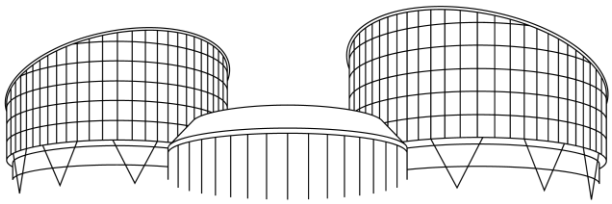

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF PALUSHI v. AUSTRIA

(Application no. 27900/04)

JUDGMENT

STRASBOURG

22 December 2009

FINAL

22/03/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Palushi v. Austria**,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Giorgio Malinverni,
George Nicolaou,
Sverre Erik Jebens, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 3 December 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 27900/04) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Naser Palushi ("the applicant"), on 16 July 2004.

2. The applicant was represented by Mr H. Pochieser, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of European and International Affairs.

3. The applicant alleged, in particular, that he had been subjected to ill-treatment contrary to Article 3 of the Convention during his detention in the Vienna Police Prison.

4. By a decision of 27 November 2008 the Court declared the application partly admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1972 and lives in Vienna. At the time of the events he was a national of the former Socialist Federal Republic of

Yugoslavia. By the time of lodging the application he had obtained Austrian citizenship.

A. The events at issue

7. On 28 April 1994 the Vienna Federal Police Authority (*Bundespolizeidirektion*) ordered the applicant's detention with a view to expulsion on account of his illegal stay in Austria. At that time a request by the applicant for asylum had been refused by the second-instance authority.

8. On the same day the applicant was taken to the Vienna East Police Prison (*Polizeigefangenenhaus Wien Ost*). On 30 April 1994 he went on hunger strike.

9. In accordance with the relevant regulations (see paragraph 45 below), a report was drawn up to document the applicant's hunger strike. According to the entries in that report, the applicant, whose height is 1.77 metres, weighed 64.8 kilograms when he started his hunger strike. Subsequently, his weight was recorded every four or five days, namely on 5, 9, 14, 19, 24, 27 and 28 May 1994. Apparently his blood-sugar level was also checked but the findings were not recorded in the report.

10. The events at issue took place when the applicant had been on hunger strike for three weeks. The exact date is in dispute between the parties.

11. According to the applicant, the events happened in the evening of 21 May 1994. He submits that he has consistently referred to that date throughout the domestic proceedings and the Convention proceedings, and that the Independent Administrative Panel in its decision of 3 September 1999 also established 21 May 1994 as the date of the events at issue.

12. According to the Government, the events at issue took place on 22 May 1994. They referred to the entry in the disciplinary file of the Vienna Police Prison, according to which the applicant had created unrest in the course of 22 May 1994 (banging against the cell door and repeatedly ringing the bell to call prison officers and finally pretending to be unconscious) and had been transferred to an individual cell on that date as a disciplinary measure.

13. While the parties disagreed as to the date of the events, it is not in dispute that, on the evening at issue, the applicant's cellmates called the police officers on duty and informed them that the applicant had slipped while going to the toilet and had sustained a bleeding injury to his head. Subsequently, the applicant was taken to an individual cell. The injury to his head was bandaged by a paramedical officer.

14. On 24 May 1994 the applicant was taken to a prison doctor, who noticed and mentioned in his written diagnosis several skin abrasions in the lumbar region of the applicant's backbone, one of which is described as being substantial. He treated these injuries with a spray and bandages.

Moreover, he recorded the applicant's weight and measured his blood pressure and blood-sugar level.

15. On the same day Mr Staub, a member of an NGO looking after the applicant, Mrs Pichler, a journalist, and Mr Horvath, a friend, visited the applicant in prison. Mrs Pichler subsequently published an article in the magazine *News* reporting that the applicant had told her that after his accident four officers had dragged him by the feet out of his cell and kicked him. They had also stabbed him behind the ears with ballpoint pens and hit him repeatedly in the face. He had shown the journalist abrasion marks on his back and hip and small round bruises behind his ears.

16. On 26 May 1994 a prison doctor changed the bandages and also examined the applicant's head. In his written diagnosis of that date he mentioned, in addition to a small healed scratch on the middle of the applicant's head, two small scabs such as would form after a superficial skin abrasion behind both ears. He further noted that the applicant had been able to walk on his own to the second floor, down to the ground floor and then back to his cell on the first floor. He did not raise any other specific health complaints. Again the doctor recorded the applicant's weight, which was down to 53.5 kilograms, and his blood pressure and blood-sugar level. He noted that on account of his loss of weight, the applicant was in a weakened condition and his release would have to be considered within the next few days.

17. On 28 May 1994 the prison doctor found the applicant unfit for detention. By then his weight had decreased to 53.2 kg. He was released from prison on the same day.

18. Later on, the applicant's asylum request was granted.

B. Proceedings brought by the applicant

1. *First set of proceedings before the Independent Administrative Panel*

19. On 17 June 1994 the applicant filed a complaint with the Vienna Independent Administrative Panel (*Unabhängiger Verwaltungssenat*). He submitted that on 21 May 1994 the four prison officers called by his cellmates had dragged him by his feet out of the cell. They had then beaten him, kicked him in his belly and kidneys and pressed a ballpoint pen behind his ear lobes. At that time he had lost consciousness. He had subsequently been dragged from the third floor along the steps down to the cellar, in the process suffering injuries and haematomas along his backbone and skin abrasions on his heels. Having been given a bandage that was insufficient, he had been locked in an individual cell in the cellar without daylight. Only upon a request by Mr Staub, who had visited him in prison on 24 May 1994, had a paramedic seen him and eventually, upon his insistence, taken him to

the prison's doctor. The treatment he had suffered at the hands of the police officers on 21 May 1994 and the fact that he had subsequently been kept until 24 May 1994 in solitary confinement without daylight and without medical care were, in the applicant's submission, in violation of his rights under Articles 3 and 5 of the Convention.

20. In its submissions in reply the Vienna Federal Police Authority contested these allegations. It stated that during his hunger strike the applicant had regularly been weighed and his blood-sugar level had been checked. Because of conflicts with former inmates the applicant had already been transferred from another cell. The applicant had several times pretended to faint and had requested an inmate, Mr Stojanovic, to call the prison officers. On the day in question the applicant had banged continuously against the cell door, had rung the bell and had disregarded the ensuing admonitions of the prison officers. In the evening he had gone to the lavatory situated in the cell, had fallen down and had suffered a slightly bleeding injury on his head. The applicant's inmates had subsequently dragged the applicant away from the toilet. The prison's paramedical officer, Mr Zechmeister, established that the applicant was only pretending to be unconscious and such behaviour continued once the applicant was taken outside the cell. An officer, Mr Freithofer, then ordered that the applicant be placed in solitary confinement. Two other officers, Mr Mayerhuber and Mr Reichel, were present. None of them had mistreated the applicant. While Mr Zechmeister fetched bandage material, Mr Freithofer and Mr Mayerhuber carefully dragged the applicant down to the ground floor. The applicant was holding his head up while being carried, and was therefore only pretending to be unconscious. As he could not be made to walk on his own, inevitably his feet, and partly also his backside, dragged along the floor. After the applicant's head injury had been cleaned and bandaged, he walked on his own to the individual cell situated on the first floor. This cell had a window. At that time the applicant did not allege that he had sustained any further injuries. As with every prisoner on hunger strike, the applicant's state of health was examined daily by the prison's paramedical officer. On 24 May 1994 the applicant showed the paramedic for the first time the abrasions on his back, which were subsequently treated by the prison doctor.

21. On 26 July 1994 and on 16 January 1995 the Independent Administrative Panel held two oral hearings at which it heard evidence from the applicant, two prison inmates, Mr Fadil and Mr Stojanovic, and two of the officers concerned, Mr Zechmeister and Mr Mayerhuber.

22. In addition to the allegations he had made in his complaint, the applicant submitted that after the incident he had noticed traces of blood behind his ears. The individual cell had had a window but no daylight had come through. There were only dirty bedclothes. There had also been a toilet which did not flush. He had suffered from severe pain in his back and on his head and had requested to see a doctor but his requests had been met

only with insulting remarks. Only after three days had the paramedical officer come to his cell again. He had shown him the injuries on his back and subsequently, after Mr Staub had visited him, had been taken to a doctor. As well as the injuries on his back because of the way in which he had been carried, he had suffered injuries to his ribs as a result of being kicked by the police officers. Afterwards the doctor had visited the cell and the applicant had obtained a cushion and clean bedclothes.

23. The representative of the police authority submitted that according to the applicant's submissions in criminal proceedings which he had brought against the four police officers concerned and which were later discontinued, he had seen the prison's doctor on 24 May 1994 before Mr Staub's visit.

24. Mr Fadil alleged that he remembered being in the same cell as the applicant in May 1994. The applicant, however, did not remember Mr Fadil. Mr Fadil submitted that the applicant had already lost consciousness several times. After his accident, the prison officers had grasped the applicant under his arms and neck and had pulled him out of the cell so that his back dragged along the floor. The cell door had then been closed but he had heard the applicant being beaten and crying. He had also learnt from other prisoners that the applicant had been injured while being dragged down the steps. Another prisoner who had meanwhile been deported had allegedly witnessed this incident and had also noticed traces of blood on the floor.

25. Mr Stojanovic, who was undisputedly a cellmate of the applicant at the time of the events, confirmed that the applicant had already lost consciousness several times before the incident in question. They had then called a doctor, who had come and measured the applicant's blood pressure. On the evening in question the officers had pulled the applicant by his feet out of the bed and then, grasping the applicant's neck, out of the cell while his back dragged along the floor. During this time the officers had punched the applicant two or three times on his chest. Then the door had been closed, and he had heard cries and something which sounded like beating. He had never noticed any injuries on the applicant's back. Some three or four days after the incident and again one week later he had met the applicant, who had shown him blue marks on his back and on his leg. The applicant also told him that he had been beaten. Mr Stojanovic had also been interviewed by police officers in the course of the criminal proceedings concerning the case. According to the transcripts of the interview, he had stated on that occasion that the applicant had several times falsely claimed to be feeling weak and had requested him to call the prison officers. After his accident the applicant had been moved by his cellmates from the toilet to his bed and his back had been dragged along the floor. The prison officers who had subsequently carried the applicant out of the cell had not mistreated him. When confronted with these statements at the hearing before the Independent Administrative Panel, Mr Stojanovic submitted that they were

not true and had apparently been wrongly recorded because of his poor knowledge of the German language and misunderstandings with the interviewing police officers.

26. Mr Zechmeister submitted that he had been on duty as a paramedical officer on the day at issue and had been called several times to the applicant's cell as the applicant had pretended to faint. When called again to the applicant's cell in the evening, his impression that the applicant was again pretending was confirmed by an examination of the applicant's reactions. He had then left in order to fetch dressing material for the applicant's head injury and requested the police officer in charge to place the applicant in solitary confinement as a disciplinary measure and in order to keep the peace with the other inmates. He had seen the applicant again in the solitary confinement wing, where he had cleaned and bandaged the injury to his head. He had not noticed any further injuries and the applicant had not mentioned any. The applicant was subsequently taken to an individual cell on the first floor. At that time, he was able to walk on his own. The applicant had never told him that he had been beaten.

27. Replying to questions by the applicant's counsel, Mr Zechmeister stated that in addition to hourly checks by police officers, the paramedic checked the cells between 6 and 9 p.m. He looked through the small window in the door without opening the door. Cells were equipped with an interphone allowing inmates to contact staff at any time. In reply to the question whether there was specific surveillance for inmates who risked losing consciousness while in solitary confinement, Mr Zechmeister replied that in his view the applicant did not present such a risk at the material time. Nor did he consider that the applicant required permanent surveillance. Inmates requiring permanent surveillance were placed in the other Vienna Police Prison at Roßauer Lände. If they were unfit for detention, they were released. Mr Zechmeister could not remember when the applicant had first been examined by the prison doctor after the incident at issue. Hunger-strikers were examined by the prison doctor either daily or every second or third day, depending on their state of health (for example, where weight loss or blood pressure gave rise to concern).

28. Mr Mayerhuber submitted that when he had arrived on the evening in question, the applicant was already lying in front of his cell. At that time two other police officers and Mr Zechmeister, examining the applicant, had been present. Mr Stojanovic had told him that the applicant had cut himself on purpose with a razor blade in order to feign a collapse. Mr Mayerhuber and another police officer had taken the applicant to the solitary confinement wing by linking their arms with the applicant's. The applicant's face had been facing away from the direction in which he was being moved. While the upper part of the applicant's body had been straight, his backside had partly dragged along the floor and his feet had constantly done so. The applicant had not been carried as there had been a risk that he might fall

down if he bristled or reacted in a clumsy way. He did not know whether the applicant had been wearing shoes at that time. The applicant had been motionless but he had not been able to tell whether the applicant was unconscious or not.

29. On 31 March 1995 the Independent Administrative Panel dismissed the applicant's complaint, noting that his transfer to an individual cell on 22 May 1994 had constituted a disciplinary measure. The applicant should therefore have brought proceedings under the Police Prison Internal Rules (*Polizeigefangenenhaus-Hausordnung*) and there was no scope for a complaint to the Independent Administrative Panel.

30. On 12 March 1997 the Constitutional Court (*Verfassungs-gerichtshof*) quashed that decision, on the ground that the Independent Administrative Panel had wrongly refused to rule on the merits of the applicant's complaint, and remitted the case to it.

2. Second set of proceedings before the Independent Administrative Panel

31. On 3 February and 18 June 1999 the Independent Administrative Panel held further hearings.

32. The representative of the police authority submitted that the injuries found on the applicant's back had been caused by his fellow inmates, who had dragged him away from the toilet. The applicant submitted that he had been dragged out of his cell by the prison officers and had thereby suffered injuries to his back. The Independent Administrative Panel also heard evidence from Mr Staub, Mrs Pichler and Mr Horvath.

33. Mr Staub submitted that when he had visited the applicant, he had noticed two skin abrasions the size of the palm of a hand to the right and left along the applicant's backbone. While these injuries had apparently been treated in a professional manner, he had considered the bandage on the applicant's head to be an “impertinence”. He had thereupon called the paramedical officer, who had apparently changed the bandages afterwards. He had further noticed skin abrasions on the applicant's heels and injuries behind his ears. The applicant had conveyed the impression to him that the conditions in the individual cell were very questionable and even catastrophic and that, despite his request, he had not been allowed to see a doctor.

34. Mrs Pichler submitted that she had noticed skin abrasions and blue marks on the applicant's back and injuries behind his ears. The applicant had told her that the latter injuries had been caused by stabbing with ballpoint pens.

35. Mr Horvath submitted that he had noticed skin abrasions on the applicant's back, on which scabs had formed. He had also noticed injuries behind the applicant's ears and had remarked that that area was swollen. The applicant had told him that he had been stabbed with a pencil.

36. Following a request by the applicant, the Independent Administrative Panel ordered an expert medical opinion. The opinion referred to the applicant's allegation that he was suffering from earaches and decreased auditory function and noted it was unlikely that the applicant's eardrum had been injured during his detention as this would have caused bleeding. However, such bleeding had neither been documented nor established, nor had the applicant himself alleged that it had occurred. Until February 1998 the applicant had not undergone any otolaryngology treatment and now, four years later, it was impossible to establish whether the applicant's ear problems and decreased auditory function in February and March 1998 were a consequence of his detention in 1994. As regards the applicant's allegation that he had suffered from purulent effluence from the right ear after his release, the expert opinion noted that this could have been the consequence of an inflammation of the middle ear.

37. The Independent Administrative Panel eventually carried out an inspection of Vienna East Police Prison and took photos, which it submitted to the applicant for comment.

38. On 16 June 1999 the applicant requested that the Independent Administrative Panel carry out another inspection in his presence.

39. In written submissions dated 21 July 1999 the applicant disputed that the cells shown on the photos corresponded to the individual cell to which he had been taken. In the solitary cell in which he had been detained there had only been a wooden pallet without a mattress and bedclothes. A spout had served as a toilet. The only window had been nearly on the same level as the ground of the courtyard which it faced and only a little daylight had come through. There were no radiators. He had repeatedly unsuccessfully tried to contact police officers through the interphone. He repeated his request for another inspection to be carried out in his presence. The request was not granted.

40. On 3 September 1999 the Independent Administrative Panel dismissed the applicant's complaint. It established the facts as follows:

> "As a result of his hunger strike, the applicant lost eleven kilograms within a very short time and was further behaving in an uncooperative, refractory manner and did not miss an opportunity to attract attention, which – from the applicant's point of view – is probably legitimate and comprehensible but also resulted in his not being treated in the most attentive and gentle way.
>
> The applicant had repeatedly shouted and disturbed the peace in his cell, which he shared with several other inmates. On 21 May 1994 the applicant's cellmates informed the police officers on guard in the prison that he had fallen from the toilet and had suffered an injury to his head. Since the police officers wanted to restore order in the cell shared by several inmates, the applicant was carried out from the cell and transferred to the individual cell situated in a separate part of the building – one floor below. Since he was carried – in particular because he made no voluntary effort to walk on his own – it happened that while being taken down the steps, his back

dragged along the edges of the steps and in the process he suffered superficial skin irritations.

After being moved to individual cell no. E 184 and examined by a paramedic of the Police Prison, his slightly bleeding wound was cleaned and bandaged. After the applicant had informed the paramedic on 24 May 1994 that he also had an abrasion on his back, the latter notified the prison doctor, who treated the wound with a spray and bandage.

The applicant subsequently remained in detention awaiting his expulsion until 28 May 1994, 12 noon, staying in cell E 184, and at the above time he was released because he was unfit for further detention.

Evidence was taken through an inspection of the file of the Vienna Federal Police Authority, the file of the Vienna Regional Criminal Court, the Josefstadt District Court and the file of the proceedings conducted by the Vienna Independent Administrative Panel. In addition, the established facts were based on the transcripts of the oral hearing in the first round of proceedings, Zl. 02/31/57/94, which contain the statements of the police officers examined at that time. Moreover, the Independent Administrative Panel conducted a supplementary oral hearing during which the transcripts of the first round of proceedings were read out and the witnesses Horvath, Mag. Staub and Pichler were examined. Finally, the Panel taking this decision obtained a medical opinion from an ear, nose and throat specialist and indirectly carried out an inspection of the site to determine the local situation at the relevant time.

The witnesses examined both in the first round of proceedings and in the continued proceedings were highly credible. The witnesses in the continued proceedings were, however, unable to comment on the factual situation, in particular the cause of the injuries, firstly because they had only noticed the applicant's injuries some time after they had been inflicted on him and were thus unable to comment first hand on the cause of these injuries. Secondly, the injuries were not such as to clearly indicate their origin, and on account of their lack of expert knowledge, the witnesses were not able to comment on the cause of these injuries. Lastly, it is doubtful to what extent statements by witnesses which are intended to reflect a direct perception can – after a period of almost four years – still be so unhampered and uninfluenced as to meet the requirements of fair proceedings.

The same must naturally hold true for the police officers, and it was not least for that reason that these officers were not examined afresh and the present decision is based on their examination in the course of the oral hearing in the first round of proceedings. The statements by the police officers were conclusive and in accord with one another; moreover, the statements made during the oral hearing in the first round of proceedings and the statements made during their questioning in the course of the preliminary investigations were consistent, without any serious contradictions relevant to the decision being discernible. Moreover, the statements of the police officers were in line with the contents of the first-instance administrative file, and on that account it could also be assumed that during his detention pending expulsion the applicant behaved in an extremely refractory manner, and the conduct of the police officers was thus the only suitable way to bring about a solution to these problems.

The applicant appeared extremely calm – not to say serene – to the Vienna Independent Administrative Panel, which is why from the present perspective, the

idea that the applicant behaved as described in the facts seemed realistic only with a great deal of imagination. The Vienna Independent Administrative Panel must, however, also take into account the fact that at that time – unlike today – the applicant was in an exceptional state of mind, and such conduct must therefore be regarded as absolutely possible.

Finally, the authority determining the case also proceeds from the assumption that the applicant had been in a kind of emergency situation at the time, and his 'civil disobedience' was the only possible way for him to successfully avoid expulsion.

The expert medical opinion and the inspection of the site could not support the applicant's submission that he had to await his expulsion in a cell without light in inhuman conditions. The cell referred to by the applicant is situated at least as high as half a floor above the elevated cell level so that there is no access to the cells through the open windows from outside. The statements made by the applicant about the route on which he had been carried from the cell shared with other inmates to the individual cell differed from the maps depicting the relevant section of the Police Prison that are included in the file. It is thus also to be assumed that the applicant's emotional state in his surroundings in the Police Prison was so tense at the relevant time that it may well be that the circumstances as the applicant perceived them should be evaluated differently from his statements in his written submissions.

There is no indication that the statements by the head of Vienna Police Prison are untrue. Although he was not yet in his present position in the prison at the time, the head of Vienna Police Prison stated that as far as he knew and according to information from his colleagues, the prison had not been redesigned or renovated during the past few years.

Finally, basing itself on the expert medical opinion obtained, the Vienna Independent Administrative Panel found that the applicant had not been injured with a ballpoint pen at that time as he maintained. An injury would almost invariably have resulted in blood coming out from the wound, and the official expert in his opinion also arrived at the conclusion that such an injury did not occur."

41. The Independent Administrative Panel's legal assessment reads as follows:

"Since the applicant – as can be deduced from the established facts set out above – is himself responsible for his injuries, and either inflicted those injuries on himself through his own conduct or sustained them as a result of his conduct – such as, for example, circulatory insufficiency while he was on the toilet, resulting from his hunger strike – no conduct contrary to Article 3 of the Convention could be observed. On account of both his refractory behaviour in his shared cell, causing unrest among the other inmates, and his passive resistance while being taken to the individual cell, the police officers carried the applicant down the staircase because of his circulatory insufficiency, and the intervening officers had no other possible way of taking him to the individual cell.

The applicant also described the situation and circumstances in the individual cell in such a manner that one cannot follow his submissions from the present perspective. The cell at issue has always been situated some five metres above the ground level of the courtyard, and in any event sufficient light comes into the cell. Moreover, the cell has a sufficiently large window, which thus also guarantees the inflow of natural light.

Nor is it understandable why the applicant believes that he was taken to a cell in the cellar and was detained in virtual darkness. At no time was there any indication to that effect in the investigation proceedings.

If the applicant also submits that he was denied medical treatment, it must be said on the contrary that he regularly received medical treatment both during his hunger strike and during his detention in the individual cell, which means that he was repeatedly taken to a doctor and his state of health was under constant supervision by a qualified paramedic, who would at any time have been in a position to arrange for the intervention of a doctor.

Finally, in his submissions as a whole, the applicant gave an explanation of the entire sequence of events which was not very consistent or easy for the authority deciding his case to understand; it cannot be assumed that the applicant intentionally made untrue statements to the panel deciding his case, thus intending to obtain an unjustified advantage. It must rather be assumed that – as already outlined above – the applicant was in a state of mind lacking full mental orientation and thus actually perceived the situation faced by him in such a manner.

Since no further violations of the law emanated from the proceedings conducted by the authority, the complaint had to be rejected as being unfounded on all counts ..."

42. On 27 February 2001 the Constitutional Court declined to deal with the applicant's complaint. Subsequently, on 28 May 2001 the applicant supplemented his complaint with the Administrative Court (*Verwaltungsgerichtshof*).

43. On 19 December 2003 the Administrative Court declined to deal with the applicant's complaint. That decision was served on the applicant's counsel on 19 January 2004.

II. RELEVANT DOMESTIC LAW

44. The Police Prison Internal Rules (*Polizeigefangenenhaus-Hausordnung* – "the Prison Rules"), set out in an ordinance of the Federal Minister of the Interior of 28 September 1988, Federal Law Gazette no. 566/1988, regulate detention in police prisons. In the present context the following provisions are relevant:

Detention

"§ 4 (1) Detention shall take place while ensuring respect for human dignity and the utmost protection of the person. ...

...

(4) Detention in solitary confinement shall be permitted only in the cases referred to in Rule 5 below."

Solitary confinement

"§ 5 (1) Detention in solitary confinement must take place:

1. where there are facts justifying the assumption that the detainee is endangering the health of others through violence;

2. where a request to that effect has been made by a court in respect of detainees against whom criminal proceedings are pending;

3. where there is a danger of infection from the detainee or where the detainee, on account of his or her appearance or conduct, objectively represents a significant burden for other detainees.

(2) Detention in solitary confinement may take place:

1. at the detainee's request;

2. during the night, if this appears necessary to maintain safety or order;

3. as a disciplinary measure;

4. where it is necessary for a short time for organisational reasons;

5. where there are facts justifying the assumption that the detainee is endangering his or her own life or health through violence."

Medical supervision of detainees

"§ 10 (1) Detainees who have already been declared fit for detention ... shall be immediately seen by a doctor where a justified request is made or where their continued fitness for detention is in doubt. ...

(2) The state of health of injured or sick detainees who have been declared fit for detention shall be kept under medical supervision, so that any deterioration may be observed in good time; should such deterioration render them unfit for further detention, the opinion of a doctor shall be obtained immediately."

45. At the material time, the Prison Rules did not contain any specific rules on the treatment of hunger-strikers. However, instructions were contained in an internal order (no. 2/93) for police prisons issued on 11 April 1993 by the Vienna Federal Police Directorate.

These instructions provided, *inter alia*, that

(a) hunger-strikers were to remain in multi-occupancy cells, unless there were reasons for another form of detention;

(b) a report had to be drawn up when a prisoner announced his or her intention to go on hunger strike; the prisoner had to be brought immediately before the paramedic, who had to take his weight and note it in the report;

(c) on the cell-board a capital "H" had to be added for each hunger-striker;

(d) a paramedic had to register all hunger-strikers daily; he had to keep one copy of the record, one had to be given to the prison officer on the floor concerned (and was to be transferred with the prisoner if he was transferred) and one had to be sent to the prison administration;

(e) termination of the hunger strike, release or expulsion had to be noted on the prisoner's report by the paramedic.

III. REPORT OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT)

46. The relevant extracts of the CPT's report on a visit to Austria from 26 September to 7 October 1994 read as follows (unofficial translation from French):

> "5. Police prisons
>
> a. follow-up visit to the Vienna Police Prison
>
> 56. As already indicated (see paragraph 3), the CPT's delegation carried out a follow-up visit to the Vienna Police Prison at Roßauer Lände. Since the end of 1990, there have been two police prisons in Vienna, with a total capacity of 450 places. At the time of the CPT's second visit, the Police Prison at Roßauer Lände had a capacity of 220 and, on the day of the visit, 211 prisoners were being held there. The majority of them – 154 – were persons detained under the aliens legislation pending deportation (*Schubhäftlinge*). The rest were either being held at the disposal of the Security Bureau, serving an administrative sanction or awaiting transfer.
>
> During the talks held at the end of the visit, the CPT delegation expressed its concern to the Austrian authorities about its findings in the police prison. Indeed, four years after the first visit, it found very few improvements in the conditions of detention.
>
> 57. The single and multi-occupancy cells in the prison were still in a dilapidated state and the conditions of hygiene were deplorable. In particular, most of the cells' equipment (beds, mattresses, sheets and blankets) was dirty and shabby; further, in the multi-occupancy cells, the state of the toilets and their partitioning remained very poor.
>
> ...
>
> c. medical care in the police prisons visited
>
> 80. The number of general practitioners assigned to the police prisons visited can be considered adequate, given the respective capacity of those establishments. Moreover, appointments with outside specialists could be arranged where necessary.
>
> 81. The situation regarding nursing staff levels in some of the prisons visited was less satisfactory.

At the Vienna Police Prison, health care was provided by a team of ten paramedical officers (*Sanitäter*), who were in charge of both this establishment and of the other police prison in Vienna (see paragraph 56). They had received six weeks' basic training in the Army, followed by a period of practical training in a hospital. This training programme had begun a year earlier and it was envisaged that, in future, health care staff would follow a recognised training programme for nurses (*Krankenpfleger*). There was always a paramedic on duty on the establishment's premises.

...

85. The delegation was also concerned by the absence of any psychological support for inmates in the Vienna Police Prison.

In one of the establishment's single cells, the delegation saw an Asian woman who was patently in a state of extreme psychological distress, exacerbated by the language barrier, and for whom the necessary psychological support was not forthcoming. According to staff, the inmate in question had resisted while being escorted for deportation and had displayed violent behaviour when placed in a multi-occupancy cell.

Another inmate, on hunger strike, was observed to be in a similar state, but was not receiving the necessary psychological support either. Moreover, this inmate had started a thirst strike; he had evidently not been informed of the potential consequences of such conduct for his health.

86. It is plain from the CPT delegation's observations that the medical care provided in the police prisons visited amounted to nothing more than a somewhat developed form of first aid. This finding is all the more serious given that periods of custody in these police establishments may last for up to six months.

The CPT considers that these establishments – particularly the larger ones, such as the Vienna Police Prison – should offer a level of medical care comparable to that which can be expected in a remand prison.

In this connection, the CPT has noted with interest the proposal to create a health care unit at the Vienna Police Prison.

87. Consequently, **the CPT recommends that the Austrian authorities review the provision of medical care in the light of the foregoing remarks. More particularly, it recommends that immediate steps be taken to ensure that:**

...

The CPT would also like to receive detailed information from the Austrian authorities on the approach adopted in police prisons as regards the treatment of persons on hunger or thirst strike, and further information on the planned creation of a health-care unit at the Vienna Police Prison.

d. other issues

i. persons detained under the aliens legislation

90. As already mentioned (see in particular paragraphs 56, 65, 71 and 74), persons deprived of their liberty under the aliens legislation (FrG) represent the largest group of persons held in the police prisons visited.

It should be stressed that the detention of such persons gives rise to specific problems. Firstly, there will inevitably be communication difficulties caused by language barriers. Secondly, many foreign nationals will find it hard to accept being in custody when they are not suspected of any criminal offence. Thirdly, tensions may arise between detainees of different nationalities or ethnic groups.

Staff assigned to supervise such persons must therefore be very carefully selected and receive appropriate training. Supervisory staff should possess heightened interpersonal communication skills; they should also be familiar with the detainees' different cultures and at least some of them should have appropriate language skills. Further, staff should be taught to recognise possible symptoms of stress displayed by detainees (whether post-traumatic or induced by sociocultural changes) and to take appropriate action.

91. It is clear from the delegation's observations during the second visit that – despite commendable efforts by certain officers in the establishments visited – the staff of police prisons had not been trained to perform this particularly onerous task. **The CPT therefore recommends that the Austrian authorities review the training of police officers responsible for the custody of foreign nationals in the light of the above remarks.**

The CPT would also like to receive the comments of the Austrian authorities on the possibility of creating special centres for this category of persons, in which they could enjoy material conditions and a detention regime appropriate to their legal status."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

47. The applicant complained that he had been ill-treated while in custody. He relied on Article 3 of the Convention, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

48. The applicant alleged that in the evening of 21 May 1994
(a) he had been beaten and kicked;
(b) he had been stabbed behind the ears with ballpoint pens;

(c) he had suffered injuries as a result of the inappropriate manner in which he had been carried down the stairs;

(d) he had subsequently been placed in solitary confinement; and

(e) he had not been given sufficient medical care.

49. In the applicant's view, the Independent Administrative Panel's findings were open to criticism in many respects. On the basis of the facts it had established, it should have come to different conclusions. For instance, the Panel had established that he had suffered skin abrasions on his back but, instead of concluding that the injuries had been caused by the inappropriate way in which he had been carried, amounting to inhuman treatment, it insinuated that the applicant's own recalcitrant and uncooperative behaviour was to blame. Similarly, the Independent Administrative Panel had accepted that owing to his hunger strike and his fear of impending expulsion, he had been in an exceptional state of mind but did not conclude that, in these circumstances, his solitary confinement amounted to inhuman or degrading treatment. This was all the more so as he had not received any adequate care regarding his hunger strike and had been left without any medical treatment for the injuries to his back until 24 May 1994.

50. Furthermore, the applicant argued that the findings of the Independent Administrative Panel could not be accepted as the proceedings before it had been defective. Firstly, their duration had been excessive, which had a negative impact on the evidential value of the witnesses' statements. Moreover, the applicant and his counsel had not been informed of the inspection of the site, in which only the police authority had participated.

51. The Government, for their part, referred to the Independent Administrative Panel's decision of 3 September 1999. They underlined that it had held a number of hearings, some of which had been conducted shortly after the events at issue, and that it had carried out a visit on the spot. Assessing the applicant's complaints in the light of Article 3 of the Convention, the Independent Administrative Panel had come to the conclusion that they were unfounded.

52. In addition, the Government gave the following information in respect of the supervision of the applicant's state of health and the medial care provided to him during his detention in solitary confinement: the Government submitted that they were not in a position to submit the applicant's complete medical record, which had already been destroyed, but only those parts of his medical file which had been considered relevant and had therefore been submitted to the Independent Administrative Panel. They asserted that the applicant, as was provided for hunger-strikers in general, was observed daily by a paramedic with regard to his state of health. However, the skin abrasions on his back had not been examined on 22 or 23 May 1994. According to the disciplinary file, a prison doctor had

commented on the applicant's solitary confinement as a disciplinary measure on 23 May. The injuries on his back had become known only on 24 May, when they had been treated by the prison doctor.

B. The Court's assessment

1. General principles

53. The Court reiterates that the authorities have an obligation to protect the physical integrity of persons in detention. Where an individual, when taken in police custody, is in good health, but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V with further references).

54. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as lying with the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336, and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

55. Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them. Although the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts. Where allegations are made under Article 3 of the Convention, however, the Court must apply a particularly thorough scrutiny (see, for instance, *Vladimir Romanov v. Russia*, no. 41461/02, § 59, 24 July 2008, and *Matko v. Slovenia*, no. 43393/98, § 100, 2 November 2006, both with a reference – *mutatis mutandis* – to *Ribitsch*, cited above, § 32).

2. Application to the present case

56. The Court will examine the applicant's allegations concerning his alleged ill-treatment on the evening in question on the one hand and those

relating to his solitary confinement and the lack of medical care until 24 May 1994 on the other hand.

(a) Alleged ill-treatment on the evening in question

57. The Court observes that the date of the events is in dispute between the parties. On the basis of the material before it the Court notes that there is indeed some inconsistency as to whether the events occurred on 21 or 22 May 1994. However, the Court does not find any cogent elements which could lead it to depart from the findings of the Independent Administrative Panel of 3 September 1999, according to which the events at issue took place on 21 May 1994 (see paragraph 40 above).

58. The applicant alleged firstly that he had been beaten and kicked by the police officers who transported him out of his cell on the evening in question. The Court observes that the medical evidence does not contain proof of any injuries clearly corresponding to the applicant's allegations. The Independent Administrative Panel did not address the issue directly. In the proceedings before the Independent Administrative Panel the police officers denied the applicant's allegations. For their part, two former cellmates of the applicant claimed that they had heard noises of beating and cries but that they had not been able to see what was going on in the corridor as the door of the cell had already been closed. Moreover, one of them had made a different statement during the criminal investigation of the case, when he had stated that the police officers had not mistreated the applicant. In sum, the Court concludes that it cannot be established beyond reasonable doubt whether the applicant was beaten and kicked by the police officers.

59. The applicant further alleged that he had been stabbed behind the ears with ballpoint pens. The Court observes that the medical report of 26 May 1994 confirms the presence of scabs behind the ears, which would be consistent with the treatment alleged by the applicant. Moreover, the applicant made the allegations three days after the incident, when he received the visit of three persons, a representative of an NGO, a journalist and a friend. All three testified as witnesses before the Independent Administrative Panel that they had seen injuries behind the applicant's ears. In its decision, the Independent Administrative Panel dismissed the allegation, with reference to an expert medical opinion. The Court notes, however, that the medical opinion (see paragraph 36 above) concerned a different question. It found it unlikely that the applicant's eardrum had been injured during his detention and stated further that it was impossible to establish whether the applicant's earaches and decreased auditory function were a consequence of his detention. The Independent Administrative Panel's reference to the expert medical opinion is therefore not conclusive as far as the alleged stabbing with ballpoint pens behind the ears is concerned. Having regard to the medical report of 26 May 1994 and the corresponding

statement of the witnesses, the Court finds that the existence of injuries behind the applicant's ears is established beyond reasonable doubt. In the absence of any explanation of how he came by them other than through the ill-treatment described, the Government have failed to discharge their burden of proving that these injuries did not stem from stabbing with ballpoint pens by the police officers.

60. According to the applicant, the police officers carried him down the stairs in such a manner that his legs and his back dragged along the steps, causing skin abrasions. The Court notes that the medical report of 24 May 1994 describes several skin abrasions in the middle and lower regions of the applicant's back. It notes that one of them, being substantial, was treated with a spray and a bandage. The medical report of 26 May 1994 notes that the bandaged skin abrasion was still moist and required a new bandage, while the other skin abrasions on the applicant's back were already covered with scabs. Moreover, the three persons who had visited the applicant in prison on 24 May 1994 all testified as witnesses before the Independent Administrative Panel that they had seen the skin abrasions on the applicant's back. One of them described two of these abrasions as having been about the size of the palm of a hand. The Independent Administrative Panel found it established that the applicant had been carried in such a way that "his back dragged along the edges of the steps" and that he had suffered "skin irritations" as a result. In the following paragraph, however, it referred to the fact that the applicant had signalled skin abrasions to the prison's paramedic on 24 May 1994 and that he had subsequently been treated by the prison doctor.

61. The Court therefore finds that the injuries on the applicant's back are established beyond reasonable doubt. Moreover, the police officers involved did not deny having carried the applicant in such a manner that his back dragged along the steps. In the absence of any explanation of how the applicant may have sustained the skin abrasions other than as a result of being improperly carried down the stairs, the Court concludes that they stemmed from the treatment described.

62. Turning to the legal assessment of the facts established, the Court has emphasised that in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Ribitsch*, cited above, § 38, and *Selmouni*, cited above, § 99).

63. In that connection, the Court rejects both the Independent Administrative Panel's argument that the police officers had no other possibility than to transport the applicant in the way described as he refused to walk on his own, and the panel's other assertions to the effect that the applicant's recalcitrant behaviour justified "the fact that he was not treated in the most attentive and gentle way." In the Court's view it is for the

respondent State to ensure that prison staff are properly trained to deal even with difficult prisoners without resorting to excessive physical force. It refers in that context to the CPT's report, which also underlined the special need to provide appropriate training to staff assigned to supervise persons detained under aliens legislation (see paragraphs 90-91 of the CPT report, cited at paragraph 46 above).

64. The Court considers that the treatment to which the applicant was subjected, namely the stabbing behind his ears and the manner in which he was carried to the individual cell, such that his back dragged along the edges of the steps, causing skin abrasions of a considerable size, must have caused him physical and mental pain and suffering. In addition, the acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of debasing him and possibly breaking his physical and moral resistance. The Court finds elements which are sufficiently serious for the treatment to which the applicant was subjected to be considered inhuman and degrading (see *Selmouni*, cited above, § 99, with further references). In reaching that conclusion the Court has taken into account the fact that the applicant had been on hunger strike for three weeks at the time of the events and was undisputedly in a physically and mentally weakened state.

65. Consequently, there has been a violation of Article 3 on account of the ill-treatment to which the applicant was subjected in the evening of 21 May 1994.

(b) Detention in solitary confinement and alleged lack of medical care

66. The Court considers that the applicant's complaints about his detention in solitary confinement and the alleged lack of medical care are closely linked and will therefore examine them together.

67. The Court notes at the outset that, in the Convention proceedings, the applicant did not complain about the conditions in the individual cell, an issue which remained in dispute in the domestic proceedings.

68. The Court reiterates that the removal from association with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman or degrading treatment or punishment. In assessing whether such a measure may fall within the ambit of Article 3 in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned (see *Lorsé and Others v. the Netherlands*, no. 52750/99, § 63, 4 February 2003, with further references).

69. According to the findings of the Independent Administrative Panel, the applicant had acted in a disturbing manner on 21 May 1994. It is not contested that his placement in solitary confinement was a disciplinary measure. The applicant was thus placed in an individual cell in the evening of 21 May 1994, and remained there for a week, until 28 May 1994, when

he was released as being unfit for further detention. On the third day of his solitary confinement he received three visitors. Moreover, he was taken to a prison doctor on the third and fifth day of his solitary confinement. In sum, the Court considers that the duration and stringency of the measure are not such as to bring the applicant's solitary confinement within the scope of Article 3.

70. However, the Court attaches weight to one particular element of the present case, namely that the applicant had already been on hunger strike for three weeks when he was placed in solitary confinement. Moreover, it refers to its above findings that the applicant had been injured as a result of the ill-treatment which he suffered during his transport to the individual cell.

71. According to the Court's established case-law, the authorities are under an obligation to protect the health of persons deprived of their liberty. The lack of appropriate medical care may amount to treatment contrary to Article 3 (see *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III).

72. The Court finds it problematic to place in solitary confinement a detainee who is at an advanced stage of a hunger strike and may present an increased risk of losing consciousness, unless appropriate arrangements are made in order to supervise his state of health. In the present case, the Court notes in particular that upon his admission to the individual cell the applicant was not examined by a doctor. The assessment that he had only pretended to be unconscious and that his state of health did not require permanent supervision and thus permitted detention in an individual cell was made by a paramedical officer (see the latter's statement before the Independent Administrative Panel, paragraph 27 above). In addition, it follows from the CPT report (see paragraphs 86-87 of that report, cited at paragraph 46 above) that at the material time the paramedical personnel received only very basic training. It also appears from the same report hat there was no sufficiently developed approach to the treatment of hunger-strikers. In these circumstances the Court is not satisfied by the Independent Administrative Panel's explanation that the applicant was under constant supervision by a “qualified paramedic”, or by the Government's assertion that he, like any other hunger-striker, was observed daily by a paramedic. Moreover, there are no documents to show that the applicant was actually examined by a paramedic on 22 or 23 May 1994.

73. Furthermore, the Court notes that the applicant has consistently claimed that he requested to see a doctor but was refused access to one until 24 May 1994. The fact that the applicant was not examined by a doctor until that date is not disputed by the Government. It was only then that the injuries he had received as a result of his ill-treatment by the police officers were treated. The doctor's written diagnosis (see paragraph 14 above) also shows that his weight was taken and that his blood pressure and blood sugar level were also measured.

74. The fact that the applicant, as a hunger-striker, was placed in solitary confinement without a proper medical examination and was refused access to a doctor until 24 May 1994 must, taken together, have caused him suffering and humiliation going beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI, with further references). In the Court's view the applicant was subjected to degrading treatment.

75. Consequently, there has been a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

77. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage. He argued that the ill-treatment to which he had been subjected had caused him intense physical and mental suffering as well as feelings of anguish and inferiority.

78. The Government asserted that the applicant's claim was excessive.

79. The Court notes that it has found violations of Article 3 in two respects, namely on account of the ill-treatment to which the applicant was subjected on 21 May 1994 and his lack of medical care in solitary confinement until 24 May 1994. Making an assessment on an equitable basis, the Court awards the applicant EUR 10,000 for non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

80. The applicant claimed a total amount of EUR 25,685.29, including value-added tax (VAT), comprising EUR 19,514.17 for costs incurred in the domestic proceedings and EUR 6,171.12 for costs incurred in the Convention proceedings.

81. Regarding the costs of the domestic proceedings, the Government argued that they were excessive. They observed in particular that the bill submitted by the applicant included the costs of his first complaint to the Constitutional Court, made in 1995, although that complaint had been

successful and the associated costs had therefore been reimbursed to him. Moreover, the bill contained an unjustified 10% supplement for the applicant's second complaint to the Constitutional Court.

82. Turning to the costs of the Convention proceedings, the Government submitted that the application was only partly admissible and that consequently only part of the costs claimed should be reimbursed.

83. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred in order to prevent or redress the violation found and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 15,000 in respect of the domestic proceedings and EUR 5,000 in respect of the Convention proceedings. Consequently, the Court awards the applicant EUR 20,000 in respect of costs and expenses, plus any tax that may be chargeable to him.

C. Default interest

84. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 3 of the Convention on account of the ill-treatment to which the applicant was subjected in the evening of 21 May 1994;

2. *Holds* that there has been a violation of Article 3 of the Convention on account of the applicant's lack of medical care while in solitary confinement until 24 May 1994;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President