JUDGMENT OF THE COURT (Fifth Chamber)
29 May 1997 *

In Case C-299/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Friedrich Kremzow

supported by

Wilfried Weh

intervener,

and

Republik Österreich,

on the interpretation of Article 164 of the EC Treaty and a number of provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida (Rapporteur), President of the Chamber, C. Gulmann, D. A. O. Edward, J.-P. Puissochet and P. Jann, Judges,

* Language of the case: German.

Advocate General: A. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Kremzow, by Richard Soyer, Rechtsanwalt, Vienna,

— Republik Österreich, by Herbert Arzberger, Oberrat in the Public Prosecutor's Office (Finanzprokurator), acting as Agent,

— Wilfried Ludwig Weh, intervener in the main proceedings,

— the Austrian Government, by Wolf Okresek, Ministerialrat in the Bundeskanzeramt-Verfassungsdienst, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the Greek Government, by Ekaterini Samoni-Rantou, Assistant Legal Adviser in the Community Legal Affairs Department of the Ministry of Foreign Affairs, and by Lydia Pnevmatikou and Georgios Karipsiadis, Specialized Researchers in that department, acting as Agents,

— the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in that department, acting as Agents,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Daniel Bethlehem, Barrister,

— Commission of the European Communities, by Ulrich Wölker, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Kremzow, Republik Österreich, Wilfried Ludwig Weh, the Austrian Government, the Greek Government, the French Government and the Commission at the hearing on 9 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 6 February 1997,

gives the following

Judgment

1 By order of 29 August 1995, received at the Court on 18 September 1995, the Oberster Gerichtshof (Supreme Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Article 164 of the EC Treaty and various provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention').

2 The questions were raised in proceedings between Mr Kremzow and the Republic of Austria on a claim for compensation for the damage which Mr Kremzow considers he sustained as a result of his being sentenced by the Oberster Gerichtshof to life imprisonment after a trial that was found by the European Court of Human Rights to be in breach of Article 6 of the Convention (judgment of 21 September 1993 in *Kremzow* v *Austria*, Series A, No 268-B).

3 In December 1982, Mr Kremzow, a retired judge of Austrian nationality, confessed to the murder in Austria of an Austrian lawyer. He subsequently retracted his confession.

4 By judgment of 8 December 1984, the Geschworenengericht (Court of Assizes) at the Kreisgericht (District Court) Korneuburg found Mr Kremzow guilty of murder (Paragraph 75 of the Criminal Code) and of unlawful possession of a firearm (Paragraph 36 of the Law on Weapons). It sentenced him to a term of 20 years' imprisonment and committed him to an institution for mentally ill criminals.

5 Following a hearing held in the absence of the accused, who had not requested to attend and whose presence had not been ordered by the court of its own motion, the Oberster Gerichtshof, ruling on appeal by judgment of 2 July 1986, upheld the judgment of the Geschworenengericht in so far as the verdict of guilty was concerned, but sentenced Mr Kremzow to life imprisonment in an ordinary prison, annulling the decision to commit him to a psychiatric hospital. The Oberster Gerichtshof also dismissed appeals on points of law brought by Mr Kremzow and members of his family against the judgment at first instance.

6 The European Commission and, subsequently, the European Court of Human Rights having been seised of the case, the latter held by judgment of 21 September

1993, cited above, that, given the gravity of what had been at stake at the hearing dealing with the appeals against sentence, Mr Kremzow ought to have been allowed to 'defend himself in person' before the Oberster Gerichtshof in accordance with Article 6(3)(c) of the Convention, notwithstanding his failure to make a request to that effect. Accordingly, the European Court of Human Rights held that Article 6 of the Convention had been violated and awarded Mr Kremzow ÖS 230 000 in respect of fees and expenses.

7 Following that judgment, Mr Kremzow brought various proceedings in the Austrian courts for, among other things, a reduction in his sentence pursuant to Paragraph 410 of the Austrian Code of Criminal Procedure and for payment of ÖS 3 969 058.65, pursuant to Article 5(5) of the Convention, by way of damages for his unlawful detention between 3 July 1986 and 30 September 1993.

8 In his action for damages before the civil courts, Mr Kremzow argued that Article 5(5) of the Convention confers a right to compensation on anyone who has been detained contrary to the provisions of Article 5(1) to (4). He maintained that Article 5(5) is directly applicable under Austrian law and affords the basis for a claim for damages in the event of an infringement of the right to liberty of person. Since the European Court of Human Rights had definitively found that the penalty imposed on him was unlawful, his detention could not be regarded as lawful detention after conviction by a competent court within the meaning of Article 5(1)(a) of the Convention.

9 The damages claim was rejected at first instance on 9 February 1994 by the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna), whose judgment was upheld by the Oberlandesgericht Wien (Higher Regional Court, Vienna) on 25 July 1994, on the ground that under Paragraph 2(3) of the Amtshaf-

tungsgesetz (Law on State Liability) no claim for compensation could arise out of a judgment of the Oberster Gerichtshof.

10 Further, by order of 3 April 1995, the Oberster Gerichtshof rejected Mr Kremzow's application for his sentence to be reduced.

11 In an extraordinary appeal brought on a point of law against the judgment of the Oberlandesgericht Wien of 25 July 1994, Mr Kremzow argued, *inter alia*, that the proceedings which had led to the order of 3 April 1995 had not rectified the violation of the Convention and that the appeal proceedings before that court should have been resumed in order to achieve that result. He also asked the Oberster Gerichtshof to make a reference to the Court of Justice of the European Communities for a preliminary ruling on whether the national court was bound by the aforementioned judgment of the European Court of Human Rights.

12 Observing that in this case it had to consider the fundamental right of freedom of the person and the civil sanctions for infringement of that right, which constituted the basis and precondition for the undisturbed exercise of all other freedoms, especially free movement of persons and freedom to carry on one's trade or profession, the national court stayed proceedings and requested the Court of Justice to give a preliminary ruling on the following questions:

'(1) Are all or at least the substantive-law provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the

Convention") — including the provisions of Articles 5, 6 and 53 of the Convention which are relevant to the proceedings before the Oberster Gerichtshof — part of Community law (Article 164 of the EEC Treaty), with the result that the Court of Justice of the European Communities may give a preliminary ruling on their interpretation pursuant to the first paragraph of Article 177 of the EEC Treaty?

(2) Only in the event that Question 1 is answered in the affirmative, at least as regards Articles 5 and 6 of the Convention:

(a) Are national courts bound by judgments of the European Court of Human Rights finding violations of the Convention at least to the extent that they are not entitled to hold that the conduct of State institutions to which the finding of a violation relates was in accordance with the Convention?

(b) Are claims for compensation for damage based on Article 5(5) of the Convention precluded where the damage flows from a decision of the Oberster Gerichtshof?

(c) Is detention within the meaning of Article 5(1)(a) of the Convention contrary to the Convention *ex tunc* where the European Court of Human Rights has found that, in the criminal proceedings, the national court was in breach of the procedural safeguards enshrined in Article 6 of the Convention?

(d) Is the legal entity against which proceedings have been brought for State liability entitled to plead that the punishment would have been on no different a scale if the violation of Article 6 of the Convention found by the European Court of Human Rights had not occurred, although the Austrian law of criminal procedure — to date — does not provide in such cases for proceedings for the revision of a judgment or other amending proceedings by means of which the procedural error could have been remedied?

(e) Does the burden of proving the causal connection between the violation of Article 6 of the Convention and the deprivation of the plaintiff's liberty fall on the plaintiff or does the burden of proof in respect of this defect fall on the defendant legal entity?'

Jurisdiction of the Court

13 Mr Kremzow argues that the Court has jurisdiction to answer the questions referred for a preliminary ruling, *inter alia*, because he is a citizen of the European Union and, as such, enjoys the right to freedom of movement for persons set forth in Article 8a of the EC Treaty. Since any citizen is entitled to move freely in the territory of the Member States without any specific intention to reside, a State which infringes that fundamental right guaranteed by Community law by executing an unlawful penalty of imprisonment must be held liable in damages by virtue of Community law.

14 It should first be noted that, as the Court has consistently held (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33), fundamental rights form an integral part of the general principles of Community law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The Convention has special significance in that respect. As the Court has also held, it follows that measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognized and guaranteed (see, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).

15 Further, according to the Court's case-law (see, in particular, Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 31), where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights — as laid down in particular in the Convention — whose observance the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law.

16 The appellant in the main proceedings is an Austrian national whose situation is not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons. Whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions (see in particular to this effect Case 180/83 *Moser* [1984] ECR 2539, paragraph 18).

17 Moreover, Mr Kremzow was sentenced for murder and for illegal possession of a firearm under provisions of national law which were not designed to secure compliance with rules of Community law (see, in particular, Case C-144/95 *Maurin* [1996] ECR I-2909, paragraph 12).

18 It follows that the national legislation applicable in the main proceedings relates to a situation which does not fall within the field of application of Community law.

19 The answer to the national court's questions must therefore be that where national legislation is concerned with a situation which, as in the case at issue in the main proceedings, does not fall within the field of application of Community law, the Court cannot, in a reference for a preliminary ruling, give the interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the Convention.

Costs

20 The costs incurred by the Austrian, German, Greek, French and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by order of 29 August 1995, hereby rules:

Where national legislation is concerned with a situation which, as in the case at issue in the main proceedings, does not fall within the field of application of Community law, the Court cannot, in a reference for a preliminary ruling, give the interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the Convention for the Protection of Human Rights and Fundamental Freedoms.

Moitinho de Almeida Gulmann Edward

Puissochet Jann

Delivered in open court in Luxembourg on 29 May 1997.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber