AS TO THE ADMISSIBILITY OF

Application No. 19082/91
by Martin SPYCHER
against Switzerland

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

MM. H. DANELIUS, Vice President
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO

Mr. K. ROGGE, 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 7 September 1991 by Martin Spycher against Switzerland and registered on 15 November 1991 under file No. 19082/91;

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 applicant is a Swiss national, born in 1956, who resides in Zurich. Before the Commission he is represented by Mr. F. Schumacher, a lawyer practising in Zurich.

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. On 21 March 1981 a demonstration took place in Zurich in support of an independent youth centre (autonomes Jugendzentrum), which had been closed down by the authorities. The authorisation for this demonstration had been issued by the authorities to the applicant. In the course of this demonstration unrest developed and several persons were arrested by the police.

2. On 23 March 1981 the applicant was arrested by police officers near the premises of the youth centre on suspicion of having thrown stones. The applicant, however, maintains that he had only picked up stray rubber bullets and witnessed the arrest of another person.

According to the applicant he was then brought into a small room on the premises of the youth centre, the so called "sleep-in", where some six police officers were present. One of them removed his glasses, and he was beaten and his hair pulled. The applicant was searched and the authorisation for the demonstration of 21 March 1981 was found on him, whereupon he was again beaten, sprayed in his eyes with tear gas and strangled with a cable.

3. On 24 March 1981 the applicant was heard by the District Attorney (Bezirksanwalt). The applicant informed him about his ill-treatment by police officers in the course of his arrest.

After his release on 25 March 1981, the applicant consulted a medical doctor who, after having examined him, provided him with a medical certificate dated 26 March 1981. The applicant also had photos of his face taken.

4. The Zurich District Attorney's Office instituted criminal investigations against unknown police officers of the Zurich City Police (Stadtpolizei) for abuse of authority (Amtsmissbrauch) and other offences. On 8 January 1982 the applicant was heard as a witness in these proceedings.

On 3 January 1983 the District Attorney's Office discontinued the criminal investigations. The authorities found that it was not sufficiently substantiated that the applicant had been ill-treated by police officers. Based on the applicant's statements three police officers could be identified. In a personal confrontation between the applicant and the police officers, the applicant excluded one of them and with regard to a second one he was not sufficiently convinced. When heard by the District Attorney the third police officer denied his presence in the room of the youth centre when the applicant was allegedly ill-treated. In this respect the applicant's statements were found to be contradictory.

5. On 24 January 1983 the applicant appealed against the District Attorney's decision. The applicant complained inter alia that the suspected police officers were not heard in his presence and that during the direct confrontation with them he was not given the opportunity to put questions to them. The authority also failed to consult the case files of other persons arrested at the same time as the applicant to identify further suspects.

6. On 22 March 1984 the Zurich Public Prosecutor's Office (Staatsanwaltschaft) dismissed the applicant's appeal. It found that it was in accordance with cantonal procedural law to hear suspects at their first interrogation alone. During the confrontation with the police officers the applicant had not made a request to put questions to them. The case files concerning other persons arrested at the same time as the applicant had been consulted by the District Attorney on express instruction by the Public Prosecutor but did not reveal further elements of relevance to the investigations. As the applicant did not recognise any other suspect when photos of police officers were shown to him, the District Attorney correctly did not extend the investigations further.

7. On 12 March 1985 the applicant, invoking the Cantonal Liability Act (kantonales Haftungsgesetz), requested the City of Zurich (Stadtgemeinde) to pay compensation of 10.000 Swiss Francs. On 7 August 1985 the Zurich City Council (Stadtrat) refused the applicant's claim.

8. On 13 February 1986 the applicant introduced a civil court action against the City of Zurich with the Zurich District Court (Bezirksgericht) claiming compensation of 11.000 Swiss Francs.

On 25 March 1986 the applicant was granted legal aid.

9. On 13 January 1988 the District Court dismissed the applicant's action. It held that the applicant had not substantiated his allegations. The Court noted that the doctor, whom the applicant had consulted on 25 March 1981, had not noticed any visible scars or bruises (Schwellungen). As regards the allegation that tear gas had been sprayed into the applicant's eyes, the Court, basing itself on the

opinion of a chemical expert, found that, if this had happened the applicant should have shown different marks in his face. The Court found that on the photos of the applicant taken by the police, shortly after his arrest, his eyes were not red, nor were there any marks of acid on his face.

The Court further found that in this respect the applicant had given different and contradictory versions. On the one hand he had stated that his spectacles had been removed before the police officers beat him and, on the other hand, he had stated that his eyes, as also evidenced by photographs, were not irritated because he wore his glasses. The allegation that he had been strangled with a cable had also not been substantiated. The applicant had not shown that the little round mark close to his larynx reported by the doctor in his certificate of 26 March 1981 could only have been caused by strangulation. Lastly the depression diagnosed by the doctor was no sufficient indication of ill-treatment of the applicant, as it could also have been caused by the fact that criminal proceedings against the applicant were then pending. The Court also noted that the applicant eventually was convicted of violence and threatening behaviour against public officials (Gewalt und Drohung gegen Beamte), breach of the public peace (Landfriedensbruch) and participation in an unauthorised demonstration (Teilnahme an einer nicht bewilligten Demonstration) and sentenced to two months' imprisonment with a probationary period.

The Court also dismissed the applicant's request for transmission of files of disciplinary proceedings against police officers following allegations of three other persons that they had been ill-treated on the same premises and on the same day as the applicant. The Court found that these files were not relevant to the applicant's case as the applicant did not claim that these persons were with him while he was allegedly ill-treated.

10. The applicant appealed to the Zurich Court of Appeal (Obergericht) against the District Court's decision. He complained inter alia that the Court had not requested the transmission of files concerning other arrests carried out at the youth centre on the same day and that his statements as witness before the District Attorney on 8 January 1982 were not taken into account. He also challenged the Court's evaluation of evidence.

On 4 May 1988 the Court of Appeal dismissed his appeal. It found that the District Court had acted correctly when it did not request the transmission of the files concerning other arrested persons because the applicant did not allege that these persons were at the same time in the same room with him. The Court also found that the applicant's statements before the District Attorney could not be considered as statements of a witness in the present proceedings as the applicant was a party to the proceedings. In any event the District Court had taken the applicant's statements into account. Lastly, the Court found that the evaluation of evidence undertaken by the District Court was not arbitrary.

11. On 8 June 1988 the applicant introduced a public law appeal (staatsrechtliche Beschwerde) against the Court of Appeal's decision with the Federal Court (Bundesgericht). In particular the applicant complained that the Cantonal Courts had refused the applicant's request for transmission of all files which concerned arrests at the youth centre on the day the applicant had been arrested, as these files could have proved that the police had ill-treated the arrested persons. He also complained that the evaluation of evidence by the Cantonal Courts was arbitrary as the applicant's statements as a witness before the Investigating Judge and evidence put forward by the applicant had not been taken sufficiently into account.

On 27 December 1990 the Federal Court dismissed the applicant's complaint. The Court found that the Cantonal Courts had not acted

arbitrarily when they refused the applicant's request for transmission of the files concerning other arrests at the youth centre. The Court further found that the Cantonal Courts had not acted arbitrarily when they did not accept the applicant's version of the events which was not supported by the statements of the expert witnesses. The Court also held that the Courts had not put on the applicant the burden of proof as to whether he had inflicted the injuries on himself after his release: the Cantonal Courts rather had found that the applicant had not succeeded in proving that he had actually been injured.

The Federal Court's decision was served on the applicant on 8 March 1991.

COMPLAINTS

1. The applicant complains that his treatment by the police officers in the course of his arrest constituted a breach of Article 3 of the Convention.

2. The applicant further complains that he did not receive a fair hearing in breach of Article 6 of the Convention. In particular, he complains that his statements as a witness in the criminal proceedings against the police officers were not sufficiently taken into account, as well as that of the doctor whom he had consulted on 25 March 1981. He further complains that his request for transmission of other files concerning the arrests of other persons on the same day was refused by the Courts as well as his request for the hearing of all the police officers on duty at the youth centre. The applicant also complains that he had been prevented from recognising the police officers who ill-treated him as he had been shown photographs which were probably 10 to 20 years old.

3. The applicant complains that his claim for compensation for the ill-treatment he suffered in the course of his arrest was refused and invokes in this respect Article 5 para. 5 of the Convention.

4. Lastly, he complains under Article 13 of the Convention that he had no effective remedy before a national authority against the violations of the Convention as the courts did not sufficiently take the applicant's evidence into account.

THE LAW

1. Before the Commission the applicant complains that he was subject to inhuman and degrading treatment upon his arrest on 23 March 1981 and refers 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 to inhuman and degrading treatment or punishment."

The Commission recalls that ill-treatment must attain a certain level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim etc. (Eur. Court H.R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25 pp. 65-67, paras. 162, 167; Soering judgment of 7 July 1989, Series A no. 161, p. 39, para. 100).

Such treatment causing, if not actual bodily injury, at least intense physical and mental suffering falls into the category of inhuman treatment within the meaning of Article 3 (Art. 3). It is degrading if it arouses in the person subjected thereto feelings of

fear, anguish and inferiority capable of humiliating and debasing this person and possibly breaking his or her physical or moral resistance (Eur. Court H.R., Ireland v. the United Kingdom judgment, loc. cit., p. 66, para. 167; Soering judgment, loc cit.).

The Commission notes that the applicant contests the findings of the national courts according to which he did not succeed in proving sufficiently his allegations of ill-treatment. In this respect the Commission recalls that the national judge, unlike the Commission, has had the benefit of listening to the witnesses at first hand and assessing the credibility and probative value of their testimony 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 national courts (No. 10044/82, Dec. 10.7.84, D.R. 39 pp. 162 et seq., 168).

The Commission notes that, after the applicant had complained about his treatment to the District Attorney on 24 March 1981, a criminal enquiry had been opened and the applicant was confronted with policemen and had photographs of policemen shown to him. It was only after this enquiry did not provide any results that the charge was dropped by the authorities.

At the stage of the civil proceedings the doctor of the applicant was heard by the investigating judge. The court heard two experts, both a medical expert and a chemical expert, in particular as regards the applicant's accusation that tear gas had been sprayed into his eyes. As a result the court came to the conclusion that the version given by the applicant as to how he had been sprayed with tear gas contained contradictions and the applicant had even given divergent versions. Furthermore, the photo taken of the applicant did not show any signs of irritated eyes. The court therefore concluded that the applicant did not sufficiently prove his allegations by supporting evidence and dismissed the applicant's claim for compensation.

The Commission considers that the authorities have taken the applicant's allegations seriously and conducted a thorough enquiry into the applicant's allegations of ill-treatment. The court did take evidence, heard witnesses and took expert opinions. This evidence, however, did not sufficiently support the applicant's claim. The court even found contradictions in the applicant's statements. As a result of the Public Prosecutor's enquiries as well as the court case instituted by the applicant, the authorities had doubts as to the applicant's allegations.

The Commission concludes that at the level of domestic courts and prosecuting authorities doubts as to the truth of the applicant's allegations subsisted and that after a thorough investigation by the domestic authorities these doubts were not dissipated. The Commission finds that the applicant did not sufficiently substantiate his allegations.

It follows that this part of the application must be rejected as being manifestly ill-founded in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 6 (Art. 6) of the Convention that he did not receive a fair hearing before the Zurich District Court and the Zurich Court of Appeal as his evidence was not taken sufficiently into account and his requests for further evidence were rejected by the courts.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant to the case, reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

With regard to the judicial decisions of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

The Commission recalls further that the admissibility of evidence is primarily a matter for regulation by national law, and as a rule it is for the national courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A No. 203 p. 10, para. 26).

As regards the applicant's complaint that his testimony was not taken into account, the Commission notes that the court held that the applicant's statements before the Public Prosecutor cannot be regarded as the statement of a witness in the technical sense, as the applicant was a party in the civil proceedings. Furthermore the District Court in its judgment had taken the applicants statement, although not as the statement of a witness, into account.

As regards the applicant's complaint that certain files had not been produced the Commission notes that this request was refused by the District Court because they did not concern events where the applicant was present and therefore were of no relevance to his case.

The Commission cannot find that this reasoning of the District Court can be seen as being arbitrary.

It follows that this part of the application is manifestly ill-founded in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

3. As regards the applicant's complaint that further police officers were not heard by the District Court, the Commission recalls that there is no exhaustion of domestic remedies if the applicant has not raised before the superior national court, at least in substance, the complaint made before the Commission (No. 8257/78, Dec. 10.7.78, D.R. 13 p. 248 at 252). The Commission observes that the applicant did not raise this complaint before the Federal Court.

It follows that in this respect the applicant has not satisfied the requirement as to exhaustion of domestic remedies contained in Article 26 (Art. 26) of the Convention and that this part of the application, therefore, is inadmissible by virtue of Article 27 para. 3 (Art. 27-3) of the Convention.

4. The applicant complains that his claim for compensation for the ill-treatment he suffered as a result of his arrest was refused and invokes in this respect Article 5 para. 5 (Art. 5-5) of the Convention.

Article 5 para. 5 (Art. 5-5) of the Convention reads as follows:

"Everyone who has been the victim of arrest of detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The Commission recalls that Article 5 para. 5 (Art. 5-5) of the Convention is only applicable if the Convention organs themselves or a national authority have established that the detention of a person constituted a violation of his rights under Article 5 paras. 1 to 4 (Art. 5-1, 5-2, 5-3, 5-4) (No. 6821/74, Dec. 5.7.76, D.R. 6, p. 65 at p. 70; No. 10371/83, Dec. 6.3.85, D.R. 42, p. 128; Eur. Court H.R. Brogan and others judgment of 29 November 1988, Series A no. 145-b, p. 35, para. 66).

The Commission notes that the applicant did not complain either before the domestic courts or in the present proceedings before the Commission that his arrest and detention had been contrary to Article 5 paras. 1 to 4 (Art. 5-1, 5-2, 5-3, 5-4) of the Convention.

The Commission concludes that since no violation of Article 5 paras. 1 to 4 (Art. 5-1, 5-2, 5-3, 5-4) has been alleged by the applicant, this part of the application must be rejected as incompatible ratione materiae with the provisions of the Convention in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

5. Lastly, the applicant complains under Article 13 (Art. 13) of the Convention that he had no possibility of effectively complaining before a national authority about his ill-treatment by the police because the courts refused to take further evidence and did not sufficiently consider the evidence before them.

Article 13 (Art. 13) of the Convention reads as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Even assuming that the applicant had an arguable claim within the meaning of Article 13 (Art. 13), the Commission notes that he did in fact have an effective remedy against the alleged violation of his right under Article 3 (Art. 3) of the Convention, namely the possibility to introduce a civil court action under the Cantonal Liability Act. The fact that this remedy eventually failed does not indicate any lack of effectiveness.

This part of the application is therefore also manifestly ill-founded in accordance with 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 Second Chamber Acting President of the Second Chamber

(K. ROGGE) (H. DANELIUS)