

KREMZOW v. AUSTRIA

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 12350/86

Friedrich Wilhelm KREMZOW

against

AUSTRIA

REPORT OF THE COMMISSION

(adopted on 20 May 1992)

TABLE OF CONTENTS

	Page
I. INTRODUCTION (paras. 1 - 19) . . . . .	1
A. The application (paras. 2 - 4) . . . . .	1
B. The proceedings (paras. 5 - 14) . . . . .	1
C. The present Report (paras. 15 - 19) . . . . .	2
II. ESTABLISHMENT OF THE FACTS (paras. 20 - 75) . . . . .	4
A. The particular circumstances of the case (paras. 20 - 59) . . . . .	4
1. The institution of criminal proceedings against the applicant (paras. 20 - 24) . . . . .	4
2. The applicant's trial before the Court of Assizes (paras. 25 - 30) . . . . .	4
3. The proceedings before the Supreme Court (paras. 31 - 59) . . . . .	5
a) Remedies taken by the Parties (paras. 31 - 34) . . . . .	5
b) The consultation of the Attorney General's office (paras. 35 - 38) . . . . .	5
c) Additional evidence (para. 39) . . . . .	6
d) Draft decision prepared by the Judge Rapporteur (paras. 40 - 43) . . . . .	6
e) Summons to the Supreme Court's hearing (paras. 44 - 48) . . . . .	7
f) The applicant's request for personal presence at the Supreme Court's hearing	

	KREMZOW v. AUSTRIA	
	(paras. 49 - 53)	8
	g) The Supreme Court's hearing and judgment	
	(paras. 54 - 59)	8
B.	Relevant domestic law	
	(paras. 60 - 75)	10
1.	Plea of nullity	
	(paras. 60 - 66)	10
2.	Appeal against sentence	
	(paras. 67 - 69)	11
3.	Supreme Court's Rules of Procedure	
	(paras. 70 - 75)	12
III.	OPINION OF THE COMMISSION	
	(paras. 76 - 154)	14
A.	Complaints declared admissible	
	(para. 76)	14
B.	Points at issue	
	(para. 77)	14
C.	Personal appearance at the hearing	
	(paras. 78 - 106)	14
1.	Article 6 paras. 1 and 3 (c) of	
	the Convention	
	(paras. 78 - 102)	14
	a) Presence at the hearing of the pleas of	
	nullity	
	(paras. 82 - 89)	15
	b) Presence at the hearing of the appeals	
	against sentence	
	(paras. 90 - 101)	16
	Conclusion (para. 102)	19
2.	Article 14 in conjunction with Article 6	
	of the Convention	
	(paras. 103 - 105)	19
	Conclusion (para. 106)	19
D.	Fairness of the Supreme Court's proceedings	
	(paras. 107 - 135)	19
1.	Preparation of the judgment prior to	
	the Supreme Court's hearing	
	(paras. 107 - 110)	19
	Conclusion (para. 111)	20
2.	Opportunity for the defence to obtain, and	
	to comment on, the Attorney General's	
	position paper	
	(paras. 112 - 121)	20
	Conclusion (para. 122)	22
3.	Other complaints	
	(paras. 123 - 134)	22

KREMZOW v. AUSTRIA

Conclusion (para. 135) . . . . .	24
E. Effective domestic remedies (paras. 136 - 140) . . . . .	25
Conclusion (para. 141) . . . . .	25
F. Detention as a convicted prisoner (paras. 142 - 146) . . . . .	25
Conclusion (para. 147) . . . . .	26
G. Recapitulation (paras. 148 - 154) . . . . .	26
Dissenting opinion of Mr. H. Danelius, joined by MM. C.A. Nørgaard and G. Jörundsson . . . . .	27
Dissenting opinion by MM. S. Trechsel, H. Schermers and A.V. Almeida Ribeiro. . . . .	28
APPENDIX I : HISTORY OF THE PROCEEDINGS BEFORE THE COMMISSION. . . . .	29
APPENDIX II : DECISION AS TO THE ADMISSIBILITY. . . . .	31

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. THE APPLICATION

2. The applicant, an Austrian citizen born in 1938 and former judge, is currently serving a life sentence for murder in Vienna. He is represented before the Commission by Mr. Wilfried Ludwig Weh, a lawyer practising in Bregenz.

3. The application is directed against Austria whose Government are represented by their Agent, Ambassador Helmut Türk, Deputy Secretary General and Legal Counsel of the Federal Ministry of Foreign Affairs.

4. The application, in so far as declared admissible, relates to criminal appeal proceedings before the Austrian Supreme Court in which the applicant's conviction of murder was confirmed and his sentence increased. He complains that he was not allowed to be present in person at the Supreme Court's hearing (Article 6 paras. 1 and 3 (c) in conjunction with Article 14 of the Convention) and that the Supreme Court's proceedings were unfair (Article 6 para. 1) in that its judgment was prepared and communicated to the Attorney General before the hearing and in that he did not have sufficient time to prepare his defence (Article 6 para. 3 (b)). The applicant further alleges violations of Article 5 in conjunction with Article 14, and of Article 13 of the Convention.

B. THE PROCEEDINGS

5. The application was introduced on 1 August and registered on 22 August 1986.

6. On 19 January 1989 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit before 7 April 1989 their observations in writing on its admissibility and merits.

7. Following an extension of this time-limit, the Government submitted their observations on 23 May 1989. The applicant was

KREMZOW v. AUSTRIA

requested to reply thereto before 10 July 1989. At his request, the time-limit was extended and he submitted his observations on 18 August 1989.

8. On 2 April 1990 the Commission decided to invite the parties to submit further observations in writing before 15 June 1990 and also to submit observations orally at a hearing on the admissibility and merits of the case.

9. After both parties had been granted extensions of the above time-limit, the applicant submitted additional observations on 29 June 1990 and the Government on 17 July 1990.

10. The oral hearing took place on 5 September 1990. The Government were represented by their Agent, Mr. Helmut Türk, who was assisted by Mr. Wolf Okresek of the Federal Chancellery and Mr. Gert Felsenstein of the Federal Ministry of Justice. The applicant was represented by his counsel, Mr. Wilfried Ludwig Weh, assisted by Mrs. Eva Weh.

11. On the same day the Commission declared the applicant's complaints relating to the Supreme Court's proceedings admissible while rejecting the remaining complaints.

12. The text of the decision on admissibility was approved by the Commission on 12 October 1990. The parties were invited to submit supplementary observations on the merits before 3 December 1990.

13. The Government submitted such observations on 4 December 1990, and the applicant, after having been granted an extension of the time-limit, on 15 February 1991.

14. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. THE PRESENT REPORT

15. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President  
J. A. FROWEIN  
S. TRECHSEL  
E. BUSUTTIL  
G. JÖRUNDSSON  
A. WEITZEL  
H. G. SCHERMERS  
H. DANELIUS  
Mrs. G. H. THUNE  
Sir Basil HALL  
Mr. C. L. ROZAKIS  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
A. V. ALMEIDA RIBEIRO

16. The text of this Report was adopted on 20 May 1992 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

17. The purpose of the Report, pursuant to Article 31 of the Convention is:

i) to establish the facts, and

KREMZOW v. AUSTRIA

ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

18. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

19. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. THE PARTICULAR CIRCUMSTANCES OF THE CASE

1. The institution of the criminal proceedings against the applicant

20. The applicant was a judge in the Austrian courts from 1964 to 1978 when he retired for reasons of health. He then worked as consultant of various practising lawyers in the area of Vienna, including Mr. P.

21. On 16 December 1982 the applicant voluntarily presented himself before the Regional Court (Kreisgericht) of Korneuburg and confessed to having killed P.

22. Criminal proceedings were instituted and the applicant has remained in detention ever since.

23. Immediately following his arrest, the applicant was taken into psychiatric treatment and observation in view of a danger of his committing suicide and of his overall mental condition. After a period in the psychiatric hospital of Vienna he was detained in the Mittersteig special institution for mentally deranged offenders.

24. On 30 November 1983 the public prosecutor filed an indictment charging the applicant with murder under Section 75 of the Penal Code (Strafgesetzbuch) and with illegal possession of a firearm under Section 36 of the Firearms Act (Waffengesetz) as well as a number of further offences. It was alleged that dire financial straits had led the applicant to defraud P. and that the homicide had been motivated by a desire to cover up the fraud. The prosecution requested that the applicant be committed to an institution for mentally abnormal criminals (Anstalt für geistig abnorme Rechtsbrecher) under Section 21 of the Penal Code.

2. The applicant's trial before the Court of Assizes

25. On 13 June 1984 the applicant's trial (Hauptverhandlung) commenced before a Court of Assizes of the Regional Court of Korneuburg sitting with a jury (Geschworenengericht). The applicant was represented by an official defence counsel (Pflichtverteidiger), the court having refused the applicant's request based on Article 6 para. 3 (c) of the Convention to defend himself in person.

26. At the first session of the trial the applicant retracted his confessions which he said were the product of a psychotic aberration. He now asserted that P. had committed suicide in his presence. The trial was discontinued and referred back to the investigating judge with a view to clarifying the facts as now alleged by the applicant.

27. Following supplementary investigations by the investigating judge, a new trial began on 5 November 1984 before the Court of Assizes.

28. The applicant states that he and his counsel disagreed on trial

KREMZOW v. AUSTRIA

strategy and that no relation of confidence existed between them.

29. On 18 December 1984 the jury found the applicant guilty of murder and unlawful possession of a firearm. The charges of fraud had earlier been dropped by the prosecution. The jury found that the applicant did not lack criminal responsibility and, in their handwritten statement of reasons (Niederschrift der Geschworenen), expressed the opinion that "the motive remains unknown, too many possibilities".

30. The bench, sitting with the jury, set the applicant's sentence at twenty years' imprisonment, the maximum determinate sentence possible under Austrian law in a case of murder. It ordered him to be committed to an institution for mentally abnormal criminals.

3. The proceedings before the Supreme Court

a) Remedies taken by the Parties

31. The applicant filed a plea of nullity (Nichtigkeitsbeschwerde) with the Supreme Court (Oberster Gerichtshof) complaining that he had been denied the right to defend himself and that the trial had not been fair.

32. The applicant's mother and wife filed a further plea of nullity and an appeal (Berufung) with the Supreme Court complaining of the length of the sentence and the commitment of the applicant to an institution for mentally abnormal criminals.

33. The public prosecutor appealed against the sentence and asked that a life sentence be imposed because of the "cold blooded planning and particular insidiousness of the applicant's offence" ("kaltblütige Planung und besondere Heimtücke der Tat"). A further appeal was filed by the private party, Mr. R. P., the son of Mr. P.

34. On 26 March 1985 the applicant, in observations in reply (Gegenausführung) to the prosecution's appeal, claimed that the prosecution's above new assertion was incompatible with the psychiatric expertise according to which his mental capacity to act with insight had been considerably reduced.

b) The consultation of the Attorney General's office

35. On 2 May 1985 the Supreme Court informed the Attorney General's office (Generalprokuratur) of the remedies taken in the applicant's case and transmitted the file. According to the transmission note the file included the following documents: the judgment of the Court of Assizes, the defendant's plea of nullity, the defendant's mother's and wife's plea of nullity and appeal, the public prosecutor's appeal and the private party's appeal. The note mentioned the Judge Rapporteur's name ("BE: Dr. Steininger") and was signed by him.

36. On 3 May 1985 the Attorney General's office acknowledged receipt of the file including appendices by a stamp on the transmission note which was signed by an agent of the Attorney General's office.

37. The Attorney General's position paper ("croquis") dated 24 July 1985 was received by the Supreme Court on 2 August 1985. It dealt in detail, on 49 pages, with the various grounds of nullity invoked by the applicant and his mother and wife in their respective pleas of nullity. The Attorney General expressed the view that the Supreme Court should hold a public hearing and reject these pleas. He did not make any submissions regarding the various appeals against the sentence.

38. On 18 September 1985 the applicant, on 2 October 1985 his official defence counsel applied for the communication of the Attorney General's position paper. However, these requests were not acted upon. The position paper was served on counsel only on 9 June 1986 (see

para. 46 below).

c) Additional evidence

39. On 31 December 1985 the private party Mr. R. P. submitted a number of missing diary-sheets of the victim P. to the Supreme Court. During the trial the applicant had repeatedly requested the production of missing parts of Mr. P.'s diary as evidence that P. had intended to commit suicide. Subsequently he had also introduced a civil action against Mr. R. P. to produce those documents. After having been informed in connection with the civil case that parts of the diary had been submitted to the Supreme Court, the applicant on 22 January 1986 requested the Regional Court of Korneuburg to order a search of the home of Mr. R. P. whom he suspected of withholding further relevant documents. This request was rejected, but copies of the diary-sheets submitted to the Supreme Court were served on the applicant through the Regional Court.

d) Draft decision prepared by the Judge Rapporteur

40. Prior to the fixing of the date of the Supreme Court's hearing, the Judge Rapporteur prepared a draft judgment which was included in the Supreme Court's file as Document No. 19. The draft was apparently revised. Parts were written on different typewriters and a number of pages added or replaced. On this draft the Rapporteur generally followed the line adopted in the Attorney General's position paper and proposed to reject the various pleas of nullity. The draft also dealt with the question of the diary-sheets.

41. Several years later (in an official statement submitted on 19 June 1989, in connection with disciplinary proceedings against the applicant) the Judge Rapporteur observed:

(German)

"Daß die Stellungnahme der Generalprokuratur zu den Nichtigkeitsbeschwerden des Angeklagten und der übrigen Rechtsmittelwerber keineswegs in toto der hg Entscheidung über diese Rechtsmittel zugrunde gelegt wurde, sondern von mir als Berichterstatter ein umfangreicher eigenständiger Entscheidungsentwurf ausgearbeitet wurde, ergibt sich aus meinem Urteilsantrag ... . Soweit der Antragsteller ... eine Äußerung des damaligen Senatsvorsitzenden ins Treffen führt, so hat sich diese (...) offensichtlich eben darauf bezogen, daß ein eigenständiger umfassender Entscheidungsentwurf vom Berichterstatter verfaßt wird, zumal darüber mehrfach in den Sitzungen des Senates diskutiert wurde."

(Translation)

"My proposal for the judgment shows that the observations of the Attorney General's office on the pleas of nullity brought by the accused and the other appellants were by no means used in their entirety as the basis for the Supreme Court's decision on these remedies, but that in my capacity as Judge Rapporteur I prepared an extensive, original draft judgment... . In so far as the applicant quotes comments by the then President of the Chamber, ..., they obviously refer (...) to the very fact that an original, extensive draft judgment is prepared by the Judge Rapporteur, particularly since the matter was discussed more than once by the Chamber."

42. The applicant observes that there is no trace of such discussions in the Supreme Court's file, as would have been required under Section 23 of the Code of Criminal Procedure (Strafprozessordnung) and Section 65 para. 2 of the Supreme Court's Rules of Procedure (Geschäftsordnung). He further concludes from the Judge Rapporteur's above statement that there were deliberations on the merits of his case

KREMZOW v. AUSTRIA

in the Supreme Court already before the public hearing.

43. The Government do not deny that preliminary deliberations (Vorberatungen) took place between the members of the competent Supreme Court Chamber prior to the hearing. It appears that statements by other members of the Chamber concerning the draft decision were taken to the file as Document No. 22, i.e. in the period between the summons and the public hearing.

e) Summons to the Supreme Court's hearing

44. On 4 June 1986 the Supreme Court set the hearing of the pleas of nullity and the appeals for 2 July 1986. The summons was sent to the parties on 9 June 1986. The Attorney General's office acknowledged receipt on 10 June 1986, the applicant received it on 17 June 1986.

45. The notification of the date of the hearing provided that at the hearing of the pleas of nullity the applicant, being incarcerated, could only appear through his official defence counsel according to Sections 286 para. 2 and 344 of the Code of Criminal Procedure. At the hearing of the appeals he would not be brought to the court as the conditions of Section 296 para. 3 of the Code of Criminal Procedure were not met.

46. The notification also mentioned the documents to be transmitted to the various parties. It was ordered that the Attorney General's position paper should be sent to the applicant's official defence counsel and to the lawyer of his wife and mother. The Attorney General's office was requested to submit a new extract from the applicant's criminal record.

47. The applicant claims that the whole of the Supreme Court's file, including the draft decision prepared by the Judge Rapporteur, was transmitted to the Attorney General's office together with the summons. The relevant passage read: "Der Generalprokurator zur Kenntnis zu Gs 948/85" ("For the attention of the Attorney General's office under file No. Gs 948/85"). In the subsequent disciplinary proceedings the corresponding part of the summons of 19 October 1988 read: "Der Generalprokurator zu Gd 58/88 zur Kenntnis (ohne Entwurf des BE [= Berichterstatters])" ("For the attention of the Attorney General's office under file No. Gd 58/88 (without draft decision of the Judge Rapporteur)").

48. The Government submit that only the summons was sent to the General Attorney's office and that the Supreme Court's file, and in particular the draft decision prepared by the Judge Rapporteur, was not simultaneously transmitted to that office. They refer to the regular practice of the Supreme Court and Section 60 para. 3 of the latter's Rules of Procedure (see para. 72 below).

f) The applicant's request for personal presence at the Supreme Court's hearing

49. On 19 June 1986 the applicant petitioned the Supreme Court to be allowed to attend the hearing of the pleas of nullity in person, a right accorded to defendants who are not incarcerated. He invoked Articles 6 and 14 of the Convention and observed that in 1986 alone he had been granted permission thirty times to appear personally before various courts and administrative authorities in Vienna. He relied on his right to defend himself in person, as guaranteed in Article 6 para. 3 (c), and observed that he had consistently objected to his being represented by official defence counsel and that under Section 296 para. 3 of the Code of Criminal Procedure detained defendants were entitled to be brought to a hearing on appeal against sentence.

50. At the same time the applicant observed that no decision had so far been taken on his request to get a copy of the Attorney General's

KREZOW v. AUSTRIA

"croquis" and that a procedure whereby the Attorney General, but not the defence, was informed of the views of the members of the Supreme Court on the various remedies would violate the principle of equality of arms stipulated in Article 6 of the Convention.

51. On 25 June 1986 the Supreme Court rejected the applicant's petition to be brought to the hearing on the pleas of nullity and his motion to discover the "croquis" of the Attorney General and to inspect the case-file. The Supreme Court noted that the applicant had not applied to be brought to the hearing of the appeals. It had no doubts concerning the constitutionality and conformity with Article 6 of the Convention of Section 286 para. 2 of the Code of Criminal Procedure which stipulates that an accused in detention has no right to appear personally at the hearing of a plea of nullity, but only a right to be represented by counsel. The Supreme Court mentioned that the proceedings concerning the appeal and those concerning pleas of nullity differed and therefore could not be compared.

52. In the same decision the Supreme Court stated that the applicant personally was not entitled to receive a copy of the Attorney General's "croquis". Article 6 of the Convention had been observed because a copy of this document had been made available to his official defence counsel.

53. The applicant's defence counsel was notified of this decision at the hearing on 2 July 1986.

g) The Supreme Court's hearing and judgment

54. The Supreme Court's hearing of the pleas of nullity and appeals was held on 2 July 1986 in the absence of the applicant, the latter being represented by his official defence counsel.

55. The hearing was opened at 9h and closed at 11h25. The court heard submissions of the applicant's official defence counsel, the lawyer of his wife and mother, the lawyer of the private party, and a representative of the Attorney General's office. According to affidavits submitted by the applicant the subsequent deliberations of the court lasted about half an hour, the reading of the judgment about five minutes.

56. By this judgment, the Supreme Court rejected the applicant's and his relatives' pleas of nullity. It allowed both the public prosecutor's appeal and in part the appeal of the applicant's relatives, sentencing the applicant to life imprisonment and nullifying the commitment to an institution for mentally abnormal criminals, the applicant thus being required to serve the life sentence in prison.

57. The Supreme Court evaluated the aggravating and mitigating circumstances discussed by the trial court and found that it had incorrectly refused to recognise the applicant's self-surrender as a mitigating circumstance under Section 34 para. 16 of the Penal Code. It then continued:

(German)

"Bei der Ausmessung der verwirkten Strafe hat das Erstgericht die besondere Schwere der personalen Täterschuld des Angeklagten in Verbindung mit dem objektiven Gewicht der verschuldeten Rechtsgutverletzung, wie sie der (vorsätzlichen) Tötung eines Menschen unter den gegebenen Umständen innewohnt, zu wenig berücksichtigt. Manifestiert sich doch in der heimtückischen, nachgeradezu einer 'Liquidiierung' des ahnungslosen und dem Angeklagten vertrauenden Mordopfers gleichkommenden Tatbegehung, um die Aufdeckung eigener finanzieller Verfehlungen des Angeklagten zu verhindern, mithin aus verwerflichen Motiven, eine derart negative Einstellung des Rechtsbrechers (im Sinne einer niedrigen Gesinnung) und damit ein solcher Grad an Schuld, daß

KREMZOW v. AUSTRIA

die Verhängung einer zeitlichen Freiheitsstrafe ... nach Lage des Falles nicht (mehr) gerechtfertigt ist. Daß der Angeklagte zur Tatzeit sich in einem abnormen Geisteszustand befand, unter dessen Einfluß er die Mordtat beging, fällt demgegenüber nicht so sehr ins Gewicht und vermag daher die übrigen, den Angeklagten belastenden Komponenten seiner Strafzumessungsschuld nicht aufzuwiegen. Die schuldangemessene Reaktion auf das Tatverhalten des Angeklagten kann daher nur in der Verhängung einer lebenslangen Freiheitsstrafe bestehen."

(Translation)

"The court of first instance failed, in assessing the sentence, to make adequate allowance for the special gravity of the accused's personal guilt and the objective weight of the offence involved in (intentionally) killing a human being in the particular circumstances of this case. After all, this treacherous crime, amounting in fact to 'liquidation' of the unsuspecting victim, who fully trusted the accused, and committed with the reprehensible intention of forestalling revelation of his own financial misdeeds, reflects such a negative attitude (i.e. such a debased outlook) on the perpetrator's part, and such a degree of guilt, that the imposition of a limited prison sentence ... no longer seems justified in the circumstances of the case. The fact that the accused committed the crime in an abnormal mental state and under its influence, is in itself less important, and cannot counter-balance the factors which tell against him in determining the sentence. The only sentence appropriate to the crime and to the accused's guilt is thus life imprisonment."

58. The original (Urschrift) of the Supreme Court's judgment shows that the rejection of the pleas of nullity was literally based on the Judge Rapporteur's draft decision prepared before the Supreme Court's hearing. The applicant infers from this that the submissions of the defence at that hearing were not at all taken into account. According to him the judgment was a replica of the Attorney General's position paper.

59. It appears that the applicant is still detained in the Mittersteig special institution for mentally deranged offenders.

B. RELEVANT DOMESTIC LAW

1. Plea of nullity

60. First instance judgments rendered by Chambers of a Regional Court can be challenged by a plea of nullity (Nichtigkeitsbeschwerde) to the Supreme Court on specific grounds enumerated in the Code of Criminal Procedure (Section 281 para. 1 and, as regards Assize Court judgments, Section 345 para. 1). The grounds in question include procedural defects and misapplication of the substantive criminal law in the finding of guilt and the determination of the sentence. In principle they do not relate to the evaluation of the evidence by the first instance court and new facts and evidence cannot be taken into account. The Supreme Court is bound by the facts and evidence established in the first instance judgment unless it finds a nullity due to a defect in the reasoning such as absence of reasons, insufficient reasons or reasons which are contradicted by the contents of the file.

61. The nullity proceedings against Assize Court judgments differ from other proceedings in that the latter grounds of nullity are not available concerning the finding of guilt since the jury's verdict (Wahrspruch) is not reasoned. The judgment only contains the questions put to the jury and their answers ("yes" or "no"). Summary reasons are set out in a memorandum (Niederschrift der Geschworenen) annexed to the transcript of the trial which as such cannot be reviewed by the Supreme Court.

KREMZOW v. AUSTRIA

62. The Supreme Court's task in such cases is mainly to control the acts of the bench and the Presiding Judge of the Assize Court (in particular whether the conduct of the trial has complied with fundamental procedural principles, whether the right questions have been put and the right directions been given to the jury). In so far as the jury is concerned, the Supreme Court may only verify whether it has not given unclear, incomplete or contradictory answers to the questions. As in other cases the Supreme Court also supervises the correct application of the criminal law, but in doing so is bound by the jury's findings as to the facts.

63. As regards the procedure, the general provisions on remedies in criminal law are applicable. The time-limit for remedies and observations in reply thereto is four weeks from receipt of the judgment if the trial has lasted more than five days (Section 285 paras. 1 and 3 of the Code of Criminal Procedure).

64. In certain cases the Supreme Court may reject a plea of nullity without a public hearing (cf. Section 285 c of the Code of Criminal Procedure). In all other cases there will be a public hearing which may also be combined with a public hearing on appeals against sentence (see below).

65. Concerning the hearing on pleas of nullity Section 286 of the Code of Criminal Procedure provides:

(German)

- "1. Wird ein Gerichtstag zur öffentlichen Verhandlung der Sache anberaumt, so ist die Vorladung des Angeklagten ... vorzunehmen, ...
2. Ist der Angeklagte verhaftet, so wird er vom Gerichtstage mit dem Beisatz in Kenntnis gesetzt, daß er nur durch einen Verteidiger erscheinen könne."

(Translation)

- "1. When the date of the public hearing is being fixed, the accused ... shall be summoned ...
2. If the accused is under arrest, the notice of the hearing given to him shall mention that he may only appear through counsel."

66. However, if the hearing is a combined one on pleas of nullity and appeals against sentence, an accused who is personally present for the latter purpose may also exercise his rights concerning the pleas of nullity. In particular he will be given the last word.

2. Appeal against sentence

67. While legal defects of the sentencing procedure may also form the subject of a plea of nullity, the sentence as such can only be challenged by way of an appeal against sentence (Berufung). It may concern both points of law (in particular whether mitigating or aggravating circumstances have correctly been taken into account) and considerations relating to the assessment of the sentence. In this respect the appellate court is bound by the legal qualification of the offence in the finding of guilt and it must limit its examination to the grounds invoked in the appeal (cf. Section 295 para. 1 of the Code of Criminal Procedure).

68. As regards the procedure, the same time-limits apply for the filing of appeals as for the filing of pleas of nullity (cf. para. 63 above). In certain cases of formal defects the appeal may be rejected by the Supreme Court without an oral hearing (cf. Section 296 para. 2 of the Code of Criminal Procedure), however where the appeal is

KREMZOW v. AUSTRIA

examined as to its substance a public hearing must be held.

69. Concerning the personal appearance of the accused at such hearings, Section 296 para. 3, second sentence of the Code of Criminal Procedure provided at the relevant time:

(German)

"Für die Anberaumung und Durchführung des Gerichtstages gelten die Bestimmungen der §§ 286 und 287 dem Sinne nach mit der Maßgabe, daß der nicht verhaftete Angeklagte stets vorzuladen und auch die Vorführung des verhafteten Angeklagten zu veranlassen ist, wenn er dies in seiner Berufung oder Gegenausführung beantragt hat oder die Vorführung sonst im Interesse der Rechtspflege geboten erscheint."

(Translation)

"The provisions of Sections 286 and 287 are applicable, mutatis mutandis, to the fixing of the date and the holding of the public hearing subject to the proviso that an accused who is not detained shall always be summoned and that an accused who is detained shall also be brought before the court if he has made a request to this effect in his appeal or counter-statement or otherwise if his personal presence appears necessary in the interest of justice."

3. Supreme Court's Rules of Procedure

70. The Supreme Court's internal procedure is regulated in the Supreme Court Act (OGH-Gesetz) and in the Supreme Court's Rules of Procedure (Geschäftsordnung) adopted as an internal instrument (Verwaltungsverordnung) according to Section 22 of this Act. The Rules of Procedure have not been published.

71. According to the Supreme Court Act the Supreme Court sits in chambers composed of five members, one of them acting as Presiding Judge, one of them as Judge Rapporteur (Sections 5 and 6, paras. 1 and 2). They are determined by the annual assignment of functions (Section 13 para. 1). Section 20, last sentence, provides that the name of the Judge Rapporteur shall not be disclosed to the parties.

72. Section 60 of the Supreme Court's Rules of Procedure reads as follows:

(German)

"(2) ... ist ... der Akt ... dem nach der Geschäftsverteilung bestimmten Berichterstatter vorzulegen.

(3) Ist der Akt in der Folge der Generalprokurator zur Äußerung oder Antragstellung oder über ihr Ersuchen vor Erledigung der Sache zur Einsicht zuzuleiten, sind Aktenstücke, aus denen auf den Inhalt der vom Obersten Gerichtshof zu fällenden Entscheidung oder den Gang der Beratung geschlossen werden könnte (Erledigungsentwurf, Äußerungen von Senatsmitgliedern udgl.) zurückzuhalten, soweit nicht eine gegenteilige richterliche Anordnung vorliegt.

(4) Nach Rücklangen des Aktes von der Generalprokurator übermittelt der Berichterstatter mit dem Erledigungsentwurf die Akten dem Senatsvorsitzenden zur weiteren Veranlassung.

(6) Bei Anordnung eines Gerichtstages ist der Generalprokurator nur das Ausschreibungsformular zur Kenntnismahme des Termines zu übermitteln. Bei dieser Gelegenheit findet eine Aktenübersendung nur über richterliche Anordnung statt.

## KREMZOW v. AUSTRIA

(7) Soweit die Generalprokurator ausgearbeitete Stellungnahmen abgegeben hat, sind Gleichschriften hiervon spätestens anlässlich der Anberaumung des Gerichtstages den anderen am Verfahren über die Nichtigkeitsbeschwerde beteiligten Parteien zuzustellen, soweit nicht eine gegenteilige richterliche Anordnung vorliegt."

(Translation)

"(2) ... the file has to be submitted to the Judge Rapporteur competent according to the assignment of cases.

(3) If the file is subsequently transmitted to the Attorney General's office either for comments or motions or at their request for inspection before a decision, all parts of the file must be withheld from which conclusions might be drawn as to the contents of the decision to be issued by the Supreme Court or as to the court's deliberations (draft decision of the Judge Rapporteur, comments by members of the Chamber or similar notes), unless there is a judicial order to the contrary.

(4) When the Attorney General's office has returned the file the Judge Rapporteur transmits it together with his draft decision to the Presiding Judge for further action.

(6) When a public hearing is fixed only the summons form is sent to the Attorney General's office for information. On this occasion the file is being transmitted only if there is a judicial order to this effect.

(7) If the Attorney General has submitted a position paper, copies thereof have to be served on the other parties to the nullity proceedings, at the latest when they are notified of the public hearing, unless there is a judicial order to the contrary."

73. According to Section 62 para. 1 it is the Judge Rapporteur who applies for the fixing of the date of the public hearing.

74. Section 65 para. 2 provides that a record shall be prepared concerning every oral deliberation and vote. This record can be kept confidential in cases provided by law.

75. After the chamber's vote on the decision either the Judge Rapporteur or that member of the chamber whose draft was adopted has to draw up the reasoning of the Supreme Court's decision (Section 65 para. 4). The Presiding Judge or his substitute, but not the Judge Rapporteur, must approve the text before it is sent out (Section 65 para. 8).

### III. OPINION OF THE COMMISSION

#### A. COMPLAINTS DECLARED ADMISSIBLE

76. The Commission has declared admissible the applicant's complaints that, in criminal appeal proceedings before the Supreme Court, he was not allowed to be present in person at the hearing; that the proceedings were unfair in that the judgment was prepared and communicated to the Attorney General before the hearing and that he was placed at a disadvantage in comparison to the Attorney General; that he did not have sufficient time to prepare his defence; that the Supreme Court's power of review was too narrow; and that he had been unlawfully sentenced to life imprisonment.

#### B. POINTS AT ISSUE

77. The Commission must accordingly examine:

- whether there has been a violation of Article 6 paras. 1 and

KREMZOW v. AUSTRIA

3 (c) (Art. 6-1, 6-3-c) of the Convention in that the applicant was not allowed to be personally present at the Supreme Court's hearing;

- whether there has been a violation of Article 14 in conjunction with Article 6 (Art. 14+6) of the Convention in that the applicant was treated differently from an accused at liberty with regard to personal appearance at the hearing;
- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that the Supreme Court's judgment was prepared and discussed in court prior to the hearing of the applicant's case;
- whether there has been a violation of Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention in that the applicant was not given sufficient opportunities to obtain, and comment on, the Attorney General's position paper;
- whether there has been a violation of Article 6 (Art. 6) of the Convention in other respects concerning the fairness of the Supreme Court's proceedings;
- whether there has been a violation of Article 13 (Art. 13) of the Convention as regards the scope of the Supreme Court's powers of review;
- whether there has been a violation of Article 5 in conjunction with Article 14 (Art. 5+14) of the Convention, as regards the applicant's sentence.

C. PERSONAL APPEARANCE AT THE HEARING

1. Article 6 paras. 1 and 3 (c) of the Convention

78. The first sentence of Article 6 para. 1 (Art. 6-1) of the Convention reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

79. Article 6 para. 3 (c) (Art. 6-3-c) reads as follows:

"Everyone charged with a criminal offence has the following minimum rights:

...  
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

80. The applicant complains under these provisions that he was not allowed to be present and to defend himself in person at the Supreme Court's hearing on 2 July 1986.

81. The Commission recalls that Article 6 (Art. 6) is applicable to proceedings in second instance (cf. Eur. Court H.R., Ekbatani judgment of 26 May 1988, Series A no. 134, p. 12, para. 24; Borgers judgment of 30 October 1991, Series A no. 214-B). In the present case the hearing before the Supreme Court concerned various pleas of nullity and appeals against sentence. Austrian law distinguishes between these two categories of remedies as regards the defendant's right to be present.

a) Presence at the hearing of the pleas of nullity

82. The applicant claims that he should have been allowed to be

KREMZOW v. AUSTRIA

present at the hearing of the pleas of nullity in order to ensure his right to defend himself in person, which is guaranteed by Article 6 para. 3 (c) (Art. 6-3-c) of the Convention. His presence would have been all the more necessary as in his submission the Supreme Court considered new evidence (diary-sheets and cheques). In these circumstances it would have been required, under Article 6 para. 1 (Art. 6-1), to allow him to comment on this evidence.

83. The Government deny that the Supreme Court considered any new evidence. In their submission the hearing of the pleas of nullity was legally limited to the examination of points of law. The Convention does not require the personal presence of the accused in criminal appeal proceedings which concern only questions of law. Section 286 of the Code of Criminal Procedure according to which an accused who is detained cannot personally appear at the hearing of pleas of nullity therefore does not infringe Article 6 (Art. 6). The rights of defence are sufficiently protected by representation through counsel which constitutes a legal requirement in these proceedings.

84. The Commission notes that the applicant's exclusion from the hearing of the pleas of nullity was based on Section 286 of the Code of Criminal Procedure. As the hearing was combined with the hearing of the appeals against sentence, the applicant could have been present only if he had been admitted for the appeal hearing. In that case he could also have been heard on issues of nullity.

85. In the Helmers judgment of 29 October 1991 (Series A no. 212-A, para. 36) the European Court of Human Rights stated inter alia that "... even where a court of appeal has jurisdiction to review the case both as to facts and as to law, the Court cannot find that Article 6 (Art. 6) always requires a right to a public hearing irrespective of the nature of the issues to be decided ... . Provided a public hearing has been held at first instance, the absence of such a hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue. Thus ... proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 (Art. 6), although the appellant was not given an opportunity of being heard in person by the appeal or cassation court".

86. The above considerations concerned a case in which no public appeal hearing was held at all, while in the present case a hearing was in fact held in the presence of the applicant's counsel. The Commission agrees with the Government that in these circumstances the personal presence of the applicant at the hearing of the plea of nullity was not required in so far as it concerned only points of law.

87. However, the examination of a plea of nullity may also involve facts and evidence of such a nature that they require a personal hearing of the accused. In this respect the Court has held in the Kamasinski judgment of 19 December 1989 (Series A no. 168, p. 43, para. 102) that: "It is an inherent part of a 'fair hearing' in criminal proceedings as guaranteed by Article 6 para. 1 (Art. 6-1) that the defendant should be given an opportunity to comment on evidence obtained in regard to disputed facts even if the facts relate to a point of procedure rather than the alleged offence as such". In that case the Court found a violation of Article 6 para. 1 (Art. 6-1) because the applicant had not been given an opportunity to comment on evidence obtained by the Supreme Court by virtue of Section 285 f of the Austrian Code of Criminal Procedure in relation to a plea of nullity.

88. The applicant alleges that Section 285 f was also applied in the present case in that the Supreme Court inspected cheques and certain parts of the victim's diary. The Commission finds no indication that during the examination of his pleas of nullity any order was made by the Supreme Court under this Section. That cheques were examined by the Supreme Court is contested by the Government and the Commission

KREMZOW v. AUSTRIA

considers that the applicant has not sufficiently substantiated his allegations in this respect. The diary-sheets were transmitted to the applicant before the Supreme Court's hearing and he could submit observations. In view of the nature of the evidence the Commission finds it doubtful whether Article 6 (Art. 6) required the applicant to be allowed to do so orally in person.

89. However, in view of its conclusions with regard to the examination of the appeals against sentence (see item b) below), the Commission does not find it necessary to express an opinion on whether the exclusion of the applicant from personal appearance at the examination of the pleas of nullity amounted to a violation of Article 6 (Art. 6) of the Convention.

b) Presence at the hearing of the appeals against sentence

90. The applicant claims that, in his application to be brought to the Supreme Court's hearing of the pleas of nullity, he also referred to the appeals from sentence. In any event, for the hearing of those appeals the personal appearance of the accused could also be ordered ex officio if that appeared necessary in the interest of justice, and in the present case the interest of justice required his personal presence.

91. The hearing concerned inter alia the request by the prosecution to raise his sentence from twenty years' imprisonment to a life sentence. In this context it was necessary for the Supreme Court to assess his personality. The reasons of the Supreme Court's judgment show that it made assumptions concerning the subjective elements of the offence which were not covered by the findings the jury made in the first instance proceedings. Thus the Supreme Court assumed as the applicant's motive an intention to cover up financial offences, and it also found a particularly base state of mind.

92. The Government submit that the personal presence of the accused was not required because only questions of law were at issue also as regards the hearing of the appeals from sentence. No new facts were established in this context by the Supreme Court and no new assessment of the applicant's personality was made. The reasons on which the Supreme Court relied were all taken from the earlier file.

93. The Government point out that the applicant would have had a right to be brought before the Supreme Court if he had made an application to this effect. This was expressly provided for by law, as the applicant having formerly been a judge must have known. His rights under the Convention were respected by providing for this legal possibility which he did not use. In this situation he could not invoke the additional discretionary power given to the Supreme Court and complain that it was not applied in his favour. In any event it was not required in the interest of justice to bring the applicant before the Supreme Court for the hearing of the appeals.

94. The Commission notes that in the Andersson and Fejde judgments of 29 October 1991 (Series A, no. 212-B, para. 29; no. 212-C, para. 33) the European Court of Human Rights considered that the holding of a public appeal hearing in the presence of the accused was not necessary unless the matter at stake for the applicant was of particular seriousness and if the case only concerned a minor offence. In the Kamasinski judgment (loc. cit., p. 45, para. 107) the Court further considered it relevant for the necessity of personal presence of the accused at an appeal hearing whether or not a severer sentence than that passed at first instance could be imposed.

95. The present case concerned a serious crime of which the applicant had been found guilty and the Supreme Court was inter alia called upon to examine an appeal of the prosecution seeking an increase of the sentence from twenty years' imprisonment to a life sentence. The Supreme Court furthermore had to decide the question whether the

KREMZOW v. AUSTRIA

sentence was to be served in a normal prison or in a special institution for mentally deranged offenders. These matters were particularly serious for the applicant and also necessarily involved an assessment of his character. In the Commission's opinion a decision on these questions could not be taken without hearing the applicant in person.

96. A further element indicating the necessity to allow the applicant's personal presence lies in the Supreme Court's findings concerning the motive for the crime, the manner in which it was committed, and the applicant's state of mind at the relevant time. There is no indication that these findings were covered by the results of the first instance procedure. The jury's findings concerning the applicant's guilt were not reasoned and the only reasons given in the judgment concerned the considerations for meting out the sentence. They did not contain statements as those made by the Supreme Court. The jury's memorandum only stated that the motives of the crime could not be clarified as there were too many possibilities. The Supreme Court's reference to an intention by the applicant to cover up financial offences is also surprising since the original charge concerning financial offences was dropped and the Court of Assizes' judgment did not contain any findings in this respect.

97. By their nature the new facts established by the Supreme Court concerned the applicant's subjective attitude at the time of the offence and therefore required to be discussed with him personally in order to ensure him a "fair trial" and his right "to defend himself in person".

98. It is true that, until the submission of his counter-statement to the prosecution's appeal, the applicant had a legal right to request his personal appearance at the Supreme Court's hearing of the appeals and that he did not make use of this right. The reference in passing to the fact that the Supreme Court's hearing also concerned the appeals against sentence, which he made in his request to attend the hearing of the pleas of nullity, was not sufficient under Austrian law to be regarded as a request for permission to appear at the hearing of the appeals. As a former judge, who was furthermore represented by an official defence counsel, the applicant must have been fully aware of the legal situation in this respect.

99. However, the situation under Austrian law is not necessarily decisive concerning the question whether there has been a valid waiver of Convention rights. The European Court of Human Rights has repeatedly held that, in so far as such a waiver is permissible, it must be established in an unequivocal manner (cf. *inter alia*, Deweer judgment of 27 February 1980, Series A no. 35; Colozza judgment of 12 February 1985, Series A no. 89; Oberschlick judgment of 23 May 1991, Series A no. 204, p. 23 para. 51; and Pfeifer and Plankl judgment of 25 February 1992, Series A no. 227, para. 37, where the Court also stated that a waiver requires minimum guarantees commensurate to its importance). In the present case the applicant expressly referred to the problem of his presence at the hearing of the appeals when requesting to be brought to the hearing of the pleas of nullity. It therefore cannot be said that he unequivocally waived his right to be present at the hearing of the appeals, in particular as the time-limit for making a request in this respect had already expired.

100. The Commission must therefore examine the Government's argument according to which it was sufficient for safeguarding the applicant's rights of defence in the present case that he had the legal possibility to request, at an early stage of the Supreme Court's proceedings, his personal appearance.

101. The Supreme Court, when fixing the date of the public hearing in 1986, was fully aware of the factual elements which could be relevant for its decision and in particular of the probability that the sentence would be increased. At this time the applicant no longer had a right

#### KREMZOW v. AUSTRIA

to request his attendance. In this situation the Supreme Court exercised its discretionary power in the sense that the applicant should be excluded from the hearing of the appeals because his presence was not required by the interest of justice. It thereby adopted an approach which in the Commission's opinion is in conflict with the very concept of a "fair hearing" and the right of the accused "to defend himself in person". The fact that the applicant was not allowed to be present at the Supreme Court's hearing of the appeals was, therefore, not in conformity with the applicant's right to a fair trial including the right to defend himself.

#### Conclusion

102. The Commission concludes, by 11 votes to 3, that there has been a violation of Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) of the Convention in that the applicant was not allowed to be personally present at the Supreme Court's hearing.

2. Article 14 in conjunction with Article 6 (Art. 14+6) of the Convention

103. Article 14 (Art. 14) of the Convention reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

104. The applicant alleges a violation of this provision in conjunction with Article 6 (Art. 6) in that, being in custody, he was not allowed to be personally present at the Supreme Court's hearing while an accused at liberty would have had a legal right to be present. The applicant refers both to the hearing of the pleas of nullity and that of the appeals. The Government deny a violation of Article 14 (Art. 14).

105. Since the Commission has just found that the Supreme Court exercised its discretion concerning the applicant's personal presence at the hearing in a manner leading to a violation of Article 6 (Art. 6) of the Convention, the Commission does not consider it necessary to examine whether in this respect there has also been discrimination contrary to Article 14 (Art. 14) of the Convention (cf. *mutatis mutandis*, Eur. Court H.R., *Philis v. Greece* judgment of 27 August 1991, Series A no. 209, para. 68).

#### Conclusion

106. The Commission concludes, by 11 votes to 3, that it is not necessary to examine the applicant's complaint under Article 14 in conjunction with Article 6 (Art. 14+6) of the Convention.

#### D. FAIRNESS OF THE SUPREME COURT'S PROCEEDINGS

1. Preparation of the judgment prior to the Supreme Court's hearing

107. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention (for text, see para. 78 above) in that the Judge Rapporteur prepared a draft judgment prior to the hearing of the case by the competent Supreme Court Chamber, and that the draft was also discussed between members of the chamber prior to the hearing, without a record of those deliberations being prepared. The judgment finally adopted was based on the Judge Rapporteur's draft without any amendments, which in the applicant's view shows that the defence arguments submitted at the hearing were not taken into account.

108. The Government contend that the defence arguments submitted at that hearing only repeated the applicant's written submissions

KREMZOW v. AUSTRIA

concerning the pleas of nullity. Accordingly it was not necessary to change the draft judgment concerning those pleas. As regards the appeals against sentence, the Government submit that the Judge Rapporteur's draft on this part of the case was prepared only after the hearing and that it reflected the results thereof.

109. On the basis of the available material the Commission finds that prior to the hearing only a draft concerning the pleas of nullity was prepared by the Judge Rapporteur and informally discussed between members of the Supreme Court Chamber. The Commission is satisfied that the part of the judgment dealing with the appeals against sentence was only prepared after the hearing.

110. The fact that part of the Supreme Court's judgment was prepared before the hearing does not in the Commission's opinion make the proceedings unfair. The Commission has examined the Supreme Court's practice in this respect in Application No. 13129/87 (Frick v. Austria, Dec. 15.10.91) where it stated the following:

"The Commission does not find this practice objectionable. It is a normal task of a Judge Rapporteur to make a proposal on the question of whether a plea of nullity is well-founded or not. This proposal does not bind the other judges of the Chamber and it is subject to changes or amendments as a result of the oral hearing. In the Commission's opinion it makes no vital difference whether the proposal is simply limited to stating the views of the Judge Rapporteur or whether it is laid out in the form of a draft decision."

The Commission sees no reason to depart from this finding in the present case.

Conclusion

111. The Commission concludes, by a unanimous vote, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention by the mere fact that a draft judgment was prepared before the Supreme Court's hearing.

2. Opportunity for the defence to obtain, and to comment on, the Attorney General's position paper

112. The applicant complains that the Attorney General's position paper, on which the Supreme Court's judgment was based to a large extent, was served on the defence only three weeks before the Supreme Court's hearing, together with the summons to that hearing, although its communication had been requested much earlier. The applicant claims that in this respect he was placed at an unfair disadvantage in comparison to the Attorney General's office, contrary to Article 6 para. 1 (Art. 6-1) of the Convention, and that he was not given adequate time and facilities for the preparation of his defence, contrary to Article 6 para. 3 (b) (Art. 6-3-b) of the Convention.

113. The text of the relevant part of Article 6 para. 1 (Art. 6-1) is reproduced in para. 78 above. Article 6 para. 3 (b) (Art. 6-3-b) reads as follows:

"Everyone charged with a criminal offence has the following minimum rights:

...

b) to have adequate time and facilities for the preparation of his defence."

114. The Government deny a violation of these provisions. They submit that the applicant's defence counsel could have asked for an inspection of the position paper in the file before it was formally served on him.

#### KREMZOW v. AUSTRIA

He thus could in good time get knowledge of the contents of the position paper in conformity with a procedure which the Commission had found to be compatible with Article 6 (Art. 6) of the Convention in Application No. 8289/78 (Peschke v. Austria, Dec. 5.3.80, D.R. 18 p. 160). In any event, as the paper was in fact served on the defence three weeks before the Supreme Court's hearing, there remained in the Government's opinion still sufficient time to prepare the defence.

115. The Commission recalls that the principle of equality of arms must be observed between the defence and the Attorney General's office. By recommending that the remedies taken on behalf of the accused be dismissed and those taken against him by the prosecution be allowed, this office becomes objectively speaking the opponent of the accused (cf. Eur. Court H.R., *Borgers* judgment, loc. cit., para. 26; also Application No. 8289/78, *Peschke v. Austria*, loc. cit., and *mutatis mutandis*, Eur. Court H.R., *Brandstetter* judgment of 28 August 1991, Series A no. 211, p. 27 para. 67).

116. It is true, as the Commission observed in the *Peschke* case (loc. cit.), that "the principle of equality of arms enshrined in the notion of fair trial does not call for a particular form of communication of the contents of the file, or of any part of it, to the defence. As long as the available procedure is not particularly onerous and does not in essence deprive the defence of the practical possibility of making use of its rights it cannot be said that the right to a fair trial has been impaired".

117. However, in the *Brandstetter* judgment which concerned a similar practice before the Vienna Court of Appeal the European Court of Human Rights found a violation of Article 6 para. 1 (Art. 6-1). The Court argued as follows (loc. cit., para. 67):

"The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon . . . .

In the present case it is common ground that no copy of the submissions of the Senior Public Prosecutor was sent to the applicant and that he was not informed of their having been filed either. The Government's argument is not that these submissions are prescribed by law so that the applicant should have known that they were to be filed; their argument seems to be that the submissions - the so-called "croquis" (...) - were filed according to a standing practice which enables the Senior Public Prosecutor to file such a croquis in such cases as he deems appropriate. They suggest that this practice must have been known to the applicant's lawyer who, accordingly, could have enquired whether in the applicant's case a croquis had been filed. If so, he could have requested leave to inspect the file under section 82 of the Code of Criminal Procedure and thus could have commented on it. Section 82, as it is formulated, however, does not seem to grant an unconditional right to inspect the complete file but only the possibility to ask for leave to do so, and the parties differ as to whether, with regard to the croquis, such leave would have been granted at the relevant time....

The Court notes that the croquis apparently has considerable importance and that the alleged practice requires vigilance and efforts on the part of the defence; against this background, the Court is not satisfied that this practice sufficiently ensures that appellants in whose cases the Senior Public Prosecutor has

KREZOW v. AUSTRIA

filed a croquis on which they should comment are aware of such filing."

118. The present case can be distinguished from the Brandstetter case in that the defence actually knew at least since September 1985 that the Attorney General's office had filed a position paper, and in that this position paper was in fact served on the defence counsel three weeks before the court's hearing. The legal position regarding the inspection of the position paper in the file was, however, the same as in the Brandstetter case, i.e. there existed a possibility to apply for, but not a right to be granted access to this document.

119. The applicant in fact applied on 18 September 1985 and his lawyer on 2 October 1985 to be served with a copy thereof. However, no decision was taken concerning these requests. The Government have not explained why there was no reaction at that time and why it was not possible to serve the position paper on the applicant's counsel before the date of the summons.

120. The Commission notes that, as in the Brandstetter case, vigilance and efforts were thus required of the defence to get hold of the Attorney General's position paper. The Commission also considers it relevant in this context that the position paper, whose length was 49 pages, was used to a large extent as the basis for the Judge Rapporteur's draft decision. The defence had no opportunity to comment thereon before the oral hearing of the Supreme Court, i.e. after the Supreme Court's judgment had been drafted and informally discussed between members of the competent chamber. Although the defence submitted comments on the position paper at the hearing, the Supreme Court did not consider it appropriate to make any changes in the draft judgment which thus became the final decision without reflecting those comments.

121. In these circumstances, the Commission finds that the principles of a "fair hearing" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention have not been respected and that the defence was not granted "adequate time and facilities" to prepare and submit its arguments under conditions which ensured that they could effectively be taken into account in the court's decision.

#### Conclusion

122. The Commission concludes, by 8 votes to 6, that there has been a violation of Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention in that the applicant was not granted sufficient opportunities to obtain, and to comment on, the Attorney General's position paper.

#### 3. Other complaints

123. The applicant also complains of a violation of Article 6 para. 1 (Art. 6-1) in several other respects. He claims that the principle of equality of arms was disregarded in that

- the defence was required to introduce its remedies against the judgment of first instance within short time-limits whereas no time-limit was provided for as regards the submission of observations on those remedies by the Attorney General's office;
- the Attorney General's office, unlike the defence, was informed at an early stage of the identity of the Judge Rapporteur contrary to the provisions of the law and thus knew which Chamber of the Supreme Court would deal with the case and could adapt its argumentation accordingly; and
- the Supreme Court's file including the Judge Rapporteur's draft decision was allegedly transmitted to the Attorney General's office but not to the defence together with the summons to the hearing.

KREMZOW v. AUSTRIA

124. The applicant further claims that his rights of defence under Article 6 para. 3 (b) (Art. 6-3-b) were violated in that

- he was refused to inspect the file personally; and
- the decision on the refusal to allow his personal appearance at the hearing was served on his counsel only on the very day of the hearing.

125. The Government consider the time allowed to the Attorney General's office for commenting on the remedies justified because, unlike the defence, the office must first familiarise itself with the case. They admit that in the applicant's case the name of the Judge Rapporteur was unlawfully disclosed to the Attorney General's office, but this fact could not make the proceedings unfair. Finally, as regards the alleged transmission of the file, the Government refer to the applicable legal provisions and the practice of the Supreme Court not to disclose to any of the parties documents which would allow conclusions to be drawn as to the preparation of its decision. In the Government's submission this practice was also followed in the present case.

126. The Government further submit that the applicant's rights under Article 6 para. 3 (b) (Art. 6-3-b) were not violated. It was not necessary to grant the applicant personal access to the file since he was represented by a lawyer. They also contest that the decision to refuse the applicant's personal appearance was served on him belatedly.

127. The Commission considers that an inequality between the defence and the prosecution as regards the time allowed for entering an appeal may raise issues under Article 6 (Art. 6) of the Convention in certain circumstances. However, not every inequality of treatment necessarily amounts to a violation of this provision. It is necessary to consider the particular circumstances of each case (cf. No. 10142/82, U. v. Luxembourg, Dec. 8.7.85, D.R. 42 p. 86).

128. In the Austrian legal system the time-limits for introducing remedies against the first instance judgment are in principle the same both for the defence and the prosecution. Only as regards the submission of the Attorney General's position paper no time-limit is provided for. In any event these procedural acts occur at different stages of the proceedings which are not directly comparable (cf., *mutatis mutandis*, No. 12129/86, Hennings v. the Federal Republic of Germany, Comm. Report 30.5.91, para. 67).

129. In the present case the Court of Assizes' judgment was served on the parties in February 1985, the various remedies against it were lodged between February and April 1985 and transmitted to the Attorney General's office in May 1985. Its position paper was submitted in August 1985. The Commission notes that the Attorney General's office was not previously familiar with the file and that it stated its position three months after the submission of the various remedies to it. Having regard to the complexity of the case this period does not appear so long as to give the Attorney General's office an unfair advantage over the defence.

130. As to the applicant's further complaint that the principle of equality of arms was violated by the fact that the name of the Supreme Court's Judge Rapporteur was disclosed to the Attorney General's office, but not to the defence, the Commission notes that this disclosure violated Austrian law. However, the relative advantage obtained thereby by the Attorney General's office, if any, was not in the Commission's opinion of such importance that it amounted to a violation of the principle of equality of arms.

131. The applicant further alleges that the principle of equality of arms was violated, because, unlike the defence, the Attorney General's

KREZOW v. AUSTRIA

office had also been informed of the Judge Rapporteur's draft decision.

132. However, it appears from the documents submitted that at no time after the preparation of the Judge Rapporteur's draft decision a judicial order was made under Section 60 para. 6 of the Supreme Court's Rules of Procedure to transmit the file to the Attorney General's office. The fact that the summons in subsequent disciplinary proceedings was formulated differently by expressly excluding the Rapporteur's draft decision from the transmission of the file, which was apparently ordered on that occasion, does not warrant the conclusion that on 9 June 1986 the draft judgment was sent to the Attorney General's office. The facts therefore do not disclose any unequal treatment between the defence and the Attorney General's office in this respect.

133. As regards the applicant's complaint concerning the refusal of personal inspection rights, the Commission recalls that in the Kamasinski case (Judgment of 19 December 1989, loc. cit., p. 39, para. 88) the European Court of Human Rights found that the provision of the Austrian Code of Criminal Procedure excluding personal inspection rights of the accused if he is represented by a lawyer is not in itself incompatible with Article 6 para. 3 (b) (Art. 6-3-b). It finds that also in the present case this provision has not been violated by the fact that the applicant personally was not granted access to the file.

134. As regards finally the fact that the applicant was not informed before the date of the Supreme Court's hearing that he would not be allowed to be personally present at that hearing, the Commission does not consider that a separate issue arises under Article 6 para. 3 (b) (Art. 6-3-b) of the Convention since it has already found that the applicant's exclusion from the hearing violated Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) of the Convention.

Conclusions

135. The Commission concludes, by a unanimous vote, that there has been no violation of Article 6 (Art. 6) of the Convention as regards the applicant's remaining complaints concerning the fairness of the Supreme Court's proceedings.

E. EFFECTIVE DOMESTIC REMEDIES

136. 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."

137. The applicant sees a violation of this provision in the limited scope of the Supreme Court's powers of review.

138. The Government have not made any submissions in relation to this complaint.

139. The Commission recalls its decision on admissibility (Appendix II) where it rejected all complaints concerning the first instance procedure. It further recalls the constant case-law according to which the Convention, including Article 13 (Art. 13), does not guarantee a right to criminal appeal proceedings. Such a right was only introduced by Article 2 of Protocol No. 7 (P7-2) which was not in force at the time of the facts of the applicant's case.

140. In these circumstances, the Commission finds that no breach of Article 13 (Art. 13) of the Convention can be made out.

Conclusion

## KREMZOW v. AUSTRIA

141. The Commission concludes, by a unanimous vote, that there has been no violation of Article 13 (Art. 13) of the Convention.

### F. DETENTION AS A CONVICTED PRISONER

142. The applicant complains of a violation of Article 5 para. 1 (a) in conjunction with Article 14 (Art. 5-1-a+14) of the Convention. He claims that the Supreme Court's judgment was arbitrary and contradictory and that for this reason his subsequent detention cannot be regarded as being detention after "lawful" conviction by a competent court.

143. The Government have not made any submissions in relation to this complaint.

144. Article 5 para. 1 (a) (Art. 5-1-a) of the Convention reads as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court".

145. The Commission considers that the detention of a person "after conviction by a competent court" cannot be examined separately as to its lawfulness under Article 5 para. 1 (a) (Art. 5-1-a) in so far as grounds are invoked which relate to the conviction itself. This question can only be examined in the context of Article 6 (Art. 6) of the Convention.

146. Since there is no issue under Article 5, Article 14 (Art. 5, 14) does not apply either in this respect.

### Conclusion

147. The Commission concludes, by a unanimous vote, that there has been no violation of Article 5 in conjunction with Article 14 (Art. 5+14) of the Convention.

### G. RECAPITULATION

148. The Commission concludes, by 11 votes to 3, that there has been a violation of Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) of the Convention in that the applicant was not allowed to be personally present at the Supreme Court's hearing (cf. para. 102 above).

149. The Commission concludes, by 11 votes to 3, that it is not necessary to examine the applicant's complaint under Article 14 in conjunction with Article 6 (Art. 14+6) of the Convention (cf. para. 106 above).

150. The Commission concludes, by a unanimous vote, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention by the mere fact that a draft judgment was prepared before the Supreme Court's hearing (cf. para. 111 above).

151. The Commission concludes, by 8 votes to 6, that there has been a violation of Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention in that the applicant was not granted sufficient opportunities to obtain, and to comment on, the Attorney General's position paper (cf. para. 122 above).

152. The Commission concludes, by a unanimous vote, that there has been no violation of Article 6 (Art. 6) of the Convention as regards the applicant's remaining complaints concerning the fairness of the

KREMZOW v. AUSTRIA

Supreme Court's proceedings (cf. para. 135 above).

153. The Commission concludes, by a unanimous vote, that there has been no violation of Article 13 (Art. 13) of the Convention (cf. para. 141 above).

154. The Commission concludes, by a unanimous vote, that there has been no violation of Article 5 in conjunction with Article 14 (Art. 5+14) of the Convention (cf. para. 147 above).

Secretary to the Commission

President of the Commission

(H. C. KRÜGER)

(C. A. NØRGAARD)

Dissenting opinion of Mr. H. Danielius, joined by  
MM. C. A. Nørgaard and G. Jörundsson

I have voted against the Commission's conclusions in paras. 102, 106 and 122 of this Report for the following reasons.

1. As regards the hearing before the Supreme Court, at which the applicant was not personally present but only represented by his lawyer, I note that the hearing consisted of two parts, namely one which concerned the pleas of nullity filed by the applicant and others and one which concerned the appeal against sentence lodged by the public prosecutor.

According to the case-law of the European Court of Human Rights, an oral hearing in a Supreme Court, after such a hearing has been held in a lower court, is not required by Article 6 of the Convention if the higher court's review is limited to questions of law (Axen judgment of 8 December 1983; Sutter judgment of 22 February 1984). It must follow that where in such cases a hearing is held at which the accused is not personally present but represented by his lawyer, this is not in conflict with Article 6.

In the present case, the hearing regarding the pleas of nullity mainly concerned legal issues. In fact the applicant had alleged in his plea of nullity that he had been denied the right to defend himself and that the trial had been unfair. It is true that certain additional evidence was also submitted to the Supreme Court in these proceedings. This evidence consisted of certain parts of the diary of the victim of the crime. However, these diary-sheets had been communicated to the applicant before the hearing and he had had the opportunity of commenting upon them. His arguments in regard to this new evidence could also be presented at the hearing by his lawyer.

In these circumstances, it does not appear that the hearing regarding the pleas of nullity was unfair by reason of the fact that the applicant was not entitled to attend it in person.

As regards the hearing concerning the public prosecutor's appeal against the sentence, the legal situation is different. The nature of this appeal did indeed require that the applicant should be entitled under Article 6 of the Convention to attend it in person.

However, Section 296 para. 3 of the Austrian Code of Criminal Procedure provides that an accused who is detained shall be brought before the court if he has made a request to this effect in his appeal or counter-statement. It is therefore clear that the applicant had the right to attend the hearing but that he did not avail himself of this right by making a request in his submissions in reply to the public prosecutor's appeal. The applicant, who was himself a judge, as well as his lawyer must have been aware of the legal situation and must have deliberately chosen not to make use of the right of personal attendance.

KREZOW v. AUSTRIA

In these circumstances, the applicant's absence from the hearing regarding the public prosecutor's appeal was not in conflict with Article 6.

2. The applicant further complains of discrimination in so far as under Austrian law the right to attend a hearing before the Supreme Court is different depending on whether or not an accused person is detained.

With regard to a hearing of a plea of nullity, it would seem that the reasons behind the distinction made in this regard could be considered objective and reasonable and that there is therefore no violation of Article 14 in conjunction with Article 6 of the Convention. As regards the hearing of an appeal against sentence, the difference between an accused at liberty and one who is detained is more limited. The first one has an unrestricted right to attend the hearing, whereas the second one must make a request to this effect in his appeal or counter-statement, which in the present case the applicant did not do. Again it would seem that the distinction is based on objective and reasonable grounds and that there is no violation of Article 14 in conjunction with Article 6 of the Convention.

3. As regards the fact that the Attorney General's position paper was sent to the applicant's lawyer in June 1986, i.e. only three weeks before the Supreme Court's hearing, and that the applicant himself was not permitted to inspect the paper in the case-file or to receive a copy of it, it is indeed difficult to understand the reasons for such a restrictive attitude. It would rather seem natural that such an important document should be immediately communicated to the lawyer of the accused and that the accused himself should also be given access to it.

The question is, however, whether the manner in which the Austrian court dealt with the matter was prejudicial to the applicant's defence and for that reason contrary to Article 6 of the Convention.

In this regard it should first be noted that the Attorney General's position paper was not the first intervention in the proceedings before the Supreme Court but that it should rather be considered as an answer to the applicant's as well as to his mother's and wife's pleas of nullity (see Report paras. 31, 32 and 35). Secondly I note that there was a period of three weeks between the time when the lawyer received the document and the hearing before the Supreme Court. Moreover, if the lawyer had considered it essential to acquaint himself with the document earlier, he could have requested to read the document in the case-file, and it seems at least very likely that such a request would have been granted.

In these circumstances, I cannot find that the applicant's defence was prejudiced in violation of Article 6 of the Convention.

Dissenting opinion by MM. S. Trechsel,  
H. Schermers and A.V. Almeida Ribeiro

We have voted against the Commission's conclusion in para. 122 of this Report for the reasons indicated in point 3 of Mr. Danelius' dissenting opinion.

APPENDIX I

HISTORY OF PROCEEDINGS BEFORE THE COMMISSION

Date

Item

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1. 8.1986

Introduction of the application

KREMZOW v. AUSTRIA  
Registration of the application

22. 8. 1986
- A. Examination of Admissibility
19. 1. 1989 Commission's decision to invite the Government to submit observations on the admissibility and merits of the application
11. 4. 1989 Extension of time-limit at Government's request
23. 5. 1989 Government's observations
20. 7. 1989 Extension of time-limit at applicant's request
18. 8. 1989 Applicant's observations in reply
2. 4. 1990 Commission's decision to hold an oral hearing and to invite parties to submit further written observations
29. 6. 1990 Applicant's additional observations
17. 7. 1990 Government's additional observations
5. 9. 1990 Oral hearing on admissibility and merits, Commission's decision to declare the application in part admissible and in part inadmissible
- B. Examination of the merits
12. 10. 1990 Commission adopts the text of the decision and invites the parties to submit supplementary observations on the merits
4. 12. 1990 Government's additional observations
6. 12. 1990 Extension of time-limit at applicant's request
12. 1. 1991 Consideration of the state of proceedings
15. 2. 1991 Applicant's additional observations
7. 9. 1991 )  
11. 1. 1992 ) Commission's consideration of the state of proceedings
12. 5. 1992 Commission's deliberations on the merits and final votes
20. 5. 1992 Adoption of the Report