EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 28501/95

Dimiter Pobornikoff

against

Austria

REPORT OF THE COMMISSION

(adopted on 3 March 1999)

TABLE OF CONTENTS

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 is a German citizen, born in 1921. He is presently detained at the Stein prison in Austria. He was represented before the Commission by Mr H. Baumgärtl, a lawyer practising in Munich.

3. The application is directed against Austria. The respondent Government were represented by their Agent, Ambassador F. Cede, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

4. The case concerns the applicant's complaint that, in criminal proceedings against him the Supreme Court held a hearing on his plea of nullity and his appeal in his absence. The applicant invokes Article 6 paras. 1 and 3 (c), (d) and (e) of the Convention.

B. The proceedings

5. The application was introduced on 21 July 1994 and registered on 5 September 1995.

6. On 27 February 1997 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 13 May 1997. The applicant replied on 27 August 1997 after an extension of the time-limit.

8. On 14 January 1998 the Commission declared the application admissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 28 January 1998 and they were invited to submit such further information or observations on the merits as they wished. No such observations were submitted.

10. After declaring the case admissible, the Commission, acting in accordance with former Article 28 para. 1 (b) of the Convention[1], 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.

11. Pursuant to the entry into force of Protocol No. 11 of the Convention, the application was transferred to the Commission sitting in Plenary.

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[1] The term “former” refers to the text of the Convention before the entry into force of Protocol No. 11 on 1 November 1998.

C. The present Report

12. The present Report has been drawn up by the Commission (First Chamber) in pursuance of former Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. S. TRECHSEL, President
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
B. CONFORTI
Sir Nicolas BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIĆ
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM. R. NICOLINI
A. ARABADJIEV

13. The text of this Report was adopted on 3 March 1999 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with former Article 31 para. 2 of the Convention.

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

(i) to establish the facts, and

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

15. The Commission's decision on the admissibility of the application is annexed hereto.

16. 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

17. On 8 March 1993 the Public Prosecutor's Office at the Feldkirch Regional Court (Landesgericht) filed an indictment charging the applicant with murder. It was alleged that the applicant, in December 1991, had killed his wife and had then buried her corpse, of which the head had been cut off, in a field where it had been discovered in May 1992. It was further alleged that he had had a mistress, and had run into financial difficulties as he had rented and furnished an apartment for her and had maintained her, whereas his wife, who had opposed a divorce, had owned the spouses' house and a collection of jewellery of considerable value. In these and the trial proceedings the applicant was represented by official counsel, Mr. A.

18. On 1 October 1993 the Feldkirch Regional Court, sitting as a Court of Assizes (*Geschworenengericht*), gave judgment. The jury found the applicant guilty of murder. The court, sitting with the jury, sentenced him to life imprisonment. It considered as aggravating circumstances that the applicant had acted for particularly base motives and had acted cruelly. It found that there were no mitigating circumstances.

19. On 2 November 1993 the applicant, still represented by Mr. A., filed a plea of nullity (*Nichtigkeitsbeschwerde*) and an appeal (*Berufung*). In his plea of nullity he complained about the composition of the court, the court's failure to put alternative questions to the jury and about the lack of reasons for the jury's verdict. He also submitted that there was no factual basis for finding him guilty. In his appeal he complained in particular that the Regional Court's judgment did not give sufficient reasons for its determination of the sentence. As to the aggravating circumstances, it was not clear which motives had been found to be established and had been evaluated as being particularly base. Nor did the judgment mention any facts which would allow the conclusion that he had acted in a cruel manner. As to possible mitigating circumstances, the applicant complained that the Regional Court had failed to take his advanced age and the fact that he had no prior convictions into account. The applicant did not request to attend the hearing before the Supreme Court.

20. On 21 December 1993 the Supreme Court (*Oberster Gerichtshof*) fixed the hearing date for the applicant's plea of nullity and his appeal for 27 January 1994. The applicant received a notification, which stated that his counsel would be summoned to the hearing. As to the hearing of the plea of nullity, the notification informed him that he, being detained, could only appear through his counsel. As to the hearing of the appeal, he would not be brought to the court as the conditions of S. 296 para. 3 of the Code of Criminal Procedure (*Strafprozeßordung*) were not fulfilled.

21. On 27 January 1994 the Supreme Court, after having held a hearing in the absence of the applicant but in the presence of his new official defence counsel, Mr. K., rejected his plea of nullity as well as his appeal. As regards the appeal, the Court found that the applicant had rightly claimed as a mitigating circumstance that he had no prior convictions. Further, given that the manner in which the applicant had killed his wife had remained unclear, there was no

factual basis for finding that the applicant had acted cruelly and for applying the corresponding aggravating circumstance. However, the outcome of the proceedings supported the conclusion that the applicant had acted for particularly base motives. Attaching particular weight to this aggravating circumstance, the Supreme Court found that - notwithstanding the above corrections concerning the basis for determining the sentence - the sentence of life imprisonment was commensurate with the applicant's guilt.

B. Relevant domestic law

22. A first instance judgment given by a Court of Assizes at a Regional Court can be challenged by a plea of nullity to the Supreme Court on specific grounds enumerated in S. 345 para. 1 of the Code of Criminal Procedure (*Strafprozeßordnung*). The Supreme Court supervises the correct application of the criminal law, but in so doing is bound by the jury's findings as to the facts. In general, the Supreme Court conducts a public hearing on the plea of nullity, which may be combined with a hearing on appeals against sentence. As regards hearings on a plea of nullity, S. 286 of the Code of Criminal Procedure, applicable to nullity pleas arising out of jury trials pursuant to S. 344 of the Code, provides that if the accused is under arrest, the notice of hearing given to him shall mention that he may only appear through counsel.

23. The sentence as such can 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. As regards the personal appearance of the accused at appeal hearings, S. 296 para. 3 provides that the Supreme Court, when deciding upon an appeal at the public hearing on the plea of nullity, always has to summon an accused who is not detained. 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 if his personal presence appears necessary in the interest of justice.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

24. The Commission has declared admissible the applicant's complaints:

- that in criminal proceedings against him the Supreme Court held a hearing on his appeal in his absence;

- that in criminal proceedings against him the Supreme Court held a hearing on his plea of nullity in his absence.

B. Points at issue

25. Accordingly, the points at issue are:

- whether there has been a violation of Article 6 paras. 1 and 3 (c) of the Convention on account of the applicant's absence at the hearing on his appeal against sentence;

- whether there has been a violation of Article 6 paras. 1 and 3 (c) of the Convention on account of the applicant's absence at the hearing on his plea of nullity.

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

26. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Commission will examine the applicant's complaints from the angle of paragraph 1 taken together with the principles inherent in paragraph 3 of Article 6 (Eur. Court HR, Unterpertinger judgment of 24 November 1985, Series A no. 110, p. 14, para. 29; Daud v. Portugal judgment of 21 April 1998, para. 33, to be published in Reports 1998).

27. Article 6, so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal ...
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> ...
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
>
> 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;"

28. The applicant maintained that in the criminal proceedings against him his defence rights have been infringed because the Supreme Court held the public hearing on his plea of nullity and his appeal against sentence in his absence.

29. The Commission recalls that Article 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. 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 and their importance for the appellant (Eur. Court HR, Kremzow v. Austria judgment of 21 September 1993, Series A no. 268-B, p. 43, paras. 58-59).

30. Therefore the Commission has to examine separately this issue in respect of the plea of nullity and the appeal against sentence dealt with by the Supreme Court.

a. Attendance at the hearing of the appeal against sentence

31. As to the hearing of his appeal the applicant submits that the Supreme Court, in accordance with S. 296 para. 3 of the Code of Criminal Procedure, would have been required to summon him in the interest of justice as the proceedings involved an evaluation of his personality and character. He submits further that he could not be expected to have requested leave to attend the hearing of his appeal. His official defence counsel, despite the fact that he repeatedly expressed his wish to be heard personally by the Supreme Court, did not inform him of the possibility to make a request to this effect.

32. The Government submit that the hearing of the applicant's appeal did not involve any question which would have necessitated that his personal attendance be ordered ex officio. The applicant failed to request his attendance at the hearing before the Supreme Court in accordance with S. 296 para. 3 of the Austrian Code of Criminal Procedure.

33. The Commission recalls that in the Kremzow case, the Court found that the appellant's absence from the Supreme Court's hearing on his appeal was in breach of Article 6 paras. 1 and 3 (c) of the Convention. Having regard to the gravity of what was at stake for the appellant in the circumstances of the case, the Court considered that he ought to have been able to "defend himself in person" and that the State was under a positive duty, notwithstanding his failure to make a request, to ensure his presence in court (Kremzow judgment, loc. cit., p. 45, para. 68).

34. The Commission notes that unlike in the above-mentioned Kremzow case, the applicant had already been sentenced to life imprisonment at first instance. Thus, the appeal proceedings before the Supreme Court could not possibly result in an increase of his sentence. However, like in the Kremzow case the Supreme Court looked at the applicant's motive for the offence. The Supreme Court, on the basis of the file, confirmed the Assize Court's finding that the applicant had acted for a particularly base motive. Attaching particular weight to this circumstance, it held that the sentence to life imprisonment was commensurate with the applicant's guilt although it corrected the first instance court's judgment as regards other aggravating and mitigating circumstances.

35. Having regard to the gravity of what was at stake for the applicant and the nature of the issues before the Supreme Court, the Commission finds that the Supreme Court should have ensured the applicant's attendance at the hearing, despite the fact that his official defence counsel failed to make a request to this effect, in accordance with the relevant procedural rule.

CONCLUSION

36. The Commission concludes, unanimously, that in the present case there has been a violation of Article 6 paras. 1 and 3 (c) of the Convention on account of the applicant's absence from the hearing on his appeal against sentence.

b. Attendance at the hearing of the plea of nullity

37. As to the hearing of his plea of nullity the applicant submits in particular that his official defence counsel was replaced by another official defence counsel shortly before the hearing. He claims that the latter failed to contact him and that he was, therefore, not duly represented before the Supreme Court.

38. The Government submit that Article 6 paras. 1 and 3 (c) of the Convention do not require the applicant's presence at the hearing of his plea of nullity as the Supreme Court is bound by the Assize Court's findings on the facts and only has to determine questions of law.

39. The Commission recalls that in the Kremzow case the Court found that in proceedings on a plea of nullity neither paragraph 1 nor paragraph 3 (c) of Article 6 requires the presence of an appellant at the hearing before the Supreme Court because this court, in nullity proceedings, is primarily concerned with questions of law that arise in regard to the conduct of the trial and other matters and the appellant is represented by counsel in the nullity proceedings (Eur. Court HR, Kremzow v. Austria judgment, op. cit., p. 44, para. 63).

40. The Commission therefore finds that the applicant's absence from the Supreme Court's hearing on his plea of nullity was not in breach of Article 6.

CONCLUSION

41. The Commission concludes, by 26 votes to 1, that in the present case there has been no violation of Article 6 paras. 1 and 3 (c) of the Convention on account of the applicant's absence from the hearing on his plea of nullity.

D. Recapitulation

42. The Commission concludes, unanimously, that in the present case there has been a violation of Article 6 paras. 1 and 3 (c) of the Convention on account of the applicant's absence from the hearing on his appeal against sentence (para. 36).

43. The Commission concludes, by 26 votes to 1, that in the present case there has been no violation of Article 6 paras. 1 and 3 (c) of the Convention on account of the applicant's absence from the hearing on his plea of nullity (para. 42).

M.-T. SCHOEPFER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

PARTIALLY DISSENTING OPINION OF Mrs. J. LIDDY

Having found a violation of Article 6 paras. 1 and 3 (c) of the Convention on account of the applicant's absence at the hearing on his appeal against sentence, for the reasons given in the Report, I was unable to agree that there was no violation of those provisions on account of his absence at the hearing on his plea of nullity. I would have preferred to say that in the circumstances of this case it was not necessary to make a finding on this issue.

The circumstances are that a new official defence counsel was appointed at some unspecified date between the filing of the applicant's plea of nullity and appeal and the hearing before the Supreme Court. According to the applicant this happened only shortly before the hearing and his new official defence counsel failed to contact him. It appears therefore that while, as stated in the Report, nullity proceedings are primarily concerned with questions of law that arise in regard to the conduct of the trial, the new official defence counsel's assessment of any questions of law that might be raised was formulated without any contact with the applicant or first-hand impressions of the facts underlying the purely legal points to be raised. At issue was a conviction for a very serious offence entailing life imprisonment and the new counsel apparently based his legal arguments purely on a reading of the papers without consultation with his client.

The first time the applicant raised this point about lack of contact was in his observations of 27 August 1997. It raises two questions: (1) Is it a factor which would justify a distinction to be drawn between the present case and the Court's finding in the Kremzow case (judgment of 21 September 1993, Series A No. 268-B) that there was no violation of the Convention by reason of Mr. Kremzow's absence at a hearing of a plea of nullity? (2) Is it a factor which casts doubt on the effectiveness of his representation at that hearing (cf. mutatis mutandis Eur. Court HR, Daud v. Portugal, judgment of 21 April 1998, paras. 39 and 42)? In the absence of legal submissions by both parties on such matters I would have preferred not to reach a definitive conclusion of non-violation but rather find that in the light of the earlier conclusion of violation in relation to the appeal it was not necessary to determine this aspect of the case.