

AS TO THE ADMISSIBILITY OF

Application No. 18166/91
by E.M.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 13 October 1993, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA

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 31 January 1991 by E.M. against Austria and registered on 6 May 1991 under file No. 18166/91;

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 an Austrian citizen born in 1948. He is a civil servant by profession and lives in Forchtenstein. He is represented by Mr. Walter Riedl, a lawyer practising in Vienna.

It follows from the applicant's statements and the documents submitted by him that on the afternoon of Friday 3 July 1987 the applicant was committed to a mental hospital against his will at the request of a hierarchical superior, Mrs. A., and on the basis of a medical certificate (Parere) by a public health officer (Amtsarzt). It is stated in the certificate that in 1986 the applicant had already been treated in a mental hospital and that the reason for the certificate was that he had "verbally" threatened a colleague in the service. According to the findings (Status) of the certificate the applicant was found to be under the influence of alcohol. His way of speaking was slurred and he had shown tendencies towards aggression, hallucination and jealousy. There were indications of chronic alcohol abuse.

On 6 July 1987, three days after the applicant's committal to a mental hospital, Mrs. A. and two other colleagues, Mrs. L. and Mrs. K., reported the incident to the police. According to Mrs. A. she had checked whether the applicant was in his office because it was known

that he often left the office without authorisation. The applicant reacted aggressively to the control and, according to Mrs. A., showed signs of being under the influence of alcohol. She heard the applicant shouting at Mrs. K. accusing her of having denounced him to Mrs. A. He then allegedly told Mrs. K. that he was in possession of tapes disclosing compromising circumstances about her private life.

Mrs. K. confirmed that the applicant had acted in a verbally aggressive manner towards her and had inter alia mentioned the existence of compromising tapes. Mrs. L. and Mrs. S. likewise confirmed that they witnessed the incident with Mrs. K.

A further police report of 6 July 1987 gives an account of the applicant's transport to the mental hospital. It is stated in the report that the applicant arrived at the hospital at 5.00 pm.

On 6 July 1987 the applicant was released from the mental hospital. An earlier release had apparently not been possible due to the absence of the competent medical director. In a medical report of 9 July 1987 it is stated that during his arrival interview the applicant stated that he considered the action taken against him to be arbitrary. He also gave another version of the incident at the office. According to him Mrs. A.'s secretary, Mrs. K., had threatened him that as in the preceding year he would have to undergo de-intoxication treatment. It was only in reply to this that he had threatened Mrs. K. with whom he allegedly had extramarital relations that he would make her husband listen to a tape proving these relations. The medical report also states that at the time when the applicant was admitted to the hospital there were no signs of drunkenness nor any other signs of mental disturbance.

As to the therapy and treatment, it is stated that the applicant behaved normally and did not show any signs of withdrawal symptoms. He furthermore did not show any signs of having hallucinations or mania and therefore did not need any medical treatment. As it became more and more apparent in several intensive talks with the applicant that he wished to be released and as there was eventually no longer any reason to fear that he would be a danger to himself or to others his release was ordered on 6 July 1987.

Summarising, the report states a diagnosis of psychopathy with aggressive tendencies as already discovered in a test of 1985. As a therapy it is suggested that the applicant give up alcohol and be supervised by a psychotherapist.

The applicant lodged a constitutional complaint with the Constitutional Court (Verfassungsgerichtshof) invoking his right to personal liberty. He pointed out that no other remedy was given against the measure in question which he considered to be unlawful alleging that he had not been examined by the medical officer and that there had been no circumstances justifying his committal to the hospital. The remedy was rejected on 27 February 1990. According to the applicant this decision was served on 1 August 1990. The court denied a violation of the applicant's right to liberty stating that the measure in question was justified under Section 49 (1) of the Hospital Act (Krankenanstaltengesetz). This provision allows provisional detention of persons in a mental hospital if a public health officer has certified that the person is a threat to his or her own security or that of others on account of mental illness. The certificate must not be older than a week. According to the Constitutional Court such a certificate is not an expert opinion and is not subject to evaluation by the authority which has to decide on the detention. Rather it is a mere formality and the authority only has to examine whether the certificate is in conformity with the formal requirements of the law. The Constitutional Court concluded that in view of the certificate of

3 July 1987 there was no reason to doubt the lawfulness of the applicant's committal to a mental hospital. It was also in the court's opinion irrelevant whether or not the applicant had threatened colleagues and whether or not he had been examined by the medical officer. The court observed that in any event the latter allegation had been contested by the authorities. It was likewise irrelevant that it did not follow from the medical order whether the committal was considered necessary for the applicant's own security or that of other persons. The formula used for the medical order contained a standard printed text referring to both possibilities. It followed from the fact that the medical officer had not crossed out one of the two alternatives that he considered both alternatives to be given.

COMPLAINT

Referring to the medical report established in the mental hospital, the applicant submits that there had never been any reason to detain him in that hospital. He alleges violations of Articles 3, 5, 6, 13 and 14 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 31 January 1991 and registered on 6 May 1991.

On 2 September 1992 the Commission decided to communicate the application to the Respondent Government and to invite them to submit written observations on the admissibility and the merits. These observations were received on 14 January 1993 and the applicant replied on 12 March 1993.

THE LAW

1. The applicant mainly claims that his committal to a mental hospital and his short-term detention in that institution violated Article 5 para. 1 (Art. 5-1) of the Convention. He submits that there were no grounds justifying this measure, in particular Article 5 para. 1 lit (e) (Art. 5-1-e) could not be relied upon as he did not show any signs of mental disturbance. He submits that prior to his committal to the hospital he was not examined by a medical doctor and considers that the reasons indicated in the medical certificate are in no way sufficient to justify his detention.

The applicant has brought this complaint before the Austrian Constitutional Court and the Respondent Government have accepted that he thereby exhausted domestic remedies.

The Respondent Government submit that the applicant was thoroughly examined and found to be a danger to other persons in view of the fact that he had threatened colleagues in the service while under the influence of alcohol.

It is true that according to the jurisprudence of the European Court of Human Rights emergency confinement of persons capable of presenting a danger to others do not require thorough medical examination prior to arrest or detention. In this respect a wide discretion is enjoyed by the competent national authorities (cf. Eur. Court H.R. judgment of 5 November 1981, X v. United Kingdom, Series A no. 46, p. 19 para. 41).

However in the present case the applicant denies the Government's allegation that he was thoroughly examined by a public medical officer. Furthermore it has to be noted that in the medical certificate which was established by the public medical officer who, according to the

Respondent Government, thoroughly examined the applicant, it is only stated that the applicant had "verbally" threatened a colleague in the service. This threat however is not defined and the medical certificate does not state if the threats were of such a nature as to justify committal to a mental hospital.

In these circumstances the Commission considers that the complaint raises serious issues of fact and of law which necessitate a further examination on the merits.

The complaint cannot, therefore, be declared manifestly ill-founded within the meaning of Article 27 (Art. 27) of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant further alleges a violation of Articles 5 para. 4, 6, 13 and 14 (Art. 5-1, 6, 13, 14) of the Convention. He submits that he did not dispose of an effective remedy before a national authority as required by Article 13 (Art. 13) and that he would have had such a remedy if for example his detention had been ordered by the police and not by a public health officer. He therefore considers that he was discriminated against (Article 14 (Art. 14)) in so far as his rights under Articles 6 and 13 (Art. 6, 13) are concerned.

The Government consider that on these points the applicant has not exhausted domestic remedies as he did not invoke these provisions before the Constitutional Court and also failed to bring his case before the Administrative Court.

The applicant considers that an Administrative Court appeal would have been an ineffective remedy. He furthermore considers that in substance he submitted all his present complaints also to the Austrian Constitutional Court.

This issue can however be left undecided as the applicant was released shortly after his commitment to the mental hospital and Article 5 para. 4 (Art. 5-4) then ceased to be applicable (No. 9403/81, Dec. 5.5.82, D.R. 28 p. 235 [238]). Consequently the application of Article 13 (Art. 13) of the Convention is excluded as Article 5 para. 4 (Art. 5-4) constitutes in the area in question the *lex specialis* (Dec. 12/7/86, No. 11539/85, D.R. 42 p. 237). The application of Article 6 (Art. 6) is likewise excluded because a claim to have the legality of detention determined is not a civil right within the meaning of this provision (Eur. Court H.R., Neumeister judgment of 27 June 1968, Series A No. 8, p. 43). The complaint under Article 14 (Art. 14) has not been substantiated and there is no appearance of a violation of this provision read together with Article 5 (Art. 5) of the Convention. This part of the application therefore has to be rejected as being 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 complaint relating to the lawfulness of the applicant's detention without prejudging the merits of the case.

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber

(M.F. BUQUICCHIO)

President of the First Chamber

(A. WEITZEL)

