STRELETZ, KESSLER and KRENZ v. GERMANY

K.-H. W. v. GERMANY

No punishment without law – *no violation* **Article 7, Section 1**
Prohibition of discrimination – *no violation* **Article 14**

At the time when they were committed the applicants' acts of murder in enforcement of the GDR's shot-to-kill border-policing regime constituted offences defined with sufficient accessibility and foreseeability by the rules of GDR law and international law on the protection of human rights. The principles applied by the German Federal Constitutional Court had general scope and were therefore equally valid in respect of persons who were not former nationals of the GDR.

In two judgments delivered on 22 March 2001 in the cases of *Streletz, Kessler and Krenz v. Germany* and *K.-H. W. v. Germany*, the European Court of Human Rights held, unanimously and by fourteen votes to three respectively, that there had been no violation of Article 7, Section 1 of the European Convention on Human Rights (no punishment without law). The Court also held, unanimously in both cases, that there had been no discrimination contrary to Article 14 of the Convention (prohibition of discrimination) taken together with Article 7 of the Convention.

1. Principal facts

Three of the applicants, all German nationals, were senior officials of the German Democratic Republic (GDR): Fritz Streletz, who was born in 1926, was a Deputy Minister of Defence; Heinz Kessler, who was born in 1920, was a Minister of Defence; Egon Krenz, who was born in 1937, was President of the Council of State.

The fourth applicant, Mr K.-H. W., likewise a German national, was born in 1952. He was a member of the GDR's National People's Army (NVA) and was stationed as a border guard on the border between the two German States.

All four applicants were convicted by the courts of the Federal Republic of Germany (FRG), after German unification on 3 October 1990, under the relevant provisions of the GDR's Criminal Code, and subsequently those of the FRG's Criminal Code, which were more lenient than those of the GDR.

Mr Streletz, Mr Kessler and Mr Krenz were sentenced to terms of imprisonment

of five-and-a-half years, seven-and-a-half years and six-and-a-half years respectively for intentional homicide as indirect principals (*Totschlag in mittelbarer Täterschaft*), on the ground that through their participation in decisions of the GDR's highest authorities, such as the National Defence Council or the Politbüro, concerning the regime for the policing of the GDR's border (*Grenzregime*), they were responsible for the deaths of a number of people who had tried to flee the GDR across the intra-German border between 1971 and 1989.

Mr W. was sentenced to one year and ten months' imprisonment, suspended, for intentional homicide (*Totschlag*), on the ground that by using his firearm he had caused the death of a person who had attempted to escape from the GDR across the border in 1972.

The applicants' convictions were upheld by the Federal Court of Justice and declared by the Federal Constitutional Court to be compatible with the Constitution.

2. Procedure of the Court

The applications of Mr Streletz, Mr Kessler and Mr K.-H. W. were lodged with the European Commission of Human Rights on 20 November 1996, 28 January 1997 and 5 May 1997 respectively. Mr Krenz's application was lodged with the Court on 4 November 1998.

On 9 December 1999 a Chamber of the Court's Fourth Section decided to relinquish jurisdiction over these four applications in favour of the Grand Chamber, on account of the importance of the questions they raised under the Convention.

A hearing was held on 8 November 2000. On the same day the Grand Chamber unanimously declared the four applications admissible. On 14 February 2001 it decided to join the applications of Mr Streletz, Mr Kessler and Mr Krenz.

3. Summary of the judgments

Complaints

The applicants submitted that their actions, at the time when they were committed, did not constitute offences under the law of the GDR or international law and that their conviction by the German courts had therefore breached Article 7, Section 1 of the European Convention on Human Rights (no punishment without law). They also relied on Article 1 (obligation to respect human rights) and Article 2, Section 2 (exceptions to the right to life) of the Convention.

Decisions of the Court

The reasoning of the two judgments is largely identical, except as indicated below.

Article 7, Section 1 of the Convention

The Court observed that its task was to consider, from the standpoint of Article 7, Section 1 of the Convention, whether, at the time when they were committed, the applicants' acts constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or international law.

a. National law

i. Legal basis for the convictions

The Court noted that the legal basis for the applicants' convictions was the criminal law of the GDR applicable at the material time, and that their sentences corresponded in principle to those prescribed in the relevant provisions of the GDR's legislation; in the event, the sentences imposed on the applicants had been lower, thanks to the principle of applying the more lenient law, which was that of the FRG.

ii. Grounds of justification under GDR law

The applicants relied in particular on section 17(2) of the GDR's People's Police Act and section 27(2) of the State Borders Act.

In the light of the principles enshrined in the GDR's Constitution and other legal provisions (which expressly included the principles of proportionality and the need to preserve human life when firearms were used), the Court considered that the applicants' conviction by the German courts, which had interpreted those provisions and applied them to the cases in issue, did not appear at first sight to have been either arbitrary or contrary to Article 7, Section 1 of the Convention.

iii. Grounds of justification derived from GDR State practice

The Court pointed out that although the aim of the GDR's State practice had been to protect the border between the two German States "at all costs" in order to preserve the GDR's existence, which was threatened by the massive exodus of its own population, the reason of State thus invoked had to be limited by the principles enunciated in the Constitution and legislation of the GDR itself; above all, it had to respect the need to preserve human life, enshrined in the GDR's Constitution, People's Police Act and State Borders Act, regard being had to the fact that even at the material time the right to life was already, internationally, the supreme value in the hierarchy of human rights.

iv. Foreseeability of the convictions

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The Court considered that the broad divide between the GDR's legislation and its practice was to a great extent the work of the applicants themselves. Because of the very senior positions they occupied in the State apparatus, they evidently could not have been ignorant of the GDR's Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime that had been made internationally. Moreover, they themselves had implemented or maintained that regime, by superimposing on the statutory provisions, published in the GDR's Official Gazette, secret orders and service instructions on the consolidation and improvement of the border-protection installations and the use of firearms. The applicants had therefore been directly responsible for the situation which had obtained at the border between the two German States from the beginning of the 1960s until the fall of the Berlin Wall in 1989.

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The Court took the view that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights, in particular the right to life, the supreme value in the hierarchy of human rights.

Even though the applicant was in a particularly difficult situation on the spot, in view of the political context in the GDR at the material time, such orders could not justify firing on unarmed persons who were merely trying to leave the country.

In addition, the Court noted that the German courts had examined in detail the extenuating circumstances in the applicant's favour and had duly taken account of the differences in responsibility between the former leaders of the GDR and the applicant by sentencing the former to terms of imprisonment and the latter to a suspended sentence subject to probation.

Reasoning common to both judgments

The Court considered that it was legitimate for a State governed by the rule of law to bring criminal proceedings against persons who had committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, could not be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.

Moreover, regard being had to the pre-eminence of the right to life in all international instruments on the protection of human rights, including the Convention itself, in which the right to life was guaranteed by Article 2, the Court

considered that the German courts' strict interpretation of the GDR's legislation in the present case was compatible with Article 7, Section 1 of the Convention.

Lastly, the Court considered that a State practice such as the GDR's border-policing policy, which flagrantly infringed human rights and above all the right to life, the supreme value in the international hierarchy of human rights, could not be covered by the protection of Article 7, Section 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, could not be described as "law" within the meaning of Article 7 of the Convention.

Having regard to all of the above considerations, the Court held that at the time when they were committed the applicants' acts constituted offences defined with sufficient accessibility and foreseeability in GDR law.

b. International law

i. Applicable rules

The Court considered that it was its duty to examine the cases from the standpoint of the principles of international law also, particularly those relating to the international protection of human rights, to which the German courts had referred.

ii. International protection of the right to life

In that connection, the Court noted in the first place that in the course of the development of that protection the relevant conventions and other instruments had constantly affirmed the pre-eminence of the right to life.

It held that, regard being had to the arguments set out above, the applicants' acts were not justified in any way under the exceptions to the right to life contemplated in Article 2, Section 2 of the Convention.

iii. International protection of the freedom of movement

Like Article 2, Section 2 of Protocol No. 4 to the Convention, Article 12, Section 2 of the International Covenant on Civil and Political Rights provided: "Everyone shall be free to leave any country, including his own."

iv. The GDR's State responsibility and the applicants' individual responsibility

If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remained to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time. Even supposing that such responsibility could not be inferred from the above-mentioned international instruments on the protection of human rights, it could be deduced from those instruments when they were read together with Article 95

of the GDR's Criminal Code, which explicitly provided, and from as long ago as 1968 moreover, that individual criminal responsibility was to be borne by those who violated the GDR's international obligations or human rights and fundamental freedoms.

In the light of all of the above considerations, the Court considered that at the time when they were committed the applicants' acts also constituted offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.

In addition, the applicants' conduct could be considered, likewise under Article 7, Section 1 of the Convention, from the standpoint of other rules of international law, notably those concerning crimes against humanity. However, the conclusion reached by the Court made consideration of that point unnecessary.

c. Conclusion

Accordingly, the applicants' conviction by the German courts after reunification had not breached Article 7, Section 1.

In the light of that finding, the Court was not required to consider whether their convictions were justified under Article 7, Section 2 of the Convention.

Article 14 of the Convention

The applicants submitted that as former citizens of the GDR they could not rely on the constitutional principle of the non-retroactiveness of criminal statutes.

The Court held that the applicants' complaint could not be raised under Article 1 of the Convention, which was a framework provision that could not be breached on its own. It could, however, be examined under Article 14 of the Convention taken together with Article 7, as the applicants had complained in substance of discrimination they had allegedly suffered as former citizens of the GDR.

However, the Court considered that the principles applied by the Federal Constitutional Court had general scope and were therefore equally valid in respect of persons who were not former nationals of the GDR.

Accordingly, there had been no discrimination contrary to Article 14 of the Convention taken together with Article 7.

Judgment was given by the Grand Chamber of 17 judges, composed as follows::

Luzius Wildhaber (Swiss), President, Elisabeth Palm (Swedish), Christos Rozakis (Greek), Georg Ress (German), Jean-Paul Costa (French), Luigi Ferrari Bravo (Italian), Lucius Caflisch (Swiss), Loukis Loucaides (Cypriot), Ireneu Cabral Barreto (Portuguese), Karel Jungwiert (Czech), Nicolas Bratza (British), Boštjan Zupančič

(Slovenian), Nina Vajic (Croatian), Matti Pellonpää (Finnish), Margarita Tsatsa-Nikolovska (FYR Macedonian), Egils Levits (Latvian), and Anatoly Kovler (Russian), Judges.

In the *Streletz, Kessler and Krenz* case Judges Loucaides, Zupančič and Levits expressed concurring opinions. In the *K.-H. W.* case Judges Loucaides and Bratza expressed concurring opinions and Judges Cabral Barreto and Pellonpää partly dissenting opinions.