AS TO THE ADMISSIBILITY OF

Application No. 13308/87
by Otmar CHORHERr against Austria

The European Commission of Human Rights sitting in private on 1 March 1991, the following members being present:

MM. S. TRECHSEL, Acting President
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J. C. SOYER
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

Mr. J. RAYMOND, 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 14 July 1987 by Otmar CHORHERR against Austria and registered on 17 September 1987 under file No. 13308/87;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to:

- the Commission's decision of 4 September 1989 to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits;

- the observations submitted by the respondent Government on 15 December 1989 and the observations in reply submitted by the applicants on 26 February 1990;

- the parties' oral submissions at the hearing on 1 March 1991;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, an Austrian citizen born in 1961 who resides in Vienna, is represented by Messrs Spreitzhofer, Höhne and Vana, lawyers practising in Vienna.

The facts of the case as submitted by the parties may be summarised as follows:

At the national holiday celebration in front of the Vienna town hall (swearing-in of conscripts and military parade) on 26 October 1985, the applicant and a friend of his distributed leaflets to the public in support of a referendum (Volksbegehren) against the acquisition of interceptor fighter aeroplanes (Abfangjäger) by the Austrian army. They carried posters attached to rucksacks bearing the inscription "Austria needs no interceptor fighter aeroplanes" and indicating the date for the signature of the referendum. The posters, which measured about 40 x 60cm, reached some 50cm above the applicant's head. After a while they were told by the police to stop distributing the leaflets and to remove the posters. As they refused to do so, they were taken to a police van and transported to a police station. Their leaflets were taken away by the police. The applicant and his friend remained in police custody until 14.40 hrs, that is, after having been in custody for 3 hours 25 minutes.

The applicant complained to the Constitutional Court (Verfassungsgerichtshof), invoking inter alia his rights under Articles 5 and 10 of the Convention. By a decision of 28 November 1986 which was served on the applicant on 22 January 1987, the Constitutional Court rejected the complaint. It accepted that both the applicant's arrest and the order to remove the poster and to stop distributing leaflets amounted to the exercise of direct administrative authority and coercion (Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt) which could be challenged before the Constitutional Court. However, the arrest and detention were covered by Section 4 of the Personal Freedom Act (Gesetz zum Schutz der persönlichen Freiheit, 1862) in conjunction with Articles 35 c and 36 of the Code of Administrative Offences (Verwaltungstrafgesetz) as the applicant had been caught in flagrante when committing acts which could reasonably be regarded as constituting the administrative offence of disturbing the public order (Section IX para. 1 (1) of the Introductory Provisions to the Administrative Procedure Acts ("Introductory Provisions" - Einführungsgesetz zu den Verwaltungsverfahrensgesetzen) and had persisted in committing such acts despite the admonition by the police. There had been no interference with freedom of expression as the order to remove the poster and to stop distributing leaflets had

not been made with the intention to interfere with this freedom, but only for the purpose of preventing a disturbance of the public order.

On the basis of the police report (Anzeige) drawn up on his arrest, administrative penal proceedings (Verwaltungsstrafverfahren) were instituted against the applicant. These resulted in a penal order (Straferkenntnis) by the Vienna Directorate of Police (Bundespolizeidirektion) on 29 April 1987. The applicant was found guilty of two administrative offences under Sections VIII.2 (making noise) and IX para 1 (1) (disturbance of the public order) of the Introductory Provisions. A fine of 1,000 AS (to be replaced by 100 hours detention in case of default) was imposed in respect of each offence, the actual detention (3 hours 25 minutes = 35 AS) being deducted from the sentence.

The applicant appealed, claiming in particular that the facts had been wrongly established on the basis of the statements of the policemen who had arrested him, while the witnesses offered by him had not been heard. He submitted that he had not shouted and that nobody had felt disturbed by his demonstration. The Vienna Directorate of Public Security (Sicherheitsdirektion) on 3 March 1988 confirmed the penal order concerning the offence under Section IX para. 1 (1) of the Introductory Provisions subject to certain modifications, and reduced the fine to 700 AS. It held that, although the expression of certain ideas by the applicant's demonstration was as such admissible, the form which he had chosen was such that it constituted the above offence: by carrying the poster he had deprived spectators of their view of the proceedings. The penal order concerning the offence under Section VIII.2 of the Introductory Provisions (making noise) was quashed by a further decision of 25 April 1988.

To the extent that the penal order was confirmed, the applicant did not complain to the Administrative Court or the Constitutional Court. He states that this would have been to no avail in view of the Constitutional Court's decision of 28 November 1986.

COMPLAINTS

The applicant complains that his rights under Articles 5 and 10 of the Convention have been violated.

Under Article 5 he submits that the Austrian reservation does not apply as regards the substantive justification of a measure of detention. There was no such justification for his detention. The Constitutional Court decision did not specify why the applicant's behaviour created a reasonable suspicion of disturbing the public order. The assumption of a disturbance (by depriving spectators of their view) was only a pretext to prevent the expression of ideas unfavourable to the army at a ceremony of a military character. This clearly emerged from the first police report which stated that the disturbance occurred because spectators had expressed disapproval of

an "attitude inimical to the Federal army" (bundesheerfeindliche Einstellung).

Under Article 10 the applicant contests the Constitutional Court's view that the order to remove the poster and to leave the ceremony did not interfere with freedom of expression because it was not intended to interfere with this freedom. In the applicant's view the intention of the authority which actually interferes with freedom of expression is irrelevant. It is only relevant whether the measure is covered by Article 10 para. 2. The applicant was ordered to stop expressing a certain opinion. This order was based on a vague legal provision which did not allow to foresee with a sufficient degree of certainty which behaviour would be regarded as unlawful. The measure did not pursue any of the purposes enumerated in Article 10 para. 2, nor was it necessary in a democratic society, having regard to the importance of the freedom of expression, the necessity to interpret the limitations of this freedom restrictively, and the principle of proportionality.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 July 1987 and registered on 17 September 1987. After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 4 September 1989. It decided to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits. The Government's observations were submitted, after an extension of the time limit, on 15 December 1990. The applicants' observations in reply were submitted on 26 February 1990.

On 3 December 1990 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application. At the hearing, which was held on 1 March 1991, the parties were represented as follows:

The Government:

Mr. H. Tuerk Ambassador, Legal Adviser to the Austrian Federal Ministry for Foreign Affairs, Agent
Mr. S. Rosenmayr Federal Chancellery, Adviser

The applicant:

Mr. T. Höhne Lawyer, Representative
Mrs. M. Langtaler Adviser

The applicant was present in person.

THE LAW

1. The applicant alleges a violation of Article 10 (Art. 10) of the Convention in respect of the sanction of AS 700 imposed on him by the Vienna Directorate of Public Security (Sicherheitsdirektion).

However, to the extent that this allegation amounts to a separate complaint, the Commission is not required to decide whether or not it discloses any appearance of a violation of Article 10 (Art. 10) of the Convention as, under Article 26 (Art. 26) of the Convention, the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant failed to put any such complaint to the Constitutional Court or to the Administrative Court. He has, therefore, not exhausted the remedies available to him under Austrian law. Moreover, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal. In particular, the considerations of the Constitutional Court in a constitutional complaint based on the imposition of the fine of AS 700 may well have been different from the previous case in that the Constitutional Court would have been considering the imposition of a fine after the event, rather than spontaneous action taken by the authorities on the spur of the moment. Further, in a complaint to the Administrative Court, the applicant could have alleged that Section IX para. 1 (1) of the Introductory Provisions to the Administrative Procedure Act ("Introductory Provisions" - Einführungsgesetz zu den Verwaltungsverfahrensgesetzen) had been wrongly applied in his case.

The Commission therefore finds that, as to the separate complaint concerning the fine of AS 700, the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention. This complaint must accordingly be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

2. The applicant also alleges violations of Articles 5 and 10 (Art. 5, 10) of the Convention in respect of his arrest and detention.

The Government contend that the Commission may not consider the applicant's detention by virtue of the Austrian reservation to Article 5 (Art. 5) of the Convention. In the alternative, they submit that the detention was lawful, and that Article 5 para. 1 (c) (Art. 5-1-c) was complied with. As to Article 10 (Art. 10) of the Convention in this respect, the Government accept that domestic remedies have been exhausted, but consider that, even if there was an interference with the applicant's right to freedom of expression, the aim of the interference was to maintain public order, the legislative provision at issue (Section IX para. 1 (1) of the Introductory

Provisions) was sufficiently precise to cover the behaviour involved, and the action of the authorities was proportionate to the aim pursued as the only way to prevent the applicant in continuing in his offence was to arrest him.

The Commission finds that these complaints raise complex issues of law under the Convention, including questions concerning the Austrian reservation to Article 5 (Art. 5) of the Convention, the determination of which must be reserved to an examination of the merits.

This part of the application 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 it inadmissible has been established.

For these reasons, the Commission by a majority,

DECLARES INADMISSIBLE the separate complaint relating to the penal order imposing a fine of 700 AS;

DECLARES ADMISSIBLE the remainder of the application without prejudging the merits of the case.

Deputy Secretary to the Commission Acting President of the Commission

(J. RAYMOND) (S. TRECHSEL)