claims before the Austrian civil courts.

In these circumstances, there is no appearance of a violation of the applicant's right to a fair hearing under Article 6 para. 1 (Art. 6-1).

It follows that the applicant's complaint under Article 6 (Art. 6) is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. 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 he could not effectively lodge his complaints about ill-treatment by police officers. He submits in particular that the Constitutional Court, sitting in camera, declared these complaints inadmissible without having taken evidence.

Article 13 (Art. 13) of the Convention provides that everyone whose rights and freedoms as set forth in the Convention are violated should have an effective remedy before a national authority.

The Commission refers to its above findings that the applicant joined as a private party the criminal proceedings against police officers involved in the alleged ill-treatment, and could also lodge his complaints about physical ill-treatment by the police in the

proceedings before the Constitutional Court, and that he thereby availed himself of effective and sufficient remedies in respect of his complaints under Article 3 (Art. 3).

It follows that this complaint is likewise 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 ADMISSIBLE the applicant's complaint that, during his police custody, he was subjected to inhuman and degrading treatment,
without prejudging the merits of the case;

DECLARES INADMISSIBLE the remainder of the application.

Deputy Secretary to the Commission — President of the Commission

(M. DE SALVIA) — (C.A. NØRGAARD)