

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 8289/78

Thomas PESCHKE

against

Austria

Report of the Commission

(adopted on 13 October 1981)

TABLE OF CONTENTS

	page
Introduction.....	3
Part I: Statement of Facts.....	4
Part II: Solution reached.....	7
Annex: Proposed legislation with explanatory memorandum.....	11

INTRODUCTION

This Report relates to application No. 8289/78 lodged against the Republic of Austria by Mr. Thomas PESCHKE on 7 July 1978 under Art. 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

On 5 March 1980 the European Commission of Human Rights declared the application admissible. It then proceeded to carry out its task under Art. 28 of the Convention which provides as follows:

"In the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission ;

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention."

The Commission found that the parties had reached a friendly settlement of the case and, during its session on 13 October 1981, it adopted this Report which, in accordance with Art. 30 of the Convention is confined to a brief statement of the facts and of the solution reached.

The following members of the Commission were present when the Report was adopted:

MM J.A Frowein, Acting President
F. Ermacora
J.E.S. Fawcett
E. Busuttil
L.Kellberg
G.Jörundsson
G.Tenekides
S.Trechsel
B.Kiernan
M.Melchior
J.Sampaio
A.Weitzel
J.C.Soyer

PART I

Statement of the facts

1. The applicant is an Austrian citizen born in 1957 who is represented by Dr. Michael Graff, a lawyer practicing in Vienna. On 18 August 1977 he was convicted by the Regional Court of Vienna sitting as a jury court, of the crime of aggravated robbery with deadly issue (ss 142 (1) and 143 of the Penal Code). The court pronounced a sentence of ten years imprisonment, i.e. the minimum penalty prescribed by law for this offence.

2. This judgment was subject to appeals both by the applicant himself and by the prosecution. The applicant filed a plea of nullity in which he claimed essentially that the court had based its sentence on the wrong legal frame of ten years to life imprisonment instead of taking account of the reduced frame for juvenile offenders which is only ten to twenty years imprisonment (s. 36 of the Penal Code). He further claimed the existence of grounds for extraordinary mitigation (s. 41 (2) of the Penal Code) which would have justified the meting out of a sentence below the minimal penalty of ten years. His appeal from sentence to this effect was however counterbalanced by an appeal of the prosecution who considered that the sentence was too lenient and did not adequately reflect the applicant's guilt.

3. On 9 December 1977 the Supreme Court fixed a combined hearing for dealing both with the nullity issue raised by the applicant and with the appeals of both parties. Only the applicant's lawyer, but not the applicant himself was summoned to appear at this hearing which was to take place on 11 January 1978. Insofar as the nullity proceedings are concerned this exclusion of the applicant was based on a binding legal rule laid down in s. 286 (2) of the Code of Criminal Procedure which provides that in the case of the accused being detained he has to be informed of the hearing before the Supreme Court together with an explanatory remark saying that he can only appear through a lawyer. Insofar as the hearing was to deal with the appeals from sentence, the court informed the applicant that it was not envisaged to bring him before the court to attend the hearing. This ruling was made by the court in exercise of discretionary powers conferred to it under s. 296 (3) of the Code of Criminal Procedure. It is there provided that "the fixing of the date and organisation of the (appeal) hearing shall be subject to the provisions of ss. 286 and 287 (i.e. the provisions regulating public hearings on pleas of nullity) it being understood that an accused who is not under arrest must always be summoned to appear and that an accused under arrest may also be brought before the court to attend the hearing". Both s. 286 and s. 296 were applicable in the present jury court case by virtue of s. 344 of the Code of Criminal Procedure to which the court referred in its above summons.

4. Prior to the Supreme Court hearing a confidential exchange of communications took place in the context of the nullity proceedings between the Judge Rapporteur appointed by the Supreme Court and the Attorney General.

On 17 November 1977 the Judge Rapporteur transmitted the file to the Attorney General with a request for his comments on the grounds of nullity raised by the defence. This request was accompanied by a confidential ("pro domo") statement from the hand of the Judge Rapporteur containing, on the one hand, a remark on a possible ground of nullity which had not been raised (i.e. the non-inclusion in the judgment of supplementary questions put to the jury), and on the other hand a simple reference as to where a certain document could be found in the file (for further details see the Commission's decision on admissibility of 5 March 1980, DR 18, p. 162).

In reply to this request, the Attorney General submitted a so-called croquis an unsigned copy of which was made available to the applicant's lawyer, under a practice established pursuant to earlier applications brought against Austria with the European Commission of Human Rights. This document contained the Attorney General's legal submissions concerning the applicant's plea of nullity, and his consent to the holding of a public court hearing.

On the original of the croquis, however, which was not accessible to the applicant's lawyer until after the final termination of the procedure, there appeared some additional comments in the form of a so-called "pro-domo" note. This note contained some further legal considerations on nullity issues. The Attorney-General agreed with the Judge Rapporteur that the non-inclusion of the supplementary questions to the jury did not entail the nullity of the judgment because these questions had been withdrawn before the case had been put to the jury. The Attorney General, however, considered it arguable that the judgment was tainted with nullity under s. 345 (1) No. 13 of the Code of Criminal Procedure because it could not be assumed - in the absence of an express reference to s. 36 of the Penal Code - that the jury court had actually taken into account the legal frame of penalties as modified by this provision (for the full text of the pro domo note, cf the Commission's decision on admissibility, DR 18, pp 162-163).

5. At the hearing before the Supreme Court on 11 January 1978 the applicant's lawyer, invoking the Convention, objected to the exclusion of his client. The hearing was nevertheless continued in the latter's absence, and the lawyer was informed only after the court's deliberations that the court had decided to reject the above objection (which in the court's view had to be construed as an application to bring the applicant to the court) for the reason that no particular grounds had been produced which would have necessitated the applicant's appearance. The Supreme Court rejected the applicant's plea of nullity and his appeal from the sentence while it upheld the prosecution's appeal adding two and a half years to the original ten year sentence. The Supreme Court judgment was served upon the applicant on 3 March 1978.

6. In his application to the Commission which he introduced on 7 July 1978 the applicant has essentially complained

a) as regards the hearing of the appeals from sentence

- that his exclusion from this hearing whose aim it was to determine the appropriate penalty having regard to his personality structure and which eventually resulted in an increase of his sentence by 25 per cent was in itself unfair because he was treated as a mere object of the procedure
- that this exclusion was also discriminatory because only imprisoned persons could be excluded whereas persons at liberty had a legal right to be summoned and to address the court

b) as regards the nullity proceedings

- that the confidential exchange of communications between the Judge Rapporteur of the Supreme Court and the Attorney General violated the principle of equality of arms as between the defence and the prosecution.

7. In its decision of 5 March 1980 by which it declared the application admissible the Commission confirmed the existence of complex issues

a) as to whether or not, in all the circumstances of the case, the applicant's personal appearance at the appeal hearing was required in order to secure him a fair hearing within the meaning of Art. 6 (1) and the right under Art. 6 (3)(c) of the Convention to defend himself in person or through legal assistance;

b) as to whether, having regard to Art. 14 of the Convention, the status of the applicant as a detained person justified a different treatment in comparison with a person at liberty regarding his procedural rights under Art. 6 (1) and 6 (3)(c) of the Convention in criminal appeal proceedings; and finally

c) as to the interpretation and application of Art. 6 (1) of the Convention having regard to those transactions between the Judge Rapporteur and the Attorney General in the nullity proceedings which had in fact been kept secret from the defence.

8. During the proceedings on the merits of these complaints a friendly settlement was reached as described in Part II of the present Report.

PART II

Solution reached

9. Following its decision on the admissibility of the application the Commission, acting in conformity with Art. 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention.

After holding an oral hearing on the merits of the case on 12 May 1981, the Commission renewed the instruction to its Secretary to contact the parties, in accordance with the usual practice, for the purpose of securing a settlement. There ensued an exchange of letters between the parties as a consequence of which the Commission saw possibilities for a settlement. It then instructed its Secretary to discuss the matter orally with the parties.

Such discussions took place in separate meetings with the parties held in Vienna on 14 and 15 September 1981. The Commission was represented by its Secretary, Mr. Krüger and Mr. Strasser. The Government were represented by their Agent, Ambassador Kurt Herndl of the Federal Ministry of Foreign Affairs who was assisted by Mr. Okresek of the Federal Chancellery, Mr. Felsenstein of the Federal Ministry of Justice, and Mr. Wiesner of the Federal Ministry of Foreign Affairs. The applicant was represented by his lawyer, Mr. Graff.

10. At the close of these discussions, the Government's Agent, Mr. Herndl, handed the Commission's Secretary a letter dated 15 September 1981 which contained the following declaration:

"Ich beehre mich, hinsichtlich der Beschwerdesache Thomas PESCHKE (Beschwerde Nr. 8289/78) der Europäischen Kommission für Menschenrechte unter Bezugnahme auf Art. 28 lit. b in Verbindung mit Art. 30 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten namens der Regierung der Republik Österreich folgendes mitzuteilen:

1. In dem vom Bundesministerium für Justiz zur Begutachtung versendeten Entwurf eines Strafrechtsänderungsgesetzes wird im Hinblick auf den gegenständlichen Beschwerdefall die Änderung der §§ 294 Abs. 5 und 296 Abs. 3 StPO dahingehend vorgeschlagen, dass der verhaftete Angeklagte auf seinen Antrag zum Gerichtstag über eine zu seinem Nachteil erhobene Berufung vorzuführen ist.

Der Entwurf dieses Strafrechtsänderungsgesetzes 1981 samt Erläuterungen ist in der Anlage angeschlossen.

2. Der Bundesminister für Justiz wird dem Bundespräsidenten vorschlagen, in Ausübung seines Gnadenrechtes die über Thomas PESCHKE mit dem Urteil des Obersten Gerichtshofes vom 11. Jänner 1978 verhängte Freiheitsstrafe von zwölf einhalb Jahren auf zehn Jahre herabzusetzen.

3. Im übrigen hat der Präsident des Obersten Gerichtshofes mit seiner Verordnung vom 24. Jänner 1980 betreffend die Neugestaltung des Amtsverkehrs zwischen dem Obersten Gerichtshof und der Generalprokuratur die Geschäftsordnung des Obersten Gerichtshofes derart geändert, dass für "pro domo"-Vermerke kein Raum mehr bleibt."

(TRANSLATION)

"Having regard to Art. 28 (b) read in conjunction with Art. 30 of the Convention on Human Rights I, on behalf of the Austrian Government, have the honour to submit to the European Commission of Human Rights the following information concerning the application by Thomas PESCHKE (No. 8289/78):

1. In the draft Criminal Law Amendment Bill which has been circulated by the Federal Ministry of Justice for the purposes of the consultation procedure it is being proposed, having regard to the present application, that sections 294 (5) and 296 (3) of the Code of Criminal Procedure should be amended to the effect that the accused who is under arrest must at his request be brought before the court to attend the hearing which deals with an appeal lodged to his detriment.

The draft Criminal Law Amendment Bill 1981 is annexed hereto together with the explanatory memorandum.*

2. The Federal Minister of Justice will propose to the Federal President to reduce, by an act of grace, to ten years the twelve and a half years prison sentence imposed upon Thomas PESCHKE by the Supreme Court's judgment of 11 January 1978.

3. By his ordinance of 24 January 1980 concerning the enactment of new regulations on the official communications between the Supreme Court and the Attorney General the President of the Supreme Court has moreover amended the Supreme Court's Rules of Procedure in such a way as to leave no room for any 'pro domo' notes."

* cf the Annex to this Report at p. 10

11. In a letter dated 21 September 1981 the applicant's lawyer, Mr. Graff, replied as follows:

"Unter Bezugnahme auf die oben angeführte Beschwerde meines Mandanten Thomas PESCHKE bei der Europäischen Kommission für Menschenrechte in Strassburg und auf die an die Kommission gerichtete Mitteilung der Bundesregierung der Republik Österreich erlaube ich mir, Ihnen mitzuteilen, dass mein Mandant seine Beschwerde Nr. 8289/78 gegen Österreich für erledigt erklärt.

Mein Mandant erklärt ferner, dass er keinerlei Ansprüche irgendwelcher Art gegen die Republik Österreich, weder im Wege eines Verfahrens vor einem österreichischen Gericht oder vor einem anderen internationalen Gericht noch anderweitig geltend machen wird, die in irgendeiner Weise mit dem Gegenstand des obigen Verfahrens vor der Europäischen Kommission für Menschenrechte im Zusammenhang stehen.

Diese Erklärung gibt mein Mandant im Hinblick auf den Vergleich im Sinne des Artikels 28 (b) der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten ab, der in Zusammenarbeit mit der Europäischen Kommission für Menschenrechte im Verfahren zur Beschwerde Nr. 8289/78 erzielt worden ist."

(TRANSLATION)

"With reference to the above application of my client Thomas PESCHKE pending before the European Commission of Human Rights in Strasbourg, and having regard to the information submitted to the Commission by the Federal Government of the Republic of Austria, I have the honour to inform you that my client declares as settled his application No. 8289/78 against Austria.

My client further declares that he will not, either by way of legal proceedings before an Austrian court or before another international tribunal or otherwise, raise any claim against the Republic of Austria which is in any way connected with the subject-matter of the above proceedings before the European Commission of Human Rights.

This declaration is being made in view of the settlement within the meaning of Art. 28 (b) of the European Convention on Human Rights which has been reached in co-operation with the European Commission of Human Rights in the proceedings concerning application No. 8289/78."

12. At its meeting on 13 October 1981 the Commission noted from the above statements that the parties had reached agreement on the terms of a settlement of the case.

Having found that a friendly settlement of the matter on the basis of respect for human rights within the meaning of Art. 28 (b) of the Convention had been secured between the parties, the Commission adopted this Report.

Secretary to the Commission

Acting President of the Commission

H.C. KRUGER

J.A.FROWEIN