

Application No. 7629/76

by

Heinz KRZYCKI

against

the Federal Republic of Germany

Report of the Commission

adopted on

9 March 1978

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## INTRODUCTION

The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The application was introduced on 13 February 1974 by Mr. Heinz Krzycki, a German citizen born in 1928 and living in Berlin. He is represented by Mr. B. Hummel, barrister in Stuttgart.

## THE SUBSTANCE OF THE APPLICANT'S COMPLAINTS

In September 1971 the applicant was conditionally released from preventive detention. In December 1971 the competent Regional Court revoked this conditional release and subsequently the applicant was again detained from 4 December 1971 until 8 June 1972 when he was released because the Court of Appeal had on 5 June 1972 quashed the Regional Court's decision which had revoked his conditional release. The applicant alleges a violation of Art. 5(1) of the Convention arguing that the Regional Court's decision revoking his conditional release had been unlawful and consequently his subsequent detention was likewise unlawful. He claims compensation under Art. 5(5) of the Convention.

## PROCEEDINGS BEFORE THE COMMISSION

The application was registered on 19 August 1976. The Commission decided on 11 December 1976 to communicate the case to the respondent Government for observations on admissibility. The respondent Government were consequently invited to submit their observations before 15 February 1977. The observations were sent on that date and received on 22 February 1977. The applicant was invited to reply before 8 March 1977. The applicant's representative first requested an extension of this time-limit and on 1 June 1977 he informed the Commission's Secretary that he had nothing to add to his previous submissions.

On 14 July 1977, after having considered the parties' written submissions, the Commission found that the applicant's complaint under Art. 5(1) and (5) of the Convention raised questions of law and fact which were also of a general interest for the application of the Convention, and should depend upon an examination on the merits. The Commission consequently decided to declare the application admissible.

On 9 November 1977 the respondent Government submitted their written observations on the merits of the case. The applicant's counsel replied on 28 November 1977.

THE PRESENT REPORT

The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. J. E. S. FAWCETT, President  
C. A. NØRGAARD, Second Vice-President  
E. BUSUTTIL  
L. KELLBERG  
B. DAVER  
J. CUSTERS  
C. H. F. POLAK  
J. A. FROWEIN  
G. JÖRUNDSSON  
G. TENEKIDES  
S. TRECHSEL  
B. KIERNAN  
N. KLECKER

The text of the Report was adopted by the Commission on 9 March 1978 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention,

A schedule setting out the history of the proceedings before the Commission and the Commission's decision on the admissibility are attached hereto as Appendices I and II.

A friendly settlement of the case has not been reached (1) and the task of the Commission in the present Report, as provided in para. (1) of Art. 31, is accordingly to establish the facts and to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

The full text of the oral and written pleadings of the parties together with further documents handed in as exhibits are held in the archives of the Commission and are available to the Committee of Ministers if required.

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(1) An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document - see Appendix III.

ESTABLISHMENT OF THE FACTS

The facts relating to the present case are generally not in dispute between the parties. They can be summarised as follows:

In December 1969 the applicant was convicted and sentenced by the Regional Court (Landgericht) in Baden-Baden. The Court ordered the applicant's preventive detention (Sicherungsverwahrung). On 30 September 1971 the Regional Court ordered the applicant's conditional release from preventive detention under Sections 42f and 42h of the Penal Code (StGB). However, the Regional Court revoked this conditional release by order of 3 December 1971 on the ground that the applicant had not met the conditions for his release. According to the findings of the Court the applicant had disrespected the orders given to him by the probation officer (Bewährungshelfer) and he had repeatedly insulted and menaced the probation officer and his family. On 19 January 1972 the Regional Court, which had in the meantime heard the applicant personally, decided to maintain its order of 3 December 1971.

Subsequently the applicant was again detained from 4 December 1971 until 8 June 1972.

At the applicant's appeal (sofortige Beschwerde) the Court of Appeal in Karlsruhe quashed on 5 June 1972 the Regional Court's orders of 3 December 1971 and 19 January 1972. The Court of Appeal found that these orders were not justified (der Widerruf der bedingten Entlassung besteht nicht zu Recht) taking into account all the circumstances of the case.

The Court stated that the applicant had in fact acted contrary to the requirements of probation, insulted and threatened the probation officer and otherwise behaved in a manner which was improper to his situation. However, judged in the context of all circumstances this misbehaviour was, in the opinion of the Court, not of such importance as to justify depriving him of the chance which was given to him after many years of detention. The Court pointed out that the applicant was known to be a complicated psychopath and it consequently had had to be expected that after a long period of deprivation of liberty he would have difficulties in adapting himself. The Court then considered that the applicant had, at his release, been promised work in an agricultural undertaking, while in reality he was committed to a farm house which the probation officer was about to transform disposing at the time of only two living rooms and a kitchen for himself and five family members. The applicant had to help in the construction work and it occurred that he had to work all night through. The applicant's reactions could therefore certainly not be approved or excused but were, on the other hand, not quite incomprehensible either.

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The applicant then brought a claim for compensation alleging that from 4 December 1971 to 8 June 1972 he had been wrongly detained. The Regional Court in Baden-Baden dismissed the claim on 11 April 1973 and the Court of Appeal in Karlsruhe rejected the applicant's appeal (sofortige Beschwerde) by decision (Beschluss) of 22 May 1973. The Court of Appeal stated that according to the Act on Compensation for Execution Measures in Criminal Proceedings (Gesetz über die Entschädigung für Strafverfolgungsmassnahmen) a claim for compensation was only given in cases where a conviction or an order concerning preventive detention or other preventive and educative measures was quashed or mitigated in consequence of retrial proceedings (Wiederaufnahmeverfahren) or normal criminal proceedings (Strafverfahren).

The applicant lodged a constitutional appeal against the Appeal Court's decision but this appeal was, on 30 January 1974, rejected by three judges of the Federal Constitutional Court (Bundesverfassungsgericht) as being inadmissible.

SUBMISSIONS OF THE PARTIES

As to the Facts

The applicant

The applicant states that he has been treated in a degrading manner by the probation officer. He denies having attacked this officer and alleges that he intended to go to the Court in order to complain of the way he was treated by the probation officer when he was arrested by the police.

The respondent Government

The respondent Government state that soon after the applicant was placed under the supervision of the probation officer tensions arose between the two in the course of which the applicant insulted and threatened the probation officer and his family.

Legal arguments advanced by the Parties

The applicant

The applicant argues that the Regional Court unlawfully revoked his conditional release and that consequently his subsequent detention was also unlawful and in violation of Art. 5(1) of the Convention. He therefore considers he has a claim under Art. 5(5) of the Convention.

The respondent Government

As to Art. 5(1) of the Convention

The respondent Government point out that the legal basis for an order imposing preventive detention were at the time of the applicant's conviction, Sections 42(a) et seq. of the Penal Code (StGB). In the meantime the criminal law has been revised but preventive detention has not been abolished. As regards the revocation of conditional release, Section 67(g)(1) which is in force since 11 January 1975 but has already been taken into account by the Karlsruhe Court of Appeal in its decision of 5 June 1972, provides as follows:

- "1. The Court shall revoke the suspension of detention if the convicted person
  - i. commits an unlawful act during the period of probation,
  - ii. commits gross or persistent breaches of instructions, or
  - iii. persistently evades the supervision and guidance of the probation officer or the supervising authority,so that it appears therefrom that the purpose of the measure requires his detention".

As there is always a final and enforceable judgement ordering preventive detention, no new proceedings are required; a judicial order in pursuance of which the execution of the judgement will be resumed is sufficient. This has not been changed by the latest developments of the criminal law.

The Government point out that the Commission has repeatedly held that the measure of preventive detention is as such compatible with Art. 5(1) of the Convention.

The present case differs from the ones dealt with by the Commission so far in as much as the alleged violation of the Convention is not the order for the execution of preventive detention but the resumption of the execution of preventive detention in pursuance of the decision of the Regional Court of Baden-Baden of 3 December 1971, after the applicant had already been conditionally released from preventive detention.

A case where the execution of detention is resumed after temporary interruption is not mentioned expressly in Art. 5(1)(a) of the Convention, but it does not give rise to any special problems. The said provision merely presupposes that the conviction ("by a competent court") comes first, before the detention ("after conviction by a competent court ....."). It may be possible to draw from this wording the conclusion that the conviction must be the legal basis for the detention. But Art. 5(1)(a) of the Convention does not allow the conclusion to be drawn that the execution of detention "after conviction" must follow immediately upon conviction or that the provision would be inapplicable in the case where the execution of the detention ordered by the judgement was interrupted. It is obvious that the Convention does not wish to make it more difficult to execute a judgement of detention in respect of persons who, for example, may have escaped serving their sentence by absconding, or who may have escaped from prison. Therefore, in such cases, final judgements which pass a sentence of imprisonment and/or order preventive detention can be executed and no new or special judicial decision is required under the Convention. On the contrary the Convention leaves it to the discretion of the Contracting Parties to entrust non-judicial agencies, eg. the prison authorities, with decisions on the commencement, suspension or resumption of the execution of a sentence passed by a criminal court since it prescribes only that the deprivation of liberty shall have been imposed "in accordance with the procedure prescribed by law" and that the detention executed after (and in pursuance of) a conviction is "lawful".

With this wording the Convention refers the question to the domestic laws of the Contracting Parties.

A requirement for the compatibility with the Convention of the resumption of the execution of preventive detention is, however, that the new deprivation of liberty which the applicant had to undergo after his conditional - hence provisional - release from preventive detention was in accordance with the law of the Federal Republic of Germany.

In the present case doubt might be cast on the "lawfulness" of the resumption of preventive detention in particular for the reason that the decisions of the Regional Court in Baden-Baden dated 3 December 1971 and 19 January 1972, on which the resumption of preventive detention was based, were quashed by the Court of Appeal in Karlsruhe. In the reasons given for its decision, the Court of Appeal said that "the revocation of the

conditional release from preventive detention is not justified". But this does not allow the conclusion to be drawn that the preventive detention executed in pursuance of the said decisions of the Regional Court was not "lawfully" executed within the meaning of Art. 5(1)(a) of the Convention.

It is true, the English text of this provision speaks of "lawful detention" which, if interpreted in isolation, could be understood to mean that the Convention would recognise a deprivation of liberty as lawful under Art. 5(1)(a) only if the competent court applied the domestic law without any error in arriving at the conviction. But the expression "lawful detention" is clearly connected with the preceding sentence, according to which it is sufficient for the compatibility of deprivation of liberty with Art. 5 of the Convention that it should be "in accordance with a procedure prescribed by law". Moreover the wording of the French text "s'il est détenu régulièrement ....." shows that Art. 5(1)(a) of the Convention requires only a formally correct procedure ("régularité") and not in addition the faultless application of domestic law (which would have required the use of the term "légalité").

With this restricted reference to domestic law, the Convention takes account of the fact that the question whether or not a conviction is based on an error of law can always be brought before an appellate court at least until the judgement has become final and enforceable. Accordingly, as the European Court of Human Rights has also stated, the words "after conviction" in Art. 5(1)(a) of the Convention are not to be interpreted "as being restricted to the case of final conviction, for this would exclude the arrest at the hearing of convicted persons who appear for trial while still at liberty, whatever remedies are still open to them" (1).

What applies to the Court judgment should also apply all the more to judicial decisions suspending provisionally the execution of sentences or of rehabilitation and prevention measures. This will naturally be done with the qualification that this suspension will be revoked where the convicted person benefitting by the suspension proves himself, by standards to be established in detail by the domestic law, to be unworthy of it. In the Federal Republic of Germany this question is of importance not only in connection with the suspension of the execution of preventive detention but above all in connection with the suspension of sentence for probation purposes under Sections 56 et seq. of the Criminal Code. According to this the execution of the sentence and especially a sentence of imprisonment for less than one year - may be suspended and the offender placed on probation if it is to be expected "that the convicted person will take the mere conviction as a warning and will not in future commit any other offences even without the effect of the execution of the sentence" (Section 56(1); first sentence, of the Criminal Code). In the practice of the Federal Republic of Germany a very important role is also played by the suspension of the execution of the remaining part of the sentence after two-thirds of it. In such cases the suspension of sentences will be revoked in circumstances enumerated in Section 56(f) of the Criminal Code, eg where the convicted person commits a criminal offence, thereby showing that he does not fulfil the expectation on which the suspension of sentence was based.

All these rules have in common that at first, by the judgement, a sentence of imprisonment and/or a measure of rehabilitation and prevention which is considered just or necessary is imposed, and at a later date it will, as a rule, become possible to suspend the execution of the sentence or measure and place the offender on probation. The suspension depends on

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(1) Judgment of 27 June 1968, Wemhoff Case, Yearbook 11, p. 802.



the prognosis of the prisoner's future development and conduct. In the individual case this decision is based on a global assessment of the prisoner's personality, but also on the presumable circumstances of his future life. It therefore requires considerable room for discretion, embracing factors which are completely different from each other and are not measurable. However, such properly exercised discretion cannot confer any statutory right to release sooner or later on probation, that would make detention prolonged after the earliest possible or justifiable date for conditional release, but still considered necessary by the deciding judge, or the revocation of an order of release on probation made under the same conditions, "unlawful" within the meaning of Art. 5(1) of the Convention.

The resumption of the execution of preventive detention the applicant had to undergo in pursuance of the decisions of the Regional Court of Baden-Baden, which were quashed by the Appellate Court, comes well within the scope of such discretion. The fact that this discretionary judgement differed from that of the Court of Appeal of Karlsruhe, as the appellate court, and was overruled by it, changes nothing, for even the findings of the Karlsruhe Court show that the applicant behaved in a manner "which can certainly not be approved or excused but which, on the other hand, is not quite incomprehensible either". Thus it was essentially the applicant himself who gave occasion for the resumption of preventive detention and had to reckon with revocation of the suspension of execution.

The impugned rulings are compatible with Art. 5(1)(a) of the Convention for the mere reason, if for no other, that this Article does not oblige the Contracting Parties to provide for the possibility of suspending the execution of prison sentences or of measures of rehabilitation and prevention. Their conformity is further shown by the fact that the right to liberty enshrined in Art. 5(1), first sentence, of the Convention is, for criminal law purposes within the scope, in particular, of Art. 5(1)(a), subject only to such restrictions as the Contracting Parties consider necessary for reasons of criminal policy. The Contracting Parties are therefore, in principle, free to impose penalties and order rehabilitation and prevention measures as well as to suspend their execution conditionally and to determine the conditions in which such privileges must be or may be revoked. Art. 5 of the Convention cannot accordingly be invoked as a yardstick for the interpretation and application of domestic law.

This does not mean that measures of the kind here in question are excluded from the sphere of application of the Convention. Of course, under Art. 3 of the Convention, the applicant was entitled not to be subjected to inhuman or degrading treatment or punishment. An arbitrary revocation of an order suspending the execution of preventive detention in placing the offender on probation might well meet the definition of inhuman treatment. But in the present case this question need not be gone into any further because the way the applicant was treated was obviously below the threshold of what is envisaged in Art. 3 of the Convention.

As to Art. 5(5) of the Convention

The respondent Government refer to the Commission's case-law according to which an application under Art. 5(5) cannot be examined before a violation of Art. 5(1) to (4) of the Convention has been established. As the applicant's preventive detention was covered by the judgement of the Regional Court of Baden-Baden of 18 December 1967 and was, therefore, lawful within the meaning of Art. 5(1)(a) of the Convention the applicant is not, therefore, entitled to compensation under Art. 5(5) of the Convention.

POINTS AT ISSUE

The applicant has invoked Art. 5(1) and (5) of the Convention. The general points at issue under this Article are as follows:

- whether or not the applicant was subsequent to the revocation of his conditional release deprived of his liberty in accordance with a procedure prescribed by law and lawfully detained after conviction (Art. 5(1)(a));
- if not, whether or not he has an enforceable right to compensation under Art. 5(5).

OPINION OF THE COMMISSION

As to Art. 5(1) of the Convention

The applicant points out that according to the finding of the Court of Appeal the revocation of his conditional release was unlawful. He concludes that his subsequent detention violated Art. 5(1).

The Government submit that "lawful detention" in the meaning of Art. 5(1)(a) refers to detention which has been ordered in accordance with a "procedure prescribed by law". It was therefore irrelevant whether in applying the domestic substantive law providing for the imposition of a prison sentence or the revocation of a conditional release the competent court made errors of law or fact.

As the applicant's conditional release had been ordered in accordance with a procedure prescribed by law his subsequent detention did not violate Art. 5(1) because it was lawful detention after conviction by a competent court (5(1)(a)).

The Commission first points out that according to its constant jurisprudence preventive detention is as such compatible with Art. 5(1) of the Convention (Decisions on admissibility of Applications Nos. 2228/64, 2622/65, and 4324/69 in Coll. 37, p. 98).

Secondly, it has to be noted that the order for the applicant's conditional release did not in any way affect the previous trial court's judgment by which the applicant was convicted and imposed a prison sentence with subsequent preventive detention. Consequently, the applicant's preventive detention after the revocation of his conditional release has to be considered as detention after conviction by a competent court in the meaning of Art. 5(1)(a). Nevertheless, the Commission considers

that in the present case the lawfulness of the applicant's preventive detention is to be determined also on the basis of the court order revoking his conditional release, because he was deprived of his liberty on the authority of this order in connection with the original conviction. The order was set aside by the appellate court and the question arises whether the applicant's detention was consequently unlawful.

The Commission is of the opinion that the situation is comparable to that of a person who has been imprisoned after having been convicted and sentenced and whose conviction is later quashed following an appeal or a request for a retrial.

Art. 5 (1)(a) does not require a "lawful conviction" but only speaks of "lawful detention". This detention must be ordered "in accordance with a procedure prescribed by law" as Art. 5 (1) lays down. Consequently the Commission has always refused to consider applications of prisoners who have been convicted and sentenced in accordance with a procedure prescribed by law and who complain that their conviction was based on error of law or fact (Decisions on the admissibility of Applications Nos. 458/59, Yearbook 3, pp. 222, 232; 1140/61, Coll. of Dec. 8, pp. 57, 62).

The Commission has also held that a national court's decision setting aside a conviction did not retroactively affect the "lawfulness" of the detention following that conviction (Decision on the admissibility of Application No. 3245/67, Yearbook 12, pp. 207, 236; cf. also Decisions on the admissibility of Applications Nos. 367/58 and 2932/66, Coll. of Dec. 31, pp. 8, 14).

Likewise, in the present case, the appellate court's decision setting aside the order revoking the applicant's conditional release did not retroactively affect the lawfulness of the applicant's preventive detention.

The Court of Appeal confirmed that the applicant had acted contrary to the conditions imposed on him when he was conditionally released but considered that a revocation of the conditional release was nevertheless unjustified. It is true that the court also questioned whether an immediate execution of the revocation order had been justified under procedural law but left this question undecided. It can therefore not be found that the revocation order had not been given "in accordance with a procedure prescribed by law". The applicant's detention following the revocation order was therefore "lawful detention".

#### Conclusion

The Commission concludes unanimously that Art. 5 (1) of the Convention has not been violated because the applicant's preventive detention was covered by sub-para. (a) of this provision.

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As to Art. 5 (5) of the Convention

Having just found that Art. 5 (1) of the Convention has not been violated the question of compensation under Art. 5 (5) of the Convention does not arise. However, taking into account that the German law provides for compensation in cases where persons sustain damages in consequence of the execution of sentences which are later set aside the question arises whether or not the fact that the applicant, although being in a similar situation, cannot claim compensation under the German law violates Art. 14 read in conjunction with Art. 5 (5).

It is doubtful whether the compensation claim of Art. 5 (5) can be considered as a "right" in the meaning of Art. 14 because this claim only arises in consequence of a violation of the rights guaranteed by the preceding paragraphs of Art. 5.

But this question can be left open. Even assuming that Art. 14 applied, it can not be found that the denial of compensation in the applicant's case is of a discriminatory character. It should first be noted that this case is to be distinguished from those where a judgment has later been set aside. The applicant was a convicted man and that was not changed by his conditional release. The provisional liberty of a prisoner conditionally released is not at all the same as that of someone not finally convicted. The German legislation, therefore, treats differently cases which are indeed different in a very important respect. The differential treatment on a reasonable basis as found here is not a discrimination in the sense of Art. 14.

Secondly, the Act on Compensation for Execution Measures in Criminal Proceedings (Gesetz über die Entschädigung für Strafverfolgungsmassnahmen) excludes compensation for detention on remand if the affected person has himself caused deliberately or by gross negligence the prosecution measures (Sec. 5 (2) of the Act) (1). In the present case it can be taken as established that the applicant has not respected the conditions imposed on him when he was conditionally released and he has thereby caused the revocation of this conditional release. His case is similar to cases in which compensation claims under the Act on Compensation for Execution Measures in Criminal Proceedings are excluded and consequently there is no appearance of a discriminatory treatment.

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(1) Sec. 5 (2) of the Act reads:

"Compensation shall likewise be disallowed where, and to the extent to which, the accused has occasioned the prosecution measure wilfully or through gross negligence .....

Conclusion

The Commission concludes unanimously that the applicant has no claim under Art. 5(5) of the Convention.

Secretary to the Commission

Acting President of the Commission

(H. C. KRUGER)

(G. SPERDUTI)