

## AS TO THE ADMISSIBILITY OF

Application No. 23888/94  
by Friedrich Wilhelm KREMZOW  
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1995, the following members being present:

Mr. C.L. ROZAKIS, President  
Mrs. J. LIDDY  
MM. E. BUSUTTIL  
A.S. GÖZÜBÜYÜK  
A. WEITZEL  
M.P. PELLONPÄÄ  
B. MARXER  
G.B. REFFI  
B. CONFORTI  
N. BRATZA  
I. BÉKÉS  
E. KONSTANTINOV  
G. RESS  
A. PERENIC  
C. BÎRSAN  
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 12 January 1994 by Friedrich Wilhelm KREMZOW against Austria and registered on 14 April 1994 under file No. 23888/94;

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

Having regard to the observations submitted by the respondent Government on 17 March 1995; and the observations in reply submitted by the applicant on 29 May and 16 August 1995;

Having deliberated;

Decides as follows:

## THE FACTS

The facts, as they have been presented by the parties, may be summarised as follows.

The applicant, born in 1938, is an Austrian national. At present he is serving a life sentence for murder at the prison of Vienna-Mittersteig. In the present case the applicant is represented by Mr. H. Mühlgassner, a lawyer practising in Vienna.

I. The applicant has lodged a previous application (No. 12350/86), which related to criminal proceedings at the outcome of which, on 18 December 1984, the Korneuburg Regional Court (Kreisgericht) convicted the applicant of murder and unlawful possession of a firearm, and sentenced him to twenty years' imprisonment. On 2 July 1986 the Austrian Supreme Court (Oberster Gerichtshof), upon the public prosecutor's appeal (Berufung), sentenced the applicant to life imprisonment.

In this case, the Court rendered a judgment on 21 September 1993, according to which there had been a violation of Article 6 para. 1 taken in conjunction with Article 6 para. 3 (c) of the Convention as regards the applicant's absence at the hearing of the appeals (Eur. Court H.R., Kremzow judgment of 21 September 1993, Series A no. 268-B). The Court did not find violations of Article 6 regarding the further complaints raised by the applicant. The respondent State was ordered to pay part of the applicant's costs and expenses incurred in the proceedings before the Convention organs.

In the course of their 507th meeting, held on 3 February 1994, at Strasbourg, the Minister's Deputies adopted their Resolution DH (94) 11 concerning the above judgment, according to which it had exercised its functions under Article 54 of the Convention.

Further applications filed by the applicant (Nos. 13715/88, 15883/89, 16417/90, 19165/91, 20262/92, 21095/92, 23506/94) concerned inter alia to the length of various proceedings.

His present application relates to the implementation of the above Court judgment.

II. On 13 October 1993 the applicant informed the Federal Minister of Justice about his proposals for an implementation of the above-mentioned Court judgment of 21 September 1993. Thus, he requested that it be suggested to the Austrian President to transform his sentence to life imprisonment into a sentence to fifteen years' imprisonment; that he should be released on probation and a probationary period of one year be fixed; that the execution of his prison sentence be suspended until the President had taken his decision. He also claimed payment of the costs and expenses awarded against the respondent State, and he reserved his position as to further compensation claims.

By letter of 27 December 1993, the Federal Ministry of Justice informed the applicant about the measures taken following the Court's judgment of 21 September 1993, in particular as regards the applicant's costs and expenses, and that no further action was envisaged.

III. On 29 November 1993 the Korneuburg Regional Court dismissed the applicant's request for a mitigation of his sentence. The Regional Court considered that the applicant had not shown any circumstances which would have resulted in a mitigation of his sentence. In this respect, the Regional Court noted that the European Court of Human Rights had found a violation of the Convention as regards the applicant's absence at the hearing on his appeal before the Supreme Court. However, there was no indication as to whether the applicant's absence had taken an influence on the Supreme Court's decision on his appeal, which would justify a subsequent mitigation of his sentence under the relevant provision of the Code of Criminal Procedure (Strafprozeßordnung).

On 29 December 1994, following successful appeal proceedings before the Supreme Court, the Korneuburg Regional Court requested the Vienna Court of Appeal to decide on an appropriate mitigation of the applicant's sentence to life imprisonment. The Regional Court considered as relevant subsequent mitigating factors the payment of compensation by the applicant, the finding of a violation of the Convention by the European Court of Human Rights and the applicant's and his family's psychological suffering.

On 20 January 1995 the Vienna Court of Appeal transferred the Korneuburg Regional Court's request for a mitigation of the applicant's sentence to the Supreme Court, supporting the request in view of all

circumstances of the applicant's case.

On 3 April 1995 the Supreme Court dismissed the request for a mitigation of the applicant's sentence to life imprisonment.

The Supreme Court, in its decision, observed that on the occasion of a non-public hearing in presence of his defence counsel and the General Prosecutor (Generalanwalt), the applicant had been given the opportunity to argue the question of a mitigation of his sentence. In particular, having regard to the judgment of the European Court of Human Rights of 21 September 1993, he had the possibility to defend himself in person regarding the motive, as established in the appellate court decision. The Supreme Court noted that the applicant, repeating his earlier statements, had further submitted that the motive had never been clearly established. He had only learnt after the Supreme Court's decision in 1986 that the Prosecutor General, when arguing his request for life imprisonment, had called him a "defrauder" ("Betrüger") and had reproached him with a low and reprehensible character.

The Supreme Court further noted the request of the Prosecutor General to mitigate the applicant's sentence in particular taking into account his particular sensitivity to serving his sentence following the judgment of the European Court of Human Rights and following the birth of his son in 1985.

The Supreme Court considered that, in accordance with the relevant provision of the Code of Criminal Procedure, the mitigation of a sentence fixed in a final judgment could only be justified with regard to such circumstances which, had they been previously known, would have obviously resulted in the fixing of a less severe sentence. The applicant's arguments, taken alone and seen as a whole, were not sufficient to entitle him to a mitigation. In this respect, the Supreme Court noted in particular that, in its judgment of 1986, the increase in the applicant's sentence had been based on the aggravating circumstances of the premeditated homicide, committed for the low motive of preventing the disclosure of his preceding own misconduct. Having regard to the applicant's statements at the pre-trial stage, the exercise of his defence rights at the hearing before the Supreme Court would not have influenced the Court's findings. The finding of a violation of the Convention by the European Court of Human Rights in the applicant's case did not, therefore, call for an amendment of the judgment of 1986, and, accordingly, the applicant's continued detention had not turned to be unlawful.

IV. Moreover, on 24 September 1994 the applicant filed a request with the Korneuburg Regional Court for his immediate release. Referring to Article 5 para. 4 of the Convention, the applicant submitted that following the Court's judgment of 21 September 1993 his continued detention was unlawful.

On 12 November 1993 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's request that the Regional Court be ordered to decide on his request for release within three days.

On 1 December 1993 the Korneuburg Regional Court rejected the applicant's requests to find that his detention was unlawful and to release him. The Regional Court, noting the findings of the European Court of Human Rights in the judgment of 21 September 1993, considered that the applicant was serving a prison sentence after his conviction, and that the execution of this sentence was not unlawful.

On 10 January 1994 the Vienna Court of Appeal rejected the applicant's appeal against the decision of 1 December 1993.

On 15 February 1994 the Austrian Supreme Court dismissed the applicant's constitutional complaint about the respective decisions of the Korneuburg Regional Court and the Vienna Court of Appeal.

V. In two sets of official liability proceedings pending before the Vienna Regional Court, the applicant claims compensation regarding loss of earnings and moral damages for his allegedly unlawful detention.

#### COMPLAINTS

The applicant, referring to the judgment of the European Court of Human Rights of 21 September 1993, complains that the Austrian authorities failed to ensure proceedings to review his continued detention, and to order his release. He invokes Article 5 para. 4 and Article 13 of the Convention. He further considers that there is a continued violation of his rights under Article 6 of the Convention. Originally, the applicant also relied on Article 53 of the Convention.

#### PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 January 1994 and registered on 14 April 1994.

On 9 April 1994 the Commission dismissed the applicant's request that the Commission should request the Court, under Rule 57 para. 1 of the Court's Rules of Procedure, for the interpretation of the above judgment (as far as its paragraphs 67 to 69 were concerned to the effect that the hearing regarding his appeal as well as the Supreme Court's judgment of 2 July 1986 sentencing him to life imprisonment violate Article 6 para. 1 taken in conjunction with Article 6 para. 3 (c) of the Convention).

On 30 November 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 17 March 1995, after an extension of the time-limit fixed for that purpose. The applicant replied on 29 May 1995, also after an extension of the time-limit fixed for that purpose.

The Government filed further information on 16 June 1995. The applicant submitted further observations on 16 August 1995.

In his observations of 16 August 1995, the applicant informed the Commission that he did not wish further to invoke Article 53 of the Convention regarding the alleged failure of the respondent Government to abide by the Court's judgment of 21 September 1993.

#### THE LAW

The applicant complains that the respondent State failed to implement the judgment of the European Court of Human Rights of 21 September 1993 in that the authorities refuse his release from prison and do not provide for a judicial procedure to have the lawfulness of his continued detention reviewed.

The applicant relies on Article 5 para. 4 (Art.5-4) and Article 13 (Art. 13) of the Convention.

The Commission observes that the applicant, in his observations of 16 August 1995, stated that he did no longer wish to pursue his argument that the alleged failure to comply with the said judgment amounted to a violation of Article 53 (Art. 53) of the Convention. He

amended his submissions in stating that his situation amounted to a continued violation of Article 6 (Art. 6) of the Convention.

Article 5 (Art. 5), so far as relevant, provides as follows:

"1. 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;

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

..."

The Government consider that a prisoner sentenced unconditionally to life imprisonment had - even after several years of imprisonment - no right to a judicial examination of the question of being pardoned and released. Such review could only be justified in particular cases where detention was dependent upon in particular personal circumstances susceptible to change. They object to the applicant's view that, following the Court's judgment of 21 September 1993, finding a violation of Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) of the Convention on the ground of the applicant's absence at the appeal hearing before the Supreme Court, his continued detention was no longer lawful within the meaning of Article 5 para. 1 (a) (Art. 5-1-a) of the Convention. In this respect they refer to the case-law of the Court that under the Convention it is not empowered to provide for the quashing of a judgment or to give any directions to the respondent State such as the opening of a new trial.

The applicant maintains that, under Article 53 (Art. 53) of the Convention, Austria was bound by the judgment of the Court of 21 September 1993 and, while having a freedom of choice as to the means of fulfilling its obligation under Article 53 (Art. 53), his continued detention and the failure to remedy the established shortcomings in the appeal proceedings before the Austrian Supreme Court amounted to a new violation of his Convention rights. He considers that, had the appeal proceedings before the Supreme Court been reopened and conducted in conformity with the Convention standards, at most his sentence to twenty years' imprisonment would have been confirmed. According to the applicant, none of the subsequent domestic proceedings afforded a sufficient remedy, in particular the proceedings regarding his request for a reduction of the sentence to life imprisonment were insufficient in that they in themselves did not afford the guarantees of Article 6 (Art. 6) of the Convention.

The Commission notes that the applicant serves a sentence to life imprisonment following his conviction by the Korneuburg Regional Court on 18 December 1984, and the Supreme Court's judgment of 2 July 1986.

The Commission recalls that where a sentence of imprisonment is imposed after "conviction by a competent court", the supervision required by Article 5 para. 4 (Art. 5-4) is incorporated in the decision of the court. This finding applies to the extent that the initial decision depriving a person of his liberty is concerned, whereas in an ensuing period of detention new issues affecting the lawfulness of the detention might arise (cf. Eur. Court H.R., De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 40, para. 6; Thynne, Wilson and Gunnell judgment of 25 October 1990, Series A no. 190-A, pp. 26/27, para. 60). Thus, the nature and purpose

of a given type of detention might require at a later stage a judicial control as to whether the reasons initially warranting detention had ceased to exist (Thynne, Wilson and Gunnell judgment, loc. cit., p. 27, para. 69).

In cases concerning life imprisonment, the Convention organs have found that discretionary life prisoners were entitled under Article 5 para. 4 (Art. 5-4) to take proceedings to have the lawfulness of their continued detention decided by a court at regular intervals and to have the lawfulness of any re-detention determined by a court. This view was taken because of the very nature of the discretionary life sentence which, unlike the mandatory life sentence, was imposed not because of the inherent gravity of the offence but because of the presence of factors which were susceptible to change with the passage of time, namely mental instability and dangerousness. A clear distinction was drawn between the discretionary life sentence which was considered to have a protective purpose and a mandatory life sentence which was viewed as essentially punitive in nature. As regards the latter category of detention, the guarantee of Article 5 para. 4 (Art. 5-4) was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention (Eur. Court H.R., Thynne, Wilson and Gunnell judgment, loc. cit., p. 27, para. 69; Wynne judgment of 18 July 1994, Series A no. 294-A, pp. 14-15, paras. 33-36).

In the present case, the Supreme Court, in its decision of 2 July 1986, confirmed the applicant's conviction of murder and sentenced him to life imprisonment, taking into account the aggravating circumstances of the offence, committed for the low motive of preventing the disclosure of the applicant's preceding misconduct. Accordingly, the applicant is serving a life sentence of a merely punitive nature.

The element which, according to the applicant, requires a new judicial control regarding the lawfulness of his life sentence, is the judgment of the European Court of Human Rights of 21 September 1993, finding a violation of Article 6 para. 1 taken in conjunction with Article 6 para. 3 (c) (Art. 6-1+6-3-c) as regards his absence at the hearing of his appeal (Kremzow judgment loc. cit., pp. 44-45, paras. 65-69).

The Commission recalls that in case of a finding of such a violation of the Convention the Convention does not give the Court jurisdiction to direct a respondent State to open a new trial or to adopt other administrative measures (cf. Eur. Court H.R., Saïdi judgment of 20 September 1993, Series A no. 261-C, p. 57, para. 47).

The Commission also notes that the applicant, in the context of his above case, already raised the issue whether, in view of the arbitrary and contradictory character of the Supreme Court's judgment he was "lawfully" detained after conviction by a competent court, a matter which he did not pursue in the proceedings before the Court and which was not examined by the Court ex officio (cf., Eur. Court H.R., Kremzow judgment, loc. cit., pp. 47-48, paras. 78, 81).

The Commission considers that the applicant's detention is based on the initial decisions of the Korneuburg Regional Court of 18 December 1984 and of the Supreme Court of 2 July 1986 and must be regarded as detention after "conviction by a competent court" within the meaning of Article 5 para. 1 (a) (Art. 5-1-a). In accordance with the principles established in the Court's case-law, the guarantee of Article 5 para. 4 (Art. 5-4) was therefore in principle satisfied by the original trial and appeal proceedings.

In this context, the Commission recalls that the judicial proceedings referred to in Article 5 para. 4 (Art. 5-4) need not always be attended by the same guarantees as those required under Article 6 para. 1 (Art. 6-1) for civil or criminal litigation (cf. Eur. Court H.R., Megyeri judgment of 12 May 1992, Series A no. 237-A, p. 11, para. 22).

The subsequent finding by the Court, in its Kremzow judgment of 21 September 1993, of a violation of Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) regarding the applicant's absence at the hearing of his appeal before the Supreme Court does not disclose such a violation of his defence rights as to require a review of his conviction and sentence (cf., mutatis mutandis, Eur. Court H.R., Drozd and Janousek judgment of 26 June 1992, Series A no. 240, p. 34, para. 110).

Consequently, in the present case, there is no issue of lawfulness which would entitle the applicant to a review of his continued detention under the original mandatory life sentence.

In these circumstances there is no appearance of a violation of the applicant's rights under Article 5 para. 4 (Art. 5-4) of the Convention.

As Article 5 para. 4 (Art. 5-4) constitutes the *lex specialis* in this area, there is no need to examine the case under the further Convention articles invoked by the applicant, in particular Article 13 (Art. 13) (No. 11256/84, Dec. 5.9.88, D.R. 57, p. 47).

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber

President of the First Chamber

(M.F. BUQUICCHIO)

(C.L. ROZAKIS)