

In the Ben Yaacoub case*,

* Note by the registry: The case is numbered 8/1985/94/142. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. R. Ryssdal, President,
Mr. F. Matscher,
Mr. J. Pinheiro Farinha,
Sir Vincent Evans,
Mr. B. Walsh,
Mr. R. Bernhardt,
Mr. J. De Meyer,

and also of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 21 September and 23 November 1987,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 July 1985, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 9976/82) against the Kingdom of Belgium, lodged with the Commission on 30 June 1982 by Mr. Borhane Ben Yaacoub, a Tunisian citizen, under Article 25 (art. 25).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). Its object was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 (art. 6-1).

2. In response to the inquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber of seven judges to be constituted included ex officio Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 2 October 1985, the President drew by lot, in the presence of the Registrar, the names of the other five members, namely Mr. G. Wiarda, Mrs. D. Bindschedler-Robert, Mr. F. Matscher, Sir Vincent Evans and Mr. B. Walsh (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

Subsequently, Mr. J. De Meyer, the newly-elected judge of Belgian

nationality, who took up his functions on 21 February 1986, succeeded Mr. Ganshof van der Meersch whose term of office as a member of the Court had expired on 20 January 1986 (Article 43 of the Convention and Rule 2 § 3) (art. 43). Mr. J. Pinheiro Farinha and Mr. R. Bernhardt, substitute judges, replaced Mr. Wiarda, whose term of office had also expired, and Mrs. Bindschedler-Robert, who was prevented from taking part in the consideration of the case (Rules 2 § 3, 22 § 1 and 24 § 1).

4. Having assumed the office of President of the Chamber (Rule 21 § 5), Mr. Ryssdal consulted, through the Registrar, the Agent of the Belgian Government ("the Government"), the Commission's Delegate and Mr. Ben Yaacoub's lawyer regarding the need for a written procedure (Rule 37 § 1). On 8 October 1985, he directed that the Agent and the lawyer should each have until 8 January 1986 to file a memorial and the Delegate two months in which to reply.

The President, however, suspended the written procedure on 16 December 1985 at the Government's request: they had stated that they wished to examine with Mr. Ben Yaacoub the possibility of reaching a friendly settlement.

5. The search for such a solution gave rise, between 16 December 1985 and 14 September 1987, to a series of letters and conversations between the Government, the applicant's lawyer and the Registrar.

To facilitate the conduct of the negotiations, the President granted legal aid to the applicant on 17 June 1986 (Rule 4 of the Addendum to the Rules of Court).

6. On 14 September 1987, the Government's Agent communicated to the Registrar the terms of an agreement reached with Mr. Ben Yaacoub's lawyer. The Commission's Delegate, having been consulted, stated, on 24 September, that they called for no observations on his part. Mr. Ben Yaacoub himself subsequently approved the agreement; his lawyer so advised the Registrar on 10 November.

7. On 23 November, the Court decided to dispense with a hearing in this case, having established that the conditions for this derogation from its usual procedure were met (Rules 26 and 38).

AS TO THE FACTS

8. The applicant, a Tunisian citizen born in 1955, was living in Brussels at the time when he applied to the Commission.

9. On 5 February 1981, the investigating judge at Termonde issued a warrant for the applicant's arrest after charging him with several offences of aggravated theft.

A Chamber (*chambre du conseil*) of the Termonde Criminal Court (*tribunal correctionnel*), consisting of a single judge, Mr. De Neve, confirmed the warrant on 7 April 1981. On 28 April, 26 May and 12 June, it extended the period of Mr. Ben Yaacoub's detention on remand; on the last occasion, it took its decision in accordance with the submissions to that effect of the public prosecutor's office (*parquet*) but against the opinion of the investigating judge. On 23 June, it committed the applicant, together with three co-accused, for trial before the Criminal Court (Article 130 of the Code of Criminal Procedure). Although the offences with which Mr. Ben Yaacoub was charged fell in principle within the competence of an assize court (Article 471 of the Criminal Code), the *chambre du conseil* decided to refer them to a court dealing with lesser offences ("*correctionnaliser*") on account of the presence of an extenuating circumstance, namely that he had no previous criminal convictions (section 2 of the Act of 4 October 1867 on extenuating circumstances).

10. On 20 July 1981, the Termonde Criminal Court, presided over by Mr. De Neve, sentenced the accused to three years' imprisonment for robbery with violence or threats.

The applicant lodged an appeal against this judgment but it was dismissed by the Ghent Court of Appeal on 12 November. In particular, the Court of Appeal considered that the successive exercise by Mr. De Neve of the functions of President of the chambre du conseil and President of the Criminal Court ran counter neither to Belgian law nor to Article 6 § 1 (art. 6-1) of the Convention.

Mr. Ben Yaacoub then appealed on points of law to the Court of Cassation (2nd Chamber). This appeal was dismissed on 19 January 1982. As regards the plea founded on Article 6 § 1 (art. 6-1), and also on "the general legal principle of the independence and impartiality of the court", the Court of Cassation gave the following reasons for its decision:

"... no legal provision prohibits a judge who, in the chambre du conseil, has given a decision on an accused's detention on remand and on his committal to the Criminal Court for trial from subsequently taking part, as President or member of that Court, in the trial of that accused;

... it does not appear from the file that, before the hearing opened or during the examination of the case before the Criminal Court, the accused challenged the above-mentioned judge on any ground; ... it cannot be inferred solely from the facts mentioned in this plea that the appellants' right to a fair examination of their case by an independent and impartial court has not been respected ..." (Pasicrisie belge, 1982, I, pp. 613-614)

11. The applicant was expelled from Belgium as a result of these judicial entanglements and now lives in Geneva.

PROCEEDINGS BEFORE THE COMMISSION

12. Before the Commission, to which he applied on 30 June 1982, Mr. Ben Yaacoub complained of an infringement of his right to have his case heard by an "impartial tribunal", within the meaning of Article 6 § 1 (art. 6-1) of the Convention. The infringement arose, according to him, from the fact that one and the same judge, Mr. De Neve, first took a decision, in the chambre du conseil, concerning his detention on remand and directed that he be committed for trial, and then presided over the court which convicted him at first instance.

13. The Commission declared the application (no. 9976/82) admissible on 4 May 1983. In its report of 7 May 1985 (Article 31) (art. 31), it concluded, by six votes to four, that there had been a breach of Article 6 § 1 (art. 6-1). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

AS TO THE LAW

14. The Government and the applicant have reached the following friendly settlement (see paragraph 6 above):

"...

1. The Belgian Government undertake to lift, with effect from 30 August 1992, the effects of the expulsion order against Mr. Ben Yaacoub.

2. Prior to that date, any request for safe-conduct enabling him

to enter Belgium will be examined, provided that it is based on valid reasons and is supported by appropriate evidence.

3. The Government will pay to the applicant 100,000 [Belgian francs, BFR] by way of agreed damages.

4. The costs and fees occasioned by both the appeal on points of law and the proceedings before the Convention institutions shall be refunded in the amount of 200,000 [BFR].

..."

The Government invited the Court, with Mr. Ben Yaacoub's agreement (see paragraph 6 above), to approve this settlement in accordance with Rule 48 § 2 of the Rules of Court, which provides:

"When the Chamber is informed of a friendly settlement ..., it may, after consulting, if necessary, ... the Delegates of the Commission ..., strike the case out of the list."

The Commission's Delegate has been consulted and has raised no objection (see paragraph 6 above).

15. The Court takes formal note of the friendly settlement reached by the Government and the applicant, a settlement which the latter regards as being in accordance with his interests. The Court could nevertheless, having regard to its responsibilities under Article 19 (art. 19) of the Convention, decide that the proceedings should continue if a reason of public policy (ordre public) appeared to necessitate such a course (Rule 48 § 4).

In this connection, it should be noted that the Belgian Court of Cassation has recently reversed its case-law in relation to its decision of 19 January 1982 in Mr. Ben Yaacoub's case (see paragraph 10 above). In accordance with the submissions of the Advocate General (ministère public) - who had cited two judgments of the European Court of Human Rights (Piersack, 1 October 1982, and De Cubber, 26 October 1984, Series A nos. 53 and 86) -, the Court of Cassation held on 29 May 1985 as follows:

"... the Criminal Court, whose decision is affirmed in part by the judgment [of the Court of Appeal of Liège], included presiding judge Michaëlis, who had previously dealt with the case as President of the chambre du conseil which committed the defendant for trial;

... this fact might arouse in the accused's mind a legitimate doubt as to the fitness of the Criminal Court, so composed, to judge his case impartially; ... it follows that the judgment is tainted by nullity;

... by dismissing the plea put forward by the applicant" - the procureur général (Principal Crown Prosecutor) attached to the Court of Appeal - "and based on the incompatibility of the functions of President of the chambre du conseil which has decided on the further procedure and those of a member of the Criminal Court in the same case, the Court of Appeal has allowed its judgment to be tainted by the same nullity;

... the claim [based on a breach of Article 6 § 1 (art. 6-1) of the Convention] is [therefore] well-founded ..."

(Claude and Kirschenbilder, Pasicrisie belge, 1986, I, p. 1228; see also, at pages 1221 to 1224, the submissions of Advocate General Piret in the Vidal case)

Several subsequent cases have been similarly decided

(11 September 1985, Paquet, Pasicrisie belge, 1985, I, p. 23; 2 October 1985, Delhausse, *ibid.*, 1986, I, p. 93; 27 May 1986, Weckx and Others, *ibid.*, 1986, I, p. 1163).

Accordingly, the problem to which Mr. Ben Yaacoub's case gave rise appears henceforth no longer to subsist in Belgium.

16. The Court considers, therefore, that it is appropriate to strike the case out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Done in English and in French, and notified in writing under Rule 54 § 2, second sub-paragraph, of the Rules of Court, on 27 November 1987.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar