



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

COURT (CHAMBER)

CASE OF KREMZOW v. AUSTRIA

(Application no. 12350/86)

JUDGMENT

STRASBOURG

21 September 1993

In the case of Kremzow v. Austria*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr R. MACDONALD,

Mr C. RUSSO,

Mrs E. PALM,

Mr R. PEKKANEN,

Sir John FREELAND,

Mr J. MAKARCZYK,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 March and 24 August 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 September 1992 and by the Government of the Republic of Austria ("the Government") on 1 October 1992, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12350/86) against Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Friedrich Wilhelm Kremzow, on 1 August 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether the facts of the case disclosed a

* The case is numbered 29/1992/374/445. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (b) and (c) (art. 6-1, art. 6-3-b, art. 6-3-c) of the Convention. The request also sought a decision as regards Articles 13 and 14 (art. 13, art. 14).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and, having been refused permission by the President to represent himself, designated the lawyers who would represent him (Rule 30); the President gave the said lawyers leave to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 September 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Macdonald, Mr C. Russo, Mrs E. Palm, Mr R. Pekkanen, Sir John Freeland and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. In his capacity as President of the Chamber (Rule 21 para. 5), Mr Ryssdal, through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 15 January 1993. The applicant submitted his claims under Article 50 (art. 50) on 19 March 1993.

5. In a letter of 9 December 1992 the applicant had asked that the President grant various interim measures (Rule 36 para. 1). After observations had been sought from the Government and the Delegate of the Commission in this regard this request was refused by the President on 2 February 1993.

On 25 February 1993 the Chamber also rejected an application by the applicant to hear witnesses and to order the production of various documents.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 March 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr W. OKRESEK, Federal Chancellery,

Agent,

Mr F. HAUG, Federal Ministry for Foreign Affairs,

Ms U. KATHREIN, Federal Ministry of Justice,

Advisers;

- for the Commission

Mrs J. LIDDY,

Delegate;

- for the applicant

Mr L. WEH, Rechtsanwalt,

Mr H. MÜHLGASSNER, Rechtsanwalt,

Counsel.

The Court heard addresses by Mr Okressek for the Government, Mrs Liddy for the Commission and Mr Weh for the applicant, as well as replies to its questions.

7. With leave from the Chamber (Rule 37 para. 1 in fine), the applicant submitted on 23 March 1993 an expert opinion on the procedure before the Supreme Court. The Government filed their comments on this and on the applicant's Article 50 (art. 50) claims on 19 April 1993.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The institution of the criminal proceedings against the applicant

8. The applicant worked as a judge in the Austrian courts from 1964 to 1978 when he retired for health reasons. He then worked as a consultant for various practising lawyers in the area of Vienna, including Mr P. On 16 December 1982 he presented himself before the Regional Court (Kreisgericht) of Korneuburg and confessed to having killed Mr P.

Following his arrest, the applicant was detained in a psychiatric hospital in Vienna in view of his mental condition and the risk of his committing suicide. He was subsequently detained in the Mittersteig special institution for mentally deranged offenders.

9. 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 Weapons Act (Waffengesetz) as well as with a number of fraud offences. It was alleged that financial difficulties had led the applicant to defraud Mr P. and that the motive for the murder was his fear that these offences would be discovered. The prosecution requested that the applicant be committed to an institution for mentally ill criminals under section 21 of the Penal Code.

1. The trial before the Court of Assizes (Geschworenengericht)

10. On 13 June 1984 the applicant's trial commenced before a Court of Assizes of the Regional Court of Korneuburg sitting with a jury. He was represented by an official defence counsel, the court having refused his request to defend himself in person.

At the hearing the applicant retracted his confession which he claimed was the product of a psychotic aberration, alleging that Mr P. had committed suicide in his presence. The trial was discontinued and the case was referred back to the investigating judge with a view to clarifying this new allegation.

11. A new trial began on 5 November 1984 before the Court of Assizes. On 18 December 1984 the jury found him guilty of murder and unlawful possession of a firearm. The charges of fraud had earlier been dropped by the prosecution for want of evidence. The jury found that the applicant was criminally responsible and expressed the opinion that "the motive remains unknown, too many possibilities".

The court, sitting with the jury, sentenced him to twenty years' imprisonment, the maximum determinate sentence possible under Austrian law in a case of murder, and ordered him to be committed to an institution for mentally deranged criminals.

2. The Supreme Court proceedings

(a) Remedies sought by the parties

12. The applicant filed a plea of nullity (Nichtigkeitsbeschwerde) with the Supreme Court (Oberster Gerichtshof) complaining, inter alia, that he had been denied the right to defend himself and that the trial had not been fair. His wife and mother filed a further plea of nullity as well as an appeal (Berufung) challenging the length of the sentence and the commitment of the applicant to a special institution.

13. The public prosecutor also appealed against the sentence requesting that a life sentence be imposed because of the planning involved in the offence and the malicious way it was carried out. A further appeal against the decision to refer his claim for damages to the civil court was lodged by Mr R.P., the son of Mr P.

(b) The consultation of the Attorney General

14. On 2 May 1985 the Supreme Court informed the Attorney General's office (Generalprokuratur) of the various remedies sought in the applicant's case and transmitted the file which included documents concerning these remedies introduced by the applicant, his relatives, the public prosecutor and the private party. The note mentioned the judge rapporteur's name and was signed by him.

The Attorney General's position paper on the nullity pleas (croquis) dated 24 July 1985 was received by the Supreme Court on 2 August 1985. It ran to forty-nine pages and considered in detail the various grounds of nullity invoked by the applicant and his mother and wife. 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.

15. The applicant applied to the Supreme Court on 18 September 1985 for communication of the Attorney General's position paper, as did his defence counsel on 2 October 1985. However, these requests were not acted upon. There is no record in the Supreme Court that the applicant's counsel sought to inspect the file. The position paper was eventually served on counsel only on 9 June 1986 (see paragraph 34 below).

(c) Additional evidence

16. On 31 December 1985 Mr R.P. (the victim's son) submitted a number of missing diary-sheets 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 Mr P. had intended to commit suicide. A motion to search Mr R.P.'s home in this connection had been rejected by the trial court. Subsequently he had also introduced a civil action against Mr R.P. to produce those documents.

On learning in the course of the civil action that parts of the diary had been submitted to the Supreme Court, the applicant unsuccessfully requested the Regional Court of Korneuburg on 22 January 1986 to order a search of the home of Mr R.P. whom he suspected of withholding further relevant documents. Copies of the diary-sheets submitted to the Supreme Court were later served on the applicant through the Regional Court.

The applicant maintains that the Supreme Court carried out additional investigations concerning certain forged cheques. This, however, is denied by the Government.

(d) The judge rapporteur's draft decision

17. Prior to the fixing of the date of the Supreme Court's hearing, the judge rapporteur, as is customary in the procedure of the court, prepared a draft judgment which was included in the official file. The draft appeared to have been revised. The rapporteur generally followed the line developed 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.

It appears that members of the Chamber of the Supreme Court dealing with the case took part in preliminary deliberations (*Vorberatungen*) prior to the hearing and that statements by other members concerning the draft decision were placed on the file at some point before the hearing.

(e) Summons to the Supreme Court's hearing

18. On 4 June 1986 the Supreme Court fixed the hearing date for the pleas of nullity and the appeals for 2 July 1986.

The applicant received the summons to the hearing on 17 June 1986. The notification stated that at the hearing of the pleas of nullity the applicant,

being incarcerated, could only appear through his official defence counsel in accordance with sections 286 para. 2 and 344 of the Code of Criminal Procedure (Strafprozessordnung, "the Code"-see paragraphs 28-29 below). 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 were not satisfied (see paragraph 31 below). It was also ordered that the Attorney General's position paper should be sent to the applicant's official defence counsel and to the lawyer acting on behalf of his wife and mother.

(f) The applicant's request to attend the Supreme Court's hearing in person

19. On 19 June 1986 the applicant, invoking Articles 6 and 14 (art. 6, art. 14) of the Convention, 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 relied on the right to defend himself in person, as guaranteed in Article 6 para. 3 (c) (art. 6-3-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 detained defendants were entitled to be brought to a hearing on an appeal against sentence. At the same time the applicant pointed out, *inter alia*, that no decision had so far been taken on his request for a copy of the Attorney General's croquis.

20. The petition was rejected by the Supreme Court on 25 June 1986 and the decision notified to the applicant's counsel on the day of the hearing (2 July 1986). The court noted that the applicant had not applied to be brought to the hearing of the appeals as provided for by section 296 para. 3 of the Code (see paragraph 31 below). It had no doubts concerning the constitutionality and conformity with Article 6 (art. 6) of the Convention of section 286 para. 2 of the Code (see paragraph 29 below). It further stated that the applicant was not entitled to receive a copy of the Attorney General's croquis personally and that Article 6 (art. 6) of the Convention had been observed since a copy of this document had been made available to his official defence counsel.

(g) The Supreme Court hearing and judgment

21. The hearing before the Supreme Court of the pleas of nullity and appeals was held on 2 July 1986 in the absence of the applicant. He was represented by his official defence counsel. It began at 9 a.m. and closed at 11.25 a.m. The court heard submissions from the legal representatives of the parties and a representative of the Attorney General's office. Its deliberations following the hearing lasted approximately thirty minutes. A brief summary of the judgment was read out.

22. The court rejected the applicant's and his relatives' pleas of nullity as well as the appeal brought by Mr R.P. It allowed both the public prosecutor's appeal and, in part, the appeal brought by the relatives and

sentenced the applicant to life imprisonment. It also annulled the order committing the applicant to a mental institution, thereby requiring him to serve his sentence in an ordinary prison.

In its evaluation of the aggravating circumstances of the case, the Supreme Court stated:

"The court of first instance failed, ..., in assessing the sentence, to make adequate allowance for the special gravity of the accused's personal guilt taken together with the objective weight of the offence involved in (intentionally) killing a person in the particular circumstances of this case. After all, this treacherous crime - amounting practically to 'liquidation' of the unsuspecting victim, who 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 baseness) on the perpetrator's part, and such a degree of guilt, that the imposition of a determinate prison sentence ... does not (any longer) seem justified in the circumstances of the case. The fact that the accused committed the crime when in an abnormal mental state and under its influence is not so important, and thus cannot counterbalance the factors which tell against him in determining the sentence. The only response to the accused's criminal behaviour which is commensurate with his guilt is accordingly a sentence of life imprisonment."

23. In the course of its judgment the court found that the rejection by the trial court of the evidentiary motion in connection with the diary-sheets did not impair the rights of the defence (see paragraph 16 above). It went on to find that the missing diary-sheets which had been submitted to the court would not have "been likely to be of any significance to the jury's verdict".

24. The original (Urschrift) of the Supreme Court's judgment shows that the rejection of the pleas of nullity was almost literally based on the judge rapporteur's draft decision prepared before the Supreme Court's hearing (see paragraph 17 above).

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

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Plea of nullity

26. First-instance judgments given by Chambers of a Regional Court can be challenged by a plea of nullity 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 that no reasons have been given or that the reasons are insufficient, contradictory, or clearly incompatible with the contents of the file.

However the latter principles concerning the reasons for the court's findings do not apply to nullity proceedings in respect of jury verdicts in the assize courts. 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 examining, in particular, whether the trial has been conducted in a manner which complies with fundamental procedural principles, whether the right questions have been put and the right directions given to the jury. The Supreme Court may only verify whether the jury has provided unclear, incomplete or contradictory answers to the questions put to it. As in other cases it also supervises the correct application of the criminal law, but in so doing is bound by the jury's findings as to the facts.

27. In certain cases the Supreme Court may reject a plea of nullity without a public hearing (section 285 (c) of the Code). In all other cases - such as the present - there will be a public hearing which may also be combined with a public hearing on appeals against sentence.

28. As regards the hearing on a plea of nullity section 286 of the Code provides:

"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.

... "

29. Section 344 of the Code applies ,in principle, the above rules to nullity pleas arising out of trials by jury.

However, if the hearing is a combined one on a plea of nullity and an appeal against sentence, an accused who is present for the latter purpose may also exercise his rights concerning the nullity plea.

B. Appeal against sentence

30. While legal defects in 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. It may concern both points of law (in particular whether mitigating or aggravating circumstances have been correctly taken into account) and factors relating to the assessment of the sentence. Where the substance of an appeal is examined a public hearing must normally be held.

31. As regards the personal appearance of the accused at appeal hearings, section 296 para. 3, second sentence, of the Code provided at the relevant time:

"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."

C. Supreme Court's Rules of Procedure

32. The Supreme Court's internal procedure is governed by the Federal Supreme Court Act (*Bundesgesetz über den Obersten Gerichtshof*) and Rules of Procedure (*Geschäftsordnung*) adopted pursuant to section 22 of this Act.

33. According to the Supreme Court Act, the Supreme Court normally sits in chambers composed of five members, one of them acting as the presiding judge, one as judge rapporteur (sections 5 and 6, paras. 1 and 2). Section 20, last sentence, provides that the name of the judge rapporteur shall not be disclosed to the parties.

34. The relevant parts of section 60 of the Supreme Court's Rules of Procedure read as follows:

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

(3) If the file is subsequently to be transmitted to the Attorney General's office, either for comments or motions or at their request for inspection before a decision, any documents in it from which conclusions might be drawn as to the content of the Supreme Court's forthcoming decision or as to its deliberations (draft decision of the judge rapporteur, comments by members of the Chamber or other similar documents) must be withheld unless there is a judicial order to the contrary.

(4) When the Attorney General's office has returned the file the judge rapporteur shall transmit it to the presiding judge for further action together with his draft decision.

...

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

(7) If the Attorney General has submitted observations, copies of them must be served on the other parties to the nullity proceedings, not later than the fixing of the date of the public hearing, unless there is a judicial order to the contrary."

35. Section 65 para. 2 of the Rules of Procedure provides that a record shall be prepared concerning every oral deliberation and vote. This record may be kept confidential in cases provided by law.

36. After the Chamber's vote on the decision either the judge rapporteur or that member of the Chamber whose draft was adopted must 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).

PROCEEDINGS BEFORE THE COMMISSION

37. The applicant lodged his application (no. 12350/86) with the Commission on 1 August 1986. He submitted numerous complaints concerning the trial proceedings before the Assize Court claiming breaches of Article 6 paras. 1, 2 and 3 (c) and (d) (art. 6-1, art. 6-2, art. 6-3-c, art. 6-3-d) of the Convention. He further complained that he was not allowed to be present in person at the Supreme Court's hearing, in breach of Article 6 paras. 1 and 3 (c) in conjunction with Article 14 (art. 14+6-1, art. 14+6-3-c). In addition he alleged that the Supreme Court proceedings were unfair (Article 6 para. 1) (art. 6-1) in that the court's judgment was prepared and communicated to the Attorney General before the hearing and that he did not have sufficient time to prepare his defence (Article 6 para. 3 (b)) (art. 6-3-b). Finally he claimed a violation of Article 5 in conjunction with Article 14 (art. 14+5), as regards the sentence imposed by the Supreme Court, and of Article 13 (art. 13) as regards the scope of the remedies available before the Supreme Court to redress Article 6 (art. 6) violations.

38. The Commission declared the case admissible on 5 September 1990 but only as regards the complaints relating to the proceedings before the Supreme Court. In its report adopted on 20 May 1992 (Article 31) (art. 31) the Commission expressed the opinion:

(a) that there had been a violation of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) in that the applicant was not allowed to be present in person at the Supreme Court's hearing (eleven votes to three);

(b) that it was not necessary to examine the same complaint under Article 14 in conjunction with Article 6 (art. 14+6) (eleven votes to three);

(c) that there had been no violation of Article 6 para. 1 (art. 6-1) by the fact that a draft judgment had been prepared before the Supreme Court's hearing (unanimously);

(d) that there had been a violation of Article 6 paras. 1 and 3 (b) (art. 6-1, art. 6-3-b) in that he had not been granted sufficient opportunities to obtain, and to comment on, the Attorney General's position paper (eight votes to six);

(e) that there had been no violation of Article 6 (art. 6) as regards his remaining complaints concerning the fairness of the Supreme Court's proceedings (unanimously);

(f) that there had been no violation of Article 13 (art. 13) or of Article 5 in conjunction with Article 14 (art. 14+5) (unanimously).

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment*.

AS TO THE LAW

I. SCOPE OF THE CASE

39. The applicant submitted that the Commission had failed to examine his complaint that there had been a violation of the presumption of innocence contrary to Article 6 para. 2 (art. 6-2) of the Convention.

40. The Commission accepts that this complaint had been made prior to the Commission's decision declaring the application admissible. The Court has therefore jurisdiction to examine it (see paragraphs 76-77 below).

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

41. The Government claimed, as they had before the Commission, that the applicant's complaints under Article 6 para. 3 (c) (art. 6-3-c) that he was not permitted to attend the nullity and appeal hearings before the Supreme Court should be rejected as inadmissible for non-exhaustion of domestic remedies by virtue of Articles 26 and 27 para. 3 (art. 26, art. 27-3) of the Convention.

The Government pointed out that the applicant would have been able to attend the hearing of the appeals in accordance with section 296 para. 3 of the Code of Criminal Procedure if he had made a request to this effect (see paragraph 31 above). However, he had not done so. In addition, under Austrian law, his presence at the appeal hearings would have entitled him to participate in the hearing of the pleas of nullity (see paragraph 29 above).

42. The Court observes that the Government's arguments on both points are closely linked to the well-foundedness of the applicant's complaints under Article 6 para. 3 (c) (art. 6-3-c). The plea should therefore be joined to the merits.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 268-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

III. ALLEGED VIOLATIONS OF ARTICLE 6 (art. 6)

43. The applicant alleged various breaches of paragraphs 1, 2 and 3 (b) and (c) of Article 6 (art. 6-1, art. 6-2, art. 6-3-b, art. 6-3-c) which, in so far as they are relevant, provide:

"1. 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 ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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

...

(b) to have adequate time and facilities for the preparation of his defence;

(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;

..."

44. The Court will first examine the applicant's main complaints under Article 6 para. 1 in conjunction with paragraph 3 (b) and (c) (art. 6-1, art. 6-3-b, art. 6-3-c).

A. Article 6 para. 1 in conjunction with paragraph 3 (b) (art. 6-1, art. 6-3-b)

1. Attorney General's position paper

45. The applicant maintained that he only received a copy of the Attorney General's position paper (croquis) three weeks before the hearing at a time when the Supreme Court's draft judgment had already been drawn up and discussed by the Chamber of the court. If he had been in a position at an earlier stage of the proceedings to file a reply to the croquis he might have had some influence on the draft judgment. Moreover, it transpired that the judgment of the Supreme Court was based almost word for word on the croquis.

46. The Government pointed out that the applicant had three weeks in which to formulate his observations for the hearing and that it was open to his lawyer to inspect the position paper in the file at the Supreme Court before its official transmission to him.

47. The Commission found that the procedure was not fair in this respect and that the defence had not been granted "adequate time and facilities" to

prepare and submit its arguments under conditions which ensured that they could effectively be taken into account by the Supreme Court. It noted that the document was used to a large extent as the basis for the judge rapporteur's draft and that the defence had no opportunity to comment on it before the oral hearing even though the draft had been informally discussed among members of the Chamber. Furthermore, the Supreme Court's judgment did not reflect any of the defence's submissions on the croquis made during the oral hearing.

48. The Court observes that, unlike the situation in *Brandstetter v. Austria* (judgment of 28 August 1991, Series A no. 211, pp. 27-28, paras. 64-69), the croquis of forty-nine pages was served on counsel on 9 June 1986, some three weeks before the date fixed for the oral hearing. It considers that this period afforded the applicant and his lawyer sufficient opportunity to formulate their reply in time for the oral hearing of 2 July 1986.

49. It has not been contested by the Government that the Supreme Court did not reply to the requests of 18 September and 2 October 1985 for the communication to the applicant of the croquis which had already been received by the Supreme Court on 2 August 1985 (see paragraph 15 above). However it was open to the applicant's lawyer to request the court for permission to consult the case file with a view to examining the croquis prior to its transmission. There is no record of his ever having done so (*ibid.*). Had such a request been filed there is no reason to suppose that leave would not have been granted.

50. Against this background the Court considers that, although the applicant may have been to some extent disadvantaged in the preparation of his defence, he nevertheless had "adequate time and facilities" to formulate his response to the croquis. Accordingly, there has been no breach of Article 6 para. 1 in conjunction with paragraph 3 (b) (art. 6-1, art. 6-3-b) in this respect.

2. Refusal to inspect file

51. The applicant also complained under this head that he was unable to inspect the file in person.

52. The Court, like the Government and the Commission, considers that this did not give rise to a breach of Article 6 paras. 1 and 3 (b) (art. 6-1, art. 6-3-b). Restriction of the right to inspect the court file to an accused's lawyer is not incompatible with the rights of the defence under Article 6 (art. 6) (see the *Kamasinski v. Austria* judgment of 19 December 1989, Series A no. 168, p. 39, para. 88).

3. Notification of decision concerning appearance at hearing

53. The applicant further submitted that the fact that the court's decision refusing him permission to attend the hearing of the nullity pleas was served on his counsel only on the day of the hearing constituted a breach of Article 6 para. 3 (b) (art. 6-3-b).

54. The Government, noting that the applicant's request had been filed only fourteen days before the hearing, argued inter alia that no violation of this provision could arise since in such circumstances both the lawyer and the applicant were required to prepare themselves for the hearing in any event.

55. The Commission considered that in view of its finding of a breach of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) no separate issue arose (see paragraph 38 (a) above).

56. The Court observes that there is no indication that the notification of the Supreme Court's decision on the day of the hearing unduly hampered the defence in the preparation of its case. There has therefore been no breach in this regard.

B. Article 6 para. 1 in conjunction with paragraph 3 (c) (art. 6-1, art. 6-3-c)

57. The applicant maintained that the refusal of leave to be present at the public hearing of the pleas of nullity and the appeals against sentence infringed his right to defend himself in person in violation of paragraphs 1 and 3 (c) of Article 6 (art. 6-1, art. 6-3-c).

58. The Court recalls that Article 6 (art. 6) extends to nullity and appeal proceedings such as those involved in the present case. However, the personal attendance of the defendant does not necessarily take on the same significance for an appeal or nullity hearing as it does for a trial hearing (see inter alia the above-mentioned Kamasinski v. Austria judgment, Series A no. 168, p. 44, para. 106).

Indeed, even where an appeal court has full jurisdiction to review the case on questions both of fact and of law, Article 6 (art. 6) does not always require a right to a public hearing and a fortiori a right to be present in person (see inter alia the Fejde v. Sweden judgment of 29 October 1991, Series A no. 212-C, p. 68, para. 31).

59. Regard must be had in assessing this question inter alia to the special features of the proceedings involved and the manner in which the defence's interests were presented and protected before the appellate court, particularly in the light of the issues to be decided by it (Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 15, paras. 31 and 32), and their importance for the appellant.

In the instant case, the hearing before the Supreme Court involved both pleas of nullity and appeals against sentence. The Court will examine the issue in respect of each of these proceedings in turn.

1. Attendance at the hearing of the pleas of nullity

60. The applicant contended that he had a right to be present at the hearing of the pleas of nullity since these proceedings involved not only questions of law but also certain questions of fact. In his plea of nullity he had submitted that wrong conclusions on questions of fact had been drawn by the trial court and that motions for evidence to be taken had been wrongly dismissed. In particular, the Supreme Court had examined the diary-sheets submitted by the victim's son and concluded that they were not of significance for the jury's verdict (see paragraph 23 above). He further claimed that an inquiry had been undertaken as regards certain cheques (see paragraph 16 above).

61. For the Government Article 6 (art. 6) does not require the participation of the accused in hearings of pleas of nullity since the proceedings only concern questions of law. Moreover, the reference by the Supreme Court to the diary-sheets was made only after it had found that there was no basis for the applicant's procedural complaint as regards the trial court's refusal to take evidence relating to this material (see paragraph 23 above).

62. The Commission, while expressing doubt whether Article 6 (art. 6) required the applicant's presence at these proceedings, did not find it necessary to give an opinion on this point.

63. The Court observes that under Austrian law the Supreme Court in dealing with nullity proceedings is primarily concerned with questions of law that arise in regard to the conduct of the trial and other matters. While the Supreme Court is bound by the findings of fact made by lower courts, it may be required, as in the present case, to examine whether a motion to take evidence has been properly refused by the trial court and whether the excluded facts might have influenced the jury's verdict.

In the Court's view, taking into consideration that the applicant was legally represented, neither paragraph 1 nor 3 (c) of Article 6 (art. 6-1, art. 6-3-c) required his presence at such proceedings. In particular, it notes that the diary-sheets in question had been submitted to him before the Supreme Court's hearing and he was able, through his lawyer, to make submissions on them in the course of the hearing. Moreover, it has not been established, as alleged by the applicant, that the Supreme Court took any steps as regards the cheques in question (see paragraph 16 above).

It follows that there has been no breach on this point.

64. In the light of this conclusion it is not necessary to deal with the question reserved in paragraph 42 in so far as it relates to this complaint.

2. Attendance at the hearing of the appeals against sentence

65. The applicant, supported by the Commission, contended that his right to defend himself in person was violated by the Supreme Court's refusal to permit his attendance at the hearing of the appeals.

66. The Government submitted that the applicant's failure to request the Supreme Court for leave to attend the hearing of the appeals constituted an unequivocal waiver of his right in this respect. It had to be borne in mind that the applicant was a former judge who was familiar with the relevant legal provisions and was represented by counsel. Moreover it could not be said, having regard to the terms of section 296 para. 3 of the Code of Criminal Procedure (see paragraph 31 above), that his request to be present at the hearing of the pleas of nullity implicitly included a request to participate in the hearing of the appeals.

67. The Court observes that the Supreme Court was called upon in the appeal proceedings to examine whether the applicant's sentence should be increased from twenty years to life imprisonment and whether the sentence should be served in a normal prison instead of a special institution for mentally deranged offenders. In the event, the Supreme Court answered both questions in the affirmative. Unlike the jury which had been unable to establish a motive for the offence, it also found that the applicant had carried out the murder to cover up his own "financial misdeeds" (see paragraph 22 above).

These proceedings were thus of crucial importance for the applicant and involved not only an assessment of his character and state of mind at the time of the offence but also his motive. In circumstances such as those of the present case, where evaluations of this kind were to play such a significant role and where their outcome could be of major detriment to him, it was essential to the fairness of the proceedings that he be present during the hearing of the appeals and afforded the opportunity to participate in it together with his counsel.

68. It is true that, for reasons which remain unclear, the applicant failed to make a request in his appeal or counter-statement to attend the hearing. However, section 296 para. 3 also provides that in the absence of a request he should be brought before the court "if his personal presence appears necessary in the interest of justice" (see paragraph 31 above).

The Court considers that, given the gravity of what was at stake for the applicant, he ought to have been able "to defend himself in person" as required by Article 6 para. 3 (c) (art. 6-3-c) and that the State was under a positive duty, notwithstanding his failure to make a request, to ensure his presence in court in such circumstances.

69. It follows that there has not been a failure to exhaust domestic remedies in this regard (see paragraph 42 above).

In sum, the Court finds a breach of Article 6 para. 1 in conjunction with paragraph 3 (c) (art. 6-1, art. 6-3-c).

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

70. The applicant contended that the preparation and discussion by members of the Supreme Court of a draft judgment, prior to the hearing of the case, rendered the proceedings unfair and in breach of Article 6 para. 1 (art. 6-1).

71. Neither the Commission nor the Government agreed.

72. The Court is not satisfied that the practice in this respect followed in the present case gave rise to any infringement of Article 6 para. 1 (art. 6-1). A draft judgment prepared in advance and then discussed informally by members of the Chamber need not in any way bind the Supreme Court or preclude it from amending the draft and reaching a different view after hearing the parties.

D. Complaints concerning equality of arms

73. The applicant further claimed the following violations of the principle of equality of arms:

- that the defence was required to introduce its remedies against the judgment of first instance within short time-limits whereas no time-limit existed as regards the submission of the Attorney General's croquis;
- that the Attorney General's office, unlike the defence, was informed of the identity of the judge rapporteur in breach of Austrian law and thus knew which Chamber of the Supreme Court would deal with the case;
- that the Supreme Court's file, including the judge rapporteur's draft, was allegedly transmitted to the Attorney General's office and not to the defence.

74. Neither the Government nor the Commission considered that these complaints disclosed a breach of Article 6 para. 1 (art. 6-1). In particular, the Government emphasised that the draft judgment could not under Austrian law be communicated to the Attorney General's office (see paragraph 34 above).

75. The Court notes that it is not in dispute that there is no time-limit for the submission of the Attorney General's position paper. However, unlike the defence, the Attorney General's office is required to familiarise itself with the case at a later and separate phase of the procedure. Moreover, the defence was not in any way prejudiced by the difference in this regard.

Secondly, it is not denied by the Government that the name of the judge rapporteur was wrongfully disclosed to the Attorney General's office. However, in itself this cannot render the proceedings unfair.

Finally, the Court notes that there is no evidence whatsoever that a copy of the draft judgment was forwarded to the Attorney General's office.

Accordingly, there has been no breach of Article 6 para. 1 (art. 6-1) in respect of the above matters.

E. Article 6 para. 2 (art. 6-2)

76. The applicant submitted that by imputing guilt of "financial misdeeds" the Supreme Court had in effect found him guilty of fraud in violation of the presumption of innocence. He pointed out that the jury which had heard all the evidence in the case had been unable to establish a motive on the grounds that there were "too many possibilities" (see paragraph 11 above).

77. The Court recalls that the applicant had already been found guilty of murder and that the Supreme Court's remarks related solely to the question of his motive for the offence. Moreover, the reference to "financial misdeeds" cannot be construed as a finding that the applicant was guilty of a specific offence. In such circumstances no question of a violation of the presumption of innocence arises.

IV. ALLEGED VIOLATIONS OF ARTICLES 13 AND 14 (art. 13, art. 14)

78. The applicant also complained that he was the victim of discrimination contrary to Article 14 in conjunction with Article 6 (art. 14+6) in that, unlike an accused at liberty, he had no right to be present in person at the Supreme Court hearing.

He further alleged a violation of Article 14 in conjunction with Article 5 para. 1 (a) (art. 14+5-1-a) on the grounds that in view of the arbitrary and contradictory character of the Supreme Court's judgment he was not "lawfully" detained after conviction by a competent court.

Finally he claimed that he was denied an effective remedy in respect of his complaints due to the limited scope of the Supreme Court's power of review.

79. Article 13 (art. 13) reads:

"Everyone whose rights and freedoms as set forth in [the] 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."

Article 14 (art. 14) reads:

"The enjoyment of the rights and freedoms set forth in [the] 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."

The relevant part of Article 5 (art. 5) reads:

"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;

..."

80. In view of the Court's finding of a violation concerning the applicant's absence at the hearing of the appeals (see paragraph 69 above) it does not consider it necessary to examine his allegation of a breach of Article 14 in conjunction with Article 6 (art. 14+6).

81. As regards the two remaining complaints, the Court observes that, while they were raised before the Commission, they were not the subject of any written or oral submissions by the applicant in the proceedings before the Court. In these circumstances the Court does not consider that these complaints have been maintained by the applicant. It sees no reason to examine them *ex officio*.

V. APPLICATION OF ARTICLE 50 (art. 50)

82. According to Article 50 (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

83. The applicant has limited his claims to costs and expenses in respect of two lawyers in relation to the Strasbourg proceedings. He stated that a second lawyer was required because of the risk of censorship of his communications with his first counsel, Dr Weh.

800,000 and 95,256 schillings were claimed respectively regarding Dr Weh and Dr Mühlgassner in respect of fees and 30,000 and 37,790 schillings for expenses.

84. The Government submitted that the appearance of a second lawyer to safeguard the applicant's rights before the Strasbourg institutions was not necessary. They pointed out that the applicant's correspondence with Dr Weh had not been censored. They considered that an award of 120,000 schillings for fees would be a more appropriate sum, taking into account that various submissions had not been necessary.

85. The Court has doubts as to whether it was necessary in the present case for the applicant to be represented by two lawyers. Moreover it has also taken into account the fact that out of a multiplicity of complaints only one has been found to be justified. Making an assessment on an equitable basis,

it awards 200,000 schillings in respect of fees and 30,000 schillings for expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Joins the Government's preliminary objections to the merits;
2. Holds that it is not necessary to decide the Government's preliminary objection in respect of the applicant's complaint that he was not present at the hearing of the pleas of nullity;
3. Dismisses the preliminary objection raised by the Government in respect of the applicant's complaint that he was not present at the hearing of the appeals;
4. Holds that there was no violation of Article 6 para. 1 taken in conjunction with Article 6 para. 3 (b) (art. 6-1, art. 6-3-b);
5. Holds that there was no violation of Article 6 para. 1 taken in conjunction with Article 6 para. 3 (c) (art. 6-1, art. 6-3-c) as regards the applicant's absence at the hearing of the pleas of nullity;
6. Holds that there was a violation of Article 6 para. 1 taken in conjunction with Article 6 para. 3 (c) (art. 6-1, art. 6-3-c) as regards the applicant's absence at the hearing of the appeals;
7. Holds that there was no violation of Article 6 para. 1 (art. 6-1) in respect of the remaining complaints under this provision;
8. Holds that there was no violation of Article 6 para. 2 (art. 6-2);
9. Holds that it is not necessary to examine the applicant's complaints under Articles 13 and 14 (art. 13, art. 14);
10. Holds that the respondent State is to pay within three months to the applicant 230,000 (two hundred and thirty thousand) Austrian schillings in respect of costs and expenses;
11. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 September 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar