



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF KÖNIG v. GERMANY (ARTICLE 50)

(Application no. 6232/73)

JUDGMENT

STRASBOURG

10 March 1980

In the König case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. G. WIARDA,
Mr. H. MOSLER,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. THÓR VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. P.-H. TEITGEN,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 and 25 October 1979 and on 27 February 1980,

Delivers the following judgment, which was adopted on the last-mentioned date, on the application in the present case of Article 50 (art. 50) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"):

PROCEDURE

1. The König case was referred to the Court by the Government of the Federal Republic of Germany ("the Government") in February 1977 and, the following month, by the European Commission of Human Rights ("the Commission"). The case originated in an application against the Federal Republic of Germany lodged with the Commission in 1973 by a German citizen, Dr. Eberhard König.

2. The applicant complained of the dilatory nature of proceedings instituted by him before the Frankfurt Administrative Court. By judgment of 28 June 1978, the Court held that the duration of the said proceedings had exceeded the "reasonable time" stipulated by Article 6 par. 1 (art. 6-1) of the

Convention (points 3 and 4 of the operative provisions and paragraphs 105 and 111 of the reasons, Series A no. 27, pp. 37, 40 and 41).

The Court also reserved the whole of the question of the application of Article 50 (art. 50). It invited the Commission's Delegates to transmit to it, within three months from the delivery of the judgment, the applicant's claims together with any observations which the Delegates might have thereon and decided that the Government should have the right to reply to such claims and observations within two months from the date on which the Registrar should have communicated them to the Government; the further procedure was reserved (point 5 of the operative provisions and paragraph 114 of the reasons, *ibid.*, pp. 41 and 42).

3. On 28 September 1978, the President of the Court granted the Delegates' request for an extension until 6 October of the time limit applicable to them. Their observations were received at the registry on the last-mentioned date, accompanied by a letter sent to the Commission on 18 September by Dr. König's lawyer, Mr. Hofferbert.

On 11 December, the time-limit applicable to the Government was extended by the President until 13 January 1979.

The Government's memorial was filed at the registry on 16 January. On 26 March, the Secretary to the Commission informed the Registrar that the Delegates did not intend to reply thereto and that, whilst the Court could call on them for any further assistance it might require, they saw no necessity for oral hearings.

4. On 16 May, the Court deliberated on the procedure to be followed. After consulting, through the Deputy Registrar, the Delegates of the Commission and the Agent of the Government, the President directed on 12 June that oral hearings would be held on 23 October. At the same time he invited those appearing before the Court to complete their written pleadings during the hearings should they so desire, to reply to several questions listed in his Order and, as regards the Commission, to produce to the Court various documents.

5. On 27 July, the Deputy Secretary to the Commission advised the Registrar that the Delegates had in mind to reply to the Government's memorial and the Court's questions during the hearings.

Documents, the majority of which were referred to in the aforesaid Order of 12 June, were transmitted to the registry by the Commission and the Government on 20 September and 22 October and on 8 and 11 October, respectively.

6. On 23 October, the Court held a short preparatory meeting immediately prior to the opening of the hearings. It took note of the Delegates' intention to have the assistance of Mr. Hofferbert and authorised him to speak in German (Rules 29 par. 1 in fine and 27 par. 3).

7. The oral hearing took place in public on the morning of 23 October at the Human Rights Building, Strasbourg.

There appeared before the Court:

- for the Government:

Mrs. I. MAIER, Ministerialdirigentin

at the Federal Ministry of Justice,

Agent,

Mr. H. BONK and Mr. H. STÖCKER, Regierungsdirektoren

at the same Ministry,

Advisers;

- for the Commission:

Mr. J. FROWEIN,

Delegate,

Mr. H. HOFFERBERT, the applicant's lawyer,

assisting the Delegate under Rule 29 par. 1, second
sentence, of the Rules of Court.

The Court heard addresses by Mr. Frowein and Mr. Hofferbert for the Commission and by Mrs. Maier for the Government, as well as their replies to the questions put by the Court (see paragraph 4 above). Mrs. Maier spoke in German pursuant to the Court's decision of 29 September 1977 (Series A no. 27, p. 7, par. 10).

The Government filed several documents during the hearing and subsequently on 3 January 1980.

AS TO THE FACTS

8. The only outstanding matter to be settled is the question of the application of Article 50 (art. 50) in the present case. Accordingly, as regards the facts, the Court will confine itself here to giving some brief particulars; for the remaining details, reference should be made to paragraphs 15 to 81 of the Court's judgment of 28 June 1978 (*ibid.*, pp. 7-27).

9. That judgment concerned the length of actions brought by Dr. König before the Frankfurt Administrative Court in 1967 and in 1971 to challenge, respectively, the withdrawal of the permit to run his clinic and the withdrawal of the authorisation to practise medicine.

In the second matter, the Administrative Court had dismissed the applicant's action by a judgment delivered on 9 June 1976 which had been affirmed by the Hessen Administrative Court of Appeal on 2 May 1978. Dr. König lodged an appeal (*Nichtzulässigkeitsbeschwerde*) and an application to quash (*Revision*) but these were rejected by the Federal Administrative Court (*Bundesverwaltungsgericht*), in two final decisions, on 10 September and 18 October 1979.

In the case concerning the clinic, the Frankfurt Administrative Court had dismissed Dr. König's action on 22 June 1977. An appeal by him against that decision is still pending before the Hessen Administrative Court of Appeal which, with the agreement of the parties, stayed the proceedings on

21 February 1979 pending the outcome of the above-mentioned proceedings before the Federal Administrative Court.

10. After delivery of the Court's judgment of 28 June 1978, the Government and the applicant attempted, with the Commission's assistance, to arrive at a friendly settlement of the latter's claims, details whereof had been given by Mr. Hofferbert in his letter of 18 September 1978 (see paragraph 3 above). The attempt met with failure in November 1978: Dr. König found that the Government's offer of DM 20,000 in full and final settlement was not sufficient.

11. The applicant seeks pecuniary compensation for the two heads of damage allegedly caused to him by the violation of Article 6 par. 1 (art. 6-1): he maintains that his financial and professional situation may have been permanently ruined and, secondly, that his personal and professional reputation had been indirectly lowered. Without quantifying his claims, he furnishes certain particulars – regarding notably the average annual income he could have anticipated as a medical practitioner and as the head of a clinic - on the basis of which he considers it possible to gauge the extent of his aggregate loss and to assess the fraction thereof attributable to the fact that the "reasonable time" was exceeded. In addition, the applicant asks for reimbursement of the expenses he incurred both in Germany, in order to expedite the hearing of his actions, and before the Convention institutions.

Dr. König leaves the assessment of the sum to be awarded to him to the Court's discretion, thereby confirming the position he had adopted in 1977 (Series A no. 27, p. 41, par. 113).

12. In their observations of 6 October 1978 (see paragraph 3 above), the Commission's Delegates stated that they did not wish to comment on the first of the applicant's claims which they saw as being concerned with the consequences of the two withdrawals of authorisation; at the hearing, they submitted that in their opinion the attribution of specific material losses to the breach found by the Court was impossible, at least on the strength of the evidence before it. On the other hand, the Delegates suggest that account should be taken of the fact that the applicant was left in a prolonged state of uncertainty as to his professional future, and this at a time of life - between the ages of forty-nine (in 1967) and sixty (in 1978) - when a man is normally at the peak of his career. They also consider that the breach of Article 6 par. 1 (art. 6-1), taken by itself, may be another factor having a bearing on an award of just satisfaction.

As far as concerns the costs of the proceedings, the expenditure incurred by Dr. König in order to expedite the domestic litigation and to present his case in Strasbourg is regarded by the Delegates as a relevant item. They express no firm view as to whether the same applies to the expenditure arising from his applications to the German courts for restoration of the suspensive effect of his appeal against the withdrawal of the authorisation to practise; in their opinion, those applications were aimed not at speeding up

the proceedings but at limiting the consequences of their excessive length. Neither do the Delegates comment on the justification for the figures given by the applicant.

13. The Government's position is as follows: there is no causal link between the breach found by the Court and the alleged damage to Dr. König's professional career; on the other hand, "reasonable", "necessary" and proven costs resulting from the exercise of the domestic legal remedies can give rise to compensation to the extent that those remedies were aimed at accelerating the procedure; furthermore, the "reasonable costs" incurred in connection with the proceedings before the Convention institutions should be reimbursed; finally, it is for the Court to determine whether the applicant should be awarded monetary compensation for the "non-material" injury he suffered by reason of the mere fact that the "reasonable time" was exceeded.

FINAL SUBMISSIONS MADE TO THE COURT

14. At the hearing, the Government requested the Court to "determine, in accordance with Article 50 (art. 50), just satisfaction for the applicant", "the amount and constituent elements" thereof being left to the Court's discretion.

AS TO THE LAW

15. Article 50 (art. 50) of the Convention empowers the Court to afford Dr. König just satisfaction on condition that, *inter alia*, "the internal law" of the Federal Republic of Germany "allows only partial reparation to be made for the consequences" of the breach found by the judgment of 28 June. This is indeed the case here: for when proceedings are continued beyond the "reasonable time" laid down in Article 6 par. 1 (art. 6-1), the intrinsic nature of the wrong prevents complete reparation (*restitutio in integrum*). This being so, the only claim the applicant can make is for just satisfaction. Even if he had been or were still able to bring such an action before a court in his own country, the Court would not, for the reasons explained in the *De Wilde, Ooms and Versyp* judgment of 10 March 1972 (Series A no. 14, pp. 8-9 and 10, par. 16 and 20), be bound to reject the request put before it for just satisfaction. Moreover, those appearing before the Court concur in thinking that German law does not, in the circumstances, provide the applicant with any appropriate remedy allowing full pecuniary indemnification.

16. Dr. König is seeking compensation for the various heads of injury allegedly sustained as a result of the inordinate length of the proceedings before the Frankfurt Administrative Court, as well as reimbursement of the costs he has incurred in Germany, in order to expedite the proceedings, and then before the Convention institutions.

17. According to the Delegates of the Commission, in order to decide Dr. König's claims it is first necessary to determine the extent to which the two sets of proceedings have exceeded the "reasonable time". In their submission, in neither action can a period greater than four years be regarded as compatible with Article 6 par. 1 (art. 6-1). For the applicant, the proceedings could have been brought to a close in 1973 or even earlier.

In its judgment of 28 June 1978, the Court did not endeavour to quantify the "unreasonable time" by indicating, even approximately, on what dates it began or what overall period it covered. In point of fact, such an assessment seemed and still seems hardly possible in view of the Court's conclusion that, independently of the delays attributable to the applicant, the failure to observe the requirements of Article 6 par. 1 (art. 6-1) stemmed from a series of circumstances affecting the conduct of the proceedings by the Second and Fourth Chambers of the Frankfurt Administrative Court (Series A no. 27, pp. 34-37 and 38-40, par. 105 and 107-111).

Thus, the action relating to the withdrawal of the authorisation to run the clinic opened with an exchange of written pleadings extending over almost seventeen months; the first measure of investigation was not taken until twenty-one months after proceedings had begun and seventeen months elapsed before the Fourth Chamber of the Administrative Court obtained the evidence given before the professional tribunals; the transmission of the case-file to the authorities and courts before whom Dr. König had brought his various appeals and applications occasioned appreciable delays: finally, more than seven years after the action had been started the Fourth Chamber postponed judgment until the outcome of the proceedings then pending before the Second Chamber, proceedings which at that time were likewise stayed (Series A no. 27, pp. 36-37, par. 104).

In the case concerning the withdrawal of the authorisation to practise, only after three years and nine months did the Second Chamber fix the first sitting for the hearing of evidence from witnesses and of oral pleadings; the Chamber had waited more than ten months before deciding to order the joinder of the Regional Medical Society whose complaints had set in motion the procedure before the professional tribunals and then led to withdrawal of the two authorisations; there also, the forwarding of the case-file to various authorities and courts entailed considerable delays; above all, twenty-three months after the commencement of the action the Chamber postponed judgment for twenty-one months, the reason being that it wished to know the result of the criminal prosecution launched more than a year previously against the applicant (Series A no. 27, pp. 39-40, par. 110).

Being both overlapping and inter-connected, the delays found by the Court hardly lend themselves to a simple process of addition, but they are undeniable and doubtless caused the proceedings to be protracted by some years.

It is on the basis of these facts that the Court found a breach of Article 6 par. 1 (art. 6-1) and must now perform the function conferred by Article 50 (art. 50).

18. Before examining in detail Dr. König's claims, the Court recalls that its judgment of 28 June 1978 was not concerned with the validity of the contested withdrawal of the authorisation but solely with the conduct of the actions brought before the Frankfurt Administrative Court. The various heads of injury possibly occasioned by the withdrawals themselves cannot therefore be treated as relevant items. The only heads of injury capable of giving rise to an award of just satisfaction are those which the applicant would not have sustained had the two actions come to a close within a reasonable time.

19. Dr. König alleges such heads of injury but he does not prove their existence or specify their extent; neither does he indicate the sums to which he considers himself entitled by way of just satisfaction. There is no denying that, as was stated by the Commission's Delegates, it is in fact an extremely difficult matter to identify with precision the prejudice suffered as a result of the undue length of the domestic proceedings. Although applicants should as a rule quantify their claims, the Court would be failing to pay proper regard to the principle of equity imposed by Article 50 (art. 50) were it not to take into consideration the problems confronting Dr. König in this respect. Accordingly, the Court did not deem it appropriate to have Dr. König called on to plead the exact amount of reparation he was claiming.

The Court points out that while the fact of exceeding the "reasonable time" could not of itself have damaged the applicant's reputation, as he contended it did, throughout the whole period it lasted he was kept in a state of "prolonged uncertainty" (see Series A no. 27, p. 37, par. 105) by reason of the dilatory nature of the two sets of proceedings in question. At the time when the judgment of 28 June 1978 was adopted, the proceedings had been pending for more than ten years and ten months in the first action (the running of the clinic) and more than seven years and one month in the second action (the practice of medicine).

Such a state of affairs is likely to have led Dr. König to defer unduly, in view of his age, the search for an alternative career. This factor must be taken into account by the Court, even though it has not been established that openings for adaptation to another profession were available to Dr. König. In addition, the inordinate protraction of the proceedings relating to the running of the clinic in all probability prejudiced the applicant in prompting him to postpone the sale or lease of the clinic and thereby to let pass certain

opportunities or possibilities. Finally, the prolonged uncertainty in which he was kept for a few further years, whilst awaiting the ever problematical outcome of the litigation, was a source of permanent and deep anxiety for him; in itself, this caused him non-pecuniary injury.

None of the above elements of damage lends itself to a process of calculation. Taking them together on an equitable basis, as is required by Article 50 (art. 50), the Court considers that under this head the applicant should be afforded satisfaction assessed at DM 30,000.

20. Dr. König can properly make an additional claim for recovery of the costs he disbursed in his litigation before the German courts and before the Convention institutions. This is in accordance with the *Neumeister* judgment of 7 May 1974 where the Court distinguished "between damage caused by a violation of the Convention and the necessary costs which the applicant has had to incur in order to try to prevent such violation, to have it established by the Commission and later by the Court and to obtain, after judgment in his favour, just satisfaction either from the competent national authorities or, if appropriate, from the Court" (Series A no. 17, pp. 20-21, par. 43).

21. Accordingly, the applicant is in the first place entitled to reimbursement of sums expended in exercising such remedies as were intended to expedite the proceedings.

In the applicant's submission, this was indeed the case with each of the ten remedies he lists. The Court notes, however, that five of the remedies, for example the constitutional applications of 11 March, 29 November and 9 December 1975, sought the restoration of the suspensive effect of the objection he had lodged against the withdrawal of the authorisation to practise. Although referring to the dilatory nature of the actions in question, these remedies were not aimed at accelerating the progress of the actions but at granting Dr. König relief from the immediate effects of the withdrawal; consequently, the costs thereby incurred are not material for the purposes of Article 50 (art. 50). On this point the Court concurs with the Government's line of reasoning.

22. There remain five constitutional applications which the Government do not contest were brought with the object of expediting the actions pending before the Frankfurt Administrative Court, namely the applications lodged by Mr. Demme on 18 October 1973 in the second action and on the following day in the first action, by Mr. Schilling on 12 November 1973 in both actions and by Mr. von Stackelberg on 27 March 1975 in the second action.

In the Government's submission, only those applications which were necessary or reasonable should be treated as relevant. In any event, they add, if the Federal Scale of Lawyers' Fees (*Bundes- gebührenordnung für Rechtsanwälte*) is taken as a basis, the applicant could claim approximately DM 2,200 and not the DM 2,875.65 he is seeking.

23. The Court is of the view that Dr. König's claim is justified under Article 50 (art. 50) if and to the extent that the remedies he exercised and his legal costs are reasonable in the circumstances of the case (see, *mutatis mutandis*, the above-cited passage from the Neumeister judgment of 7 May 1974).

The two applications lodged on 12 November 1973 do not fulfil this condition since less than a month before Mr. Demme had applied to the Constitutional Court with the same object in view and the latter Court had not yet given its ruling. Consequently, the DM 1,000 paid by the applicant to Mr. Schilling are to be deducted from the above-mentioned sum of DM 2,875.65.

On the other hand, Dr. König is entitled to reimbursement of the DM 1,875.65 paid to Mr. Demme and Mr. von Stackelberg for the applications lodged on 18 October 1973, 19 October 1973 and 27 March 1975. This amount, though a little higher than that judged legitimate by the Government, is not however disproportionate or unreasonable. Admittedly, in the Neumeister judgment of 7 May 1974 the Court proceeded on the basis of the scales in force at the relevant time under the free legal aid scheme operated for proceedings before the Commission and for applicants' relations with the Commission's Delegates (Series A no. 17, p. 21, par. 44), but this decision stemmed from the fact that Mr. Neumeister, unlike Dr. König, had not produced detailed fee notes (Series B no. 15, p. 134; Series A no. 17, pp. 19-20, par. 42).

24. As far as the proceedings before the Convention institutions are concerned, the applicant did not receive free legal aid. He paid DM 1,075.10 to Mr. Heldmann and FF 3,000 (the equivalent, at the relevant time, of DM 1,738.20) to Mr. Burger, his two counsels before the Commission; DM 1,000 to Mr. Burger and DM 2,140.60 to Mr. Hofferbert, his lawyers at the merits stage (Article 6 par. 1) (art. 6-1) before the Court; finally, DM 2,832 to Mr. Hofferbert, for having assisted the Delegates during the proceedings relating to Article 50 (art. 50).

Those appearing before the Court agree that the costs borne by Dr. König under these various heads are relevant for the purposes of Article 50 (art. 50), but they express divergent opinions as to the correct basis of calculation. The Government consider that the proper course would be to adopt a uniform European rule, in the event the scale established by the Commission for free legal aid; they cite the Neumeister judgment of 7 May 1974. The Delegates, for their part, find it rather anomalous that applicants who are nationals of countries where justice is less expensive should obtain full indemnification whereas other applicants would have to pay a sometimes considerable balance themselves.

The Court recalls that the decision reached in the above-cited judgment is to be explained solely by the facts of the case (see paragraph 23 above). In

the present instance, the Court sees no reason for refusing full reimbursement of the costs incurred insofar as they prove reasonable.

25. The Government do not, in point of fact, raise any objection to the requests concerning the fees of Mr. Burger, but they do contest the first of Mr. Hofferbert's two fee notes; they claim, in particular, that Mr. Hofferbert's assistance was not indispensable.

The Court agrees with the Government's line of thinking. Mr. Burger alone appeared before the Court in 1977 to assist the Commission's Delegates in pursuance of Rule 29 par. 1, second sentence, of the Rules of Court (see Series A no. 27, pp. 7 and 41, par. 13 and 113). Mr. Burger had for a long time been acquainted with the brief in Dr. König's case, since he had been instructed to represent the applicant before the Commission. Furthermore, the applicant has not shown that at the merits stage before the Court co-operation between Mr. Burger and Mr. Hofferbert was essential.

According to the Government, the fees paid by the applicant to Mr. Heldmann and then to Mr. Hofferbert, his lawyer during the proceedings relating to Article 50 (art. 50), do not correspond to the scales in force in the Federal Republic of Germany; these fees, so it is said, amount to practically the double. They cannot however, in the Court's view, be regarded as out of proportion.

26. Dr. König finally requests recovery of the personal expenses of DM 1,269 occasioned, for the most part, by his journeys to Strasbourg between 1973 and 1978. The Government state that they have no objection to make on this count.

According to Rule 26 par. 3 of the Commission's Rules of Procedure, the applicant or his representative shall appear before the Commission to present the application in an oral hearing appointed by the Commission or for any other purpose if so invited by the Commission. While the applicant does not have the status of a party before the Court, his presence in the court-room is nevertheless of great value, for it can provide the Court with the means of immediately ascertaining, either directly or through the Delegates or those assisting them (Rules 38 and 29 of the Rules of Court), the applicant's views on the issues affecting him.

27. On the basis of these considerations, the Court assesses at DM 9,789.95 the sum to be paid to Dr. König in respect of his legal costs and personal expenses, to which are to be added DM 30,000 for the injury sustained as a result of the "reasonable time" stipulated by Article 6 par. 1 (art. 6-1) having been exceeded (see paragraph 19 above).

FOR THESE REASONS, THE COURT

Holds unanimously that the Federal Republic of Germany is to pay Dr. König compensation of DM 39,789.95.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this tenth day of March, one thousand nine hundred and eighty.

For the President
Léon LIESCH
Judge

Marc-André EISSEN
Registrar