

AS TO THE ADMISSIBILITY

Application No. 16417/90
by Friedrich Wilhelm KREMZOW
against Austria

The European Commission of Human Rights sitting in private on
7 November 1990, the following members being present :

MM. C.A. NØRGAARD, President

J.A. FROWEIN

S. TRECHSEL

F. ERMACORA

E. BUSUTTI

G. JÖRUNDSSON

A.S. GÖZÜBÜYÜK

A. WEITZEL

J.C. SOYER

H.G. SCHERMERS

H. DANELIUS

Sir Basil HALL

MM. F. MARTINEZ

C.L. ROZAKIS

Mrs. J. LIDDY

MM. L. LOUCAIDES

J.C. GEUS

A.V. ALMEIDA RIBEIRO

M.P. PELLONPÄÄ

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 28 March 1990
by Friedrich Wilhelm KREMZOW against Austria and registered on 9 April
1990 under file No. 16417/90 ;

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

Having deliberated ;

Decides as follows :

THE FACTS

The applicant is an Austrian citizen born in 1938 who is
serving a life sentence for murder and unlawful possession of a
firearm. The criminal proceedings which led to his conviction and
sentence are the subject of Application No. 12350/86, which was
declared admissible by the Commission on 5 September 1990.

The facts submitted in the present case may be summarised as
follows.

The applicant complains of disciplinary proceedings taken
against him, as a retired judge, in relation to the same facts which
had led to his criminal conviction. They were found also to
constitute a disciplinary offence and the applicant was sentenced to
the loss of all rights connected with his former position as a retired
judge including loss of his pension rights.

In first instance the proceedings took place before the Vienna
Court of Appeal acting as Disciplinary Court (Oberlandesgericht als

Disziplinargericht). After the admission of the indictment by this Court the case was to be heard by the same Court. The applicant challenged the judges, arguing that by admitting the indictment they had already expressed an opinion on the case. The challenge was first rejected by the Court, but after a successful appeal to the Supreme Court different judges were called upon to rule on the challenge. It was again rejected following which the Court in its original composition convicted the applicant on 22 June 1988. The Court essentially found that it was bound by the final decision of the criminal courts which revealed a behaviour by the applicant that also constituted a disciplinary offence.

The appeal proceedings took place before the Supreme Court acting as Disciplinary Court of Appeal (Oberster Gerichtshof als Disziplinarberufungsgericht). The applicant invoked in particular Article 6 of the Convention. Before the Supreme Court's hearing the Attorney General's office (Generalprokuratur) was invited to comment on the file and in this context was told the name of the Supreme Court's Rapporteur. Contrary to the criminal proceedings, the applicant was allowed to participate personally in the Supreme Court's hearing. Three judges of the Supreme Court, including its President and Vice-President, declared themselves disqualified. The applicant's challenge of a further judge was rejected although that judge stated that he had been the Judge Rapporteur in the criminal case and that he had prepared a draft decision for the Supreme Court which had been discussed several times in the competent Chamber before the hearing of the applicant's criminal appeal. On 3 October 1989 the Supreme Court rejected the applicant's appeal, holding inter alia that Article 6 of the Convention was not applicable to the disciplinary proceedings in question. The decision was served on the applicant on 15 November 1988.

COMPLAINTS

The applicant claims that in the above disciplinary proceedings the Courts in substance determined a "criminal charge" against him and that Article 6 of the Convention is therefore applicable ; he does not claim that the proceedings determined his "civil rights and obligations".

In his submission there has been a violation of Article 6 para. 1 in that the Courts were not "impartial" and in that he did not enjoy a "fair hearing" ; of Article 6 para. 2 because the Courts considered themselves bound by his criminal conviction ; of Article 6 para. 3 (d) because evidence in his favour (an admission by his deceased mother in her will that she had killed the victim) was not accepted ; and finally of Article 4 of Protocol No. 7 to the Convention ("ne bis in idem") because he was twice convicted of the same offence. the applicant considers the Austrian reservation concerning the latter provision as invalid under Article 64 of the Convention in that it is of a general character and does not contain a brief statement of the law concerned.

THE LAW

1. The applicant complains of disciplinary proceedings taken against him as a retired judge following his criminal conviction of murder and unlawful possession of a firearm. He claims that the disciplinary proceedings concerned the determination of the same criminal charges, that Article 6 (Art. 6) therefore applied to them, and that requirements of this provision were disregarded in several respects.

The Commission recalls the case law based on the Engel judgment of the Court according to which disciplinary proceedings must in certain circumstances be qualified as "criminal" for the purposes of the Convention in order to make sure that the Contracting States,

when choosing to prosecute certain acts as disciplinary offences, do not allow the disciplinary to "improperly encroach upon the criminal" and thereby avoid the applicability of Article (Art. 6) (cf. Eur. Court H.R. judgment of 8 June 19876, Series A no. 22, p. 34 para. 81). it is true that in this context the Court also referred to "mixed offences" and the fact of "cumulating criminal proceedings and disciplinary proceedings" (ibid. para. 86) such as it occurred in the present case.

However, the Commission notes that in the applicant's case the criminal and the disciplinary consequences of the applicant's acts were strictly distinguished. In fact, the Disciplinary Court did not itself "convict" the applicant of the criminal offences concerned ; it based itself on the conviction pronounced by the competent criminal court which it considered as binding. The Disciplinary Court's task was in essence limited to an examination of the question whether in the case of the applicant being a retired judge the commission of the serious criminal offences of which he had been found guilty also constituted a disciplinary offence. This was confirmed and the applicant was consequently subjected to the additional sanctions of the disciplinary law. In the Commission's opinion they were the typical sanctions which many Contracting States' disciplinary statutes for civil servants provide in such cases : withdrawal of rights connected with the professional status of a civil servant, including loss of pension rights.

It follows that Article 6 (Art. 6) is not applicable in the present case, and the applicant's complaints under his provision must accordingly be rejected under Article 27 para. 2 (Art. 27-2) as being incompatible with the provisions of the Convention, *ratione materiae*.

2. As regards the applicant's further complaint under Article 4 of Protocol No. 7 (P7-4) to the Convention, the Commission considers that it is not required to examine the applicant's arguments concerning the validity of the Austrian reservation to this provision. It has just found that the disciplinary proceedings complained of cannot be qualified as further criminal proceedings against the applicant.

The conduct of criminal and subsequent genuine disciplinary proceedings is a normal phenomenon in many Contracting States to which Article 4 of Protocol No. 7 (P7-4) does not apply. Accordingly, this part of the application must also be rejected as being incompatible with the provisions of the Convention, *ratione materiae*.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)