



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

COURT (CHAMBER)

CASE OF KOENDJBIHARIE v. THE NETHERLANDS

(Application no. 11487/85)

JUDGMENT

STRASBOURG

25 October 1990

In the Koendjiharie case*,

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 Thór VILHJÁLMSSON,

Mr L.-E. PETTITI,

Mr B. WALSH,

Mr R. BERNHARDT,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Mr S.K. MARTENS,

Mr I. FOIGHEL,

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

Having deliberated in private on 27 June and 28 September 1990,

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 13 December 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11487/85) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by Mr Jonas Mohamed Rafiek Koendjiharie, a Netherlands national, on 18 March 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

* Note by the Registrar: The case is numbered 27/1989/187/247. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11) to the Convention which came into force on 1 January 1990.

*** The amendments to the Rules of Court which entered into force on 1 April 1989 are applicable to this case.

the respondent State of its obligations under Article 5 §§ 1 and 4 (art. 5-1, art. 5-4) and Article 6 §§ 1 and 3 (art. 6-1, art. 6-3) of the Convention.

2. In response to the enquiry 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 and designated the lawyer who would represent him (Rule 30).

3. On 19 December 1989 the President of the Court decided that, pursuant to Rule 21 § 6 and in the interests of the proper administration of justice, this case and the Keus case* should be heard by the same Chamber. The Chamber to be constituted for this purpose included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 27 January 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Bernhardt, Mr N. Valticos, Mrs E. Palm and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr A. Spielmann, substitute judge, replaced Mrs Palm, who was unable to take part in the consideration of the case (Rule 24 § 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the Delegate of the Commission and the applicant's representative on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence, the Registrar received the Government's memorial on 23 April 1990. The applicant's claims under Article 50 (art. 50) of the Convention were communicated to him on 28 May.

5. On 29 May the Commission produced various documents, as requested by the Registrar on the instructions of the Court.

6. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 13 February 1990 that the oral proceedings should open on 27 June 1990 (Rule 38).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Miss D.S. VAN HEUKELOM, Assistant Legal Adviser,

Ministry of Foreign Affairs,

Agent,

Mr J.C. DE WIJKERSLOOTH DE WEERDESTEIJN, Landsadvokaat, *Counsel,*

Mrs R.E. VAN GALEN-HERRMANN, Ministry of Justice,

Adviser;

- for the Commission

Mr H. VANDENBERGHE,

Delegate;

* * Note by the Registrar: 30/1989/190/250.

- for the applicant

Mrs G.E.M. LATER, advokate en procureur,

Counsel,

Mr M.T.M. ZUMPOLLE,

Adviser.

The Court heard addresses by Miss van Heukelom and Mr De Wijkerslooth de Weerdesteijn for the Government, by Mr Vandenberghe for the Commission and by Mrs Later for the applicant, as well as their answers to its questions.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Jonas Mohamed Rafiek Koendjiharie is a Netherlands national, born in Surinam. He resides at present in The Hague.

9. On appeal from a judgment of the District Court (Arrondissementsrechtbank) of The Hague, the Court of Appeal (Gerechtshof) of The Hague sentenced him on 22 June 1979 to a term of nine months' imprisonment, to be followed by two years' placement at the Government's disposal (see paragraph 17 below), for rape aggravated by a previous conviction for the same offence. On 22 January 1980 the Supreme Court (Hoge Raad) dismissed his appeal on a point of law.

10. On coming out of prison, Mr Koendjiharie was committed on 17 March 1980 to the State psychiatric clinic "Veldzicht" at Balkbrug, from where he absconded on 24 September 1981. Suspected of a further rape, he was arrested on 16 April 1982 and placed in detention on remand, but was acquitted by the District Court of The Hague on 22 July 1982. After a period spent at a remand centre in The Hague, he was examined at the Utrecht "Institute of Selection" from 13 September to 20 December 1982, when he was taken back to the "Veldzicht" clinic.

In the meantime, on 19 April 1982, his placement had been extended by the Court of Appeal of The Hague until 2 April 1984.

11. Mr Koendjiharie's lawyer, Mrs Later, learned in March 1984 that, according to the Ministry of Justice, the applicant's period of placement would end on 8 July rather than 2 April 1984, because it had been suspended during his detention on remand from 16 April to 22 July 1982 (see paragraphs 10 above and 17 below). The applicant objected to this, claiming that his acquittal had deprived the detention of any legal basis and, accordingly, of any effect on the application of Article 37 (b) § 3 of the Criminal Code (see paragraph 17 below).

On 17 May 1984 he filed an interlocutory application (kort geding), for his immediate release, with the President of the District Court of The

Hague, relying on this argument. He added that his placement had ended on 2 April 1984 since no application to extend it had been submitted within the statutory time-limit (see paragraph 18 below).

The President, before whom the State had argued in favour of the position taken by the Ministry of Justice, dismissed Mr Koendjbiharie's application on 29 May 1984. The latter appealed.

12. In the intervening period, on 17 May 1984, the Attorney General at the Court of Appeal of The Hague had requested the Court of Appeal, which had jurisdiction pursuant to Article 37 (b) of the Criminal Code, to extend by one year the applicant's placement at the Government's disposal.

At the hearing on 4 June 1984 the Court of Appeal outlined the opinion of the "Veldzicht" clinic, then questioned the member of staff who was responsible for co-ordinating the applicant's treatment at the clinic. Mrs Later put forward the arguments summarised above (see paragraph 11 above), contending that the Attorney General's application was inadmissible. In the alternative she referred to Mr Koendjbiharie's marriage plans which, she maintained, would reduce the risk of his re-offending. She also asked the court to hear, before giving its decision, at least one of the two experts which she had named.

By an interlocutory judgment on 22 June the court decided to hear, on 17 August, the views of the senior physician of the "Veldzicht" clinic.

13. On that date the physician in question failed to appear, but the court did not consider it necessary to call him again, because Mr Koendjbiharie no longer intended to marry.

On 21 September 1984 it extended by one year the applicant's placement, stating that it had been interrupted during his detention on remand.

The applicant, who had absconded on around 17 September, was informed of this decision by his lawyer, who, after making numerous representations, received a copy of it on 31 October.

14. On 17 January 1985 before the Court of Appeal of The Hague, to which he had appealed against the interlocutory order of 29 May 1984 (see paragraph 11 above), the applicant relied on Article 37 (h) of the Criminal Code. He considered that his continued confinement was unlawful inasmuch as the judgment of 21 September 1984 had not been rendered within two months of the application for extension submitted by the Attorney General (see paragraphs 12-13 above and paragraph 20 below). By a judgment of 18 April 1985, the court rejected this argument on the ground that the delay in giving judgment did not affect the validity of the decision delivered on 21 September 1984 by the Criminal Division. It also dismissed the complaints directed against the President's order, which it upheld.

15. On 8 March 1985 Mr Koendjbiharie unsuccessfully requested the Minister for Justice to order his conditional release. On 15 April 1985 he

went voluntarily to the Utrecht "Institute of Selection", where he was confined.

16. On 31 May 1985 the Attorney General filed an application for a further extension of the applicant's confinement for a period of one year. During the hearing Mrs Later repeated her earlier arguments (see paragraphs 11 and 14 above), but the court rejected them by a decision of 25 June 1985. However, it refused to allow the Attorney General's application, finding that there were not sufficient reasons for granting it.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. Since 1928 the Netherlands Criminal Code (Wetboek van Strafrecht) has contained special provisions applying to persons suffering from a mental deficiency or mental illness. The provisions were substantially amended by an Act of 19 November 1986, which came into force on 1 September 1988. According to Article 37 (as applicable to the events in the present case), the perpetrator of an offence which cannot be imputed to him because he suffers from a mental deficiency or mental illness is not liable to punishment. If the protection of public order so requires, the court may direct that such a person be placed at the Government's disposal so that he can receive treatment at the Government's expense.

Such a measure may also be taken in conjunction with a criminal sanction if the convicted person's responsibility was merely diminished at the time of the offence (Article 37 (a)).

Under Article 37 (b) § 1, the placement lasts for two years unless the Government terminates it earlier. This period commences as soon as the judgment ordering it has become final (paragraph 2 thereof); it is suspended by any other deprivation of liberty resulting from a judicial decision (paragraph 3, according to the most widely accepted interpretation).

18. The court which makes the initial order may extend the confinement, on each occasion for one or two years (Article 37 (b) § 2), on an application by the crown prosecutor, himself acting on the opinion of the director of the clinic. To this end, the crown prosecutor has to submit an application to the court in question not more than two months and not less than one month before the placement period is due to expire (Article 37 (f) § 1). According to case-law, failure to comply with this requirement renders the application inadmissible.

The prosecutor must attach to his application a copy of the clinic's report on the physical and mental health of the person concerned together with a reasoned declaration - preferably by the doctor treating the patient - on the appropriateness of extending the confinement (Article 37 (f) § 2).

19. Article 37 (g) governs the procedure to be followed for the examination of the application: if possible the court is to hear the person in

question and, if it considers additional information to be necessary, interview witnesses and experts. The crown prosecutor and the lawyer of the person confined may attend any hearing, of which a record is drawn up.

By a circular of 16 April 1980, the Minister for Justice issued instructions to the courts to hear the person concerned before extending his placement.

20. By virtue of Article 37 (h) § 1, the court is to give its decision within two months following the lodging of the application. However, Article 37 (b) § 4 states that the person concerned remains at the Government's disposal until the court has ruled on the extension. In a judgment of 14 June 1974 (*Nederlandse Jurisprudentie* (NJ) 1974, no. 436), the Supreme Court (Civil Division) took the view that the last-mentioned rule applied even if the court exceeded the two-month time-limit, which was merely of an exhortatory nature. While recognising how inconvenient this interpretation might be for the person concerned, the court noted that this did not mean that the latter was entirely without a remedy against such a breach:

"if, once the time-limit laid down in Article 37 (h) has expired, the decision provided for in that provision is arbitrarily delayed, the Government may find itself required, if necessary as a result of legal action by the person confined, to terminate the placement extended pursuant to Article 37 (b) § 4."

By a judgment of 29 September 1989 (NJ 1990, no. 2) the Supreme Court (Civil Division) gave the following clarification regarding the 1974 decision: in itself the failure to comply with the time-limit laid down in Article 37 (h) does not give rise to an obligation to terminate the placement; the existence of such an obligation depends in particular on the extent to which, and the reasons for which, the time-limit is exceeded as well as the personal and social interests at stake.

According to a judgment of the Supreme Court (Civil Division) of 9 January 1970 (NJ 1970, no. 240), it falls to the court to decide to what extent it must state its reasons in the order extending the confinement, which is neither delivered in public nor appealable (Article 37 (h) § 2), but is served on the person concerned (Article 37 (h) § 3).

21. A person placed at the Government's disposal may at any time request the Minister for Justice to revoke the measure. By virtue of Article 37 (e), the Minister may terminate the confinement at any moment, unconditionally or conditionally, if personal or material circumstances justify such a decision.

PROCEEDINGS BEFORE THE COMMISSION

22. In his application of 18 March 1985 to the Commission (no. 11487/85), Mr Koendjbiharie complained that his confinement had been extended on the basis of an application submitted after the date on which it should normally have ceased and that the relevant court had rendered its decision neither within two months of the lodging of the Crown Prosecutor's application nor "speedily". In his view, the contested proceedings had infringed Article 5 §§ 1 and 4 (art. 5-1, art. 5-4) of the Convention as well as Article 6 §§ 1 and 3 (art. 6-1, art. 6-3) thereof. In addition, he claimed to be the victim of discrimination based on his national origin, contrary to Article 14 in conjunction with Article 6 § 1 (art. 14+6-1), and of inhuman and degrading treatment inflicted by the staff of the hospital, in breach of Article 3 (art. 3).

23. The Commission declared the application admissible on 9 December 1988. In its report of 12 October 1989 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 5 §§ 1 and 4 (art. 5-1, art. 5-4), but not of Article 6 §§ 1 and 3 (art. 6-1, art. 6-3), nor of Articles 14 and 3 (art. 14, art. 3).

The full text of the Commission's opinion is reproduced as an annex to this judgment*.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (art. 5-1)

24. The applicant complained of a violation of Article 5 § 1 (art. 5-1) which, in so far as he relied on it, provides as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 185-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

... ."

In the first place he alleged that the Attorney General at the Court of Appeal of The Hague had not lodged his application of 17 May 1984 for an extension of the confinement (see paragraph 12 above) until after the statutory time-limit had expired, when - for reasons referred to above (see paragraph 11) - the placement had already ended. In addition, he complained that no record had been drawn up of the hearing of 17 August 1984 before the Court of Appeal (see paragraphs 12-13 above), which, furthermore, had failed to render its decision within the two-month time-limit prescribed to that effect. Finally, the decision had never been served on the applicant; only his lawyer had received a copy of it, over a month after its delivery.

25. In its report, the Commission did not refer to these various complaints, but at the hearing on 27 June 1990, its Delegate confirmed that the applicant had indeed raised them before it. As they relate to the proceedings which led to the order extending the confinement made on 21 September 1984 by the Court of Appeal of The Hague, it is appropriate to examine them, if necessary, in the light of the provision under which those proceedings fall in any event to be dealt with, namely paragraph 4 of Article 5 (art. 5-4).

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 (art. 5-4)

26. According to Article 5 § 4 (art. 5-4),

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

In Mr Koendjiharie's submission, the Court of Appeal did not decide on his case "speedily".

27. Consideration of the Netherlands legal system as described above (see paragraphs 17-21) leads the Court to conclude that the contested proceedings amounted to an "automatic periodic review of a judicial character" within the meaning of the *X v. United Kingdom* judgment of 5 November 1981 (Series A no. 46, p. 23, § 52).

According to the case-law on the scope of paragraphs 1 and 4 of Article 5 (art. 5-1, art. 5-4), in order to satisfy the requirements of the Convention, such review must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5 (art. 5): to protect the individual against arbitrariness, in particular with regard to the time taken to give a decision. That is the first point to be examined, being the one which Mr Koendjiharie stressed in particular.

28. In the Court's view, the relevant period began on 17 May 1984, when the application to extend the confinement was filed with the Court of Appeal, and ended on the day on which the order of 21 September 1984 was communicated to the applicant or to his lawyer, given that the decision was not delivered in public (see paragraph 20 above). Although it has been impossible to establish that last date with certainty, it appears from the evidence that Mrs Later learned of the extension shortly afterwards; it therefore seems reasonable to consider that the period in question ended in late September 1984.

29. On the face of it, a lapse of time of more than four months appears incompatible with the notion of speediness. This impression is strengthened by the fact that, when amending national law, the Netherlands legislature set at three months the period exceptionally available to a court which, like the Court of Appeal in this case, is considering the possibility, after a first hearing, of refusing the extension, but deems it necessary to obtain additional information (see paragraph 12 above).

A more detailed study of the facts of the case does not dispel this impression, quite the contrary. The Court of Appeal was evidently not slow to initiate the examination of the application - lodged on 17 May, the court considered it on 4 June - but it is legitimate to question its decision to adjourn the proceedings until 17 August. The Government supplied no information capable of justifying it. Nor did they provide any explanation why the Court of Appeal took more than one month after the hearing to draft a brief order.

30. The Court, accordingly, finds a failure to comply with the requirement of "speediness" laid down in paragraph 4 of Article 5 (art. 5-4) of the Convention.

31. This conclusion makes it unnecessary to consider whether there has also been a breach of paragraph 1 (art. 5-1) on account of the failure to comply with the two-month period prescribed by Article 37 (h) § 1 of the Netherlands Criminal Code in order to ensure that proceedings progress rapidly. Nor in the circumstances of the case is it necessary for the Court to examine the other complaints made by Mr Koendjiharie under Article 5 (art. 5) of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 3, 6 AND 14 (art. 3, art. 6, art. 14)

32. Initially the applicant also relied on Articles 3, 6 and 14 (art. 3, art. 6, art. 14) (see paragraph 22 above), but he withdrew these complaints at the hearing before the Court, which does not consider it necessary to examine them of its own motion.

IV. APPLICATION OF ARTICLE 50 (art. 50)

33. Under Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

34. Mr Koendjiharie claimed in the first place 100 guilders for each day of "unlawful" detention from 17 July to 17 September 1984 and from 15 April to 25 June 1985. He had suffered in particular while he was awaiting the outcome of the proceedings concerning the extension of his confinement.

In the Government's view there was no sufficient causal connection between the damage alleged and the violations of Article 5 (art. 5) complained of; there was nothing to indicate that the applicant would have been released if the Convention had been complied with. The Commission's Delegate did not submit any observations on this question.

The Court considers that the length of the proceedings which led to the order of 21 September 1984 may have engendered in the applicant a certain feeling of frustration, but not to the extent of justifying the award of compensation. The finding of a violation of Article 5 § 4 (art. 5-4) constitutes in itself sufficient just satisfaction in this respect.

B. Costs and expenses

35. Mr Koendjiharie also sought a sum of 18,989.62 guilders in respect of costs and fees of the lawyer who presented his case before the Commission and the Court.

The Government argued that Mr Koendjiharie, who had received legal aid in Strasbourg, had not shown that he had to pay his lawyer additional fees whose reimbursement he was entitled to request.

In the Court's view, the mere fact that the applicant was granted legal aid does not mean that he is not under an obligation to settle the fee note drawn up by his counsel and attached to the claim submitted under Article 50 (art. 50). In the absence of proof to the contrary, it must be accepted that the applicant is required to pay his lawyer the amounts set out in the fee note, from which the legal aid received from the Council of Europe is to be deducted. The amount in question is consistent with the criteria laid down in

the Court's case-law. The applicant should therefore be awarded 18,989.62 guilders, less the 12,397.50 francs already paid as legal aid.

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been a violation of Article 5 § 4 (art. 5-4) inasmuch as the Court of Appeal of The Hague failed to rule "speedily";
2. Holds by eight votes to one that it is unnecessary to examine the other complaints based on Article 5 (art. 5);
3. Holds unanimously that it is also unnecessary to examine the complaints initially submitted by the applicant and based on Articles 3, 6 and 14 (art. 3, art. 6, art. 14);
4. Holds unanimously that the Netherlands is to pay to the applicant, under Article 50 (art. 50), the sum of 18,989.62 guilders (eighteen thousand nine hundred and eighty-nine guilders and sixty-two cents) less 12,397.50 French francs (twelve thousand three hundred and ninety-seven francs and fifty centimes);
5. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 October 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of Court, the dissenting opinion of Mr Bernhardt is annexed to this judgment.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE BERNHARDT

I have voted against the statement in number 2 of the operative part of the judgment "that it is unnecessary to examine the complaints based on Article 5 (art. 5)". In my view, the Court should have also examined the question whether the decision of the Court of Appeal of The Hague of 21 September 1984, which extended by one year the applicant's period of placement at the Government's disposal, has been taken "in accordance with a procedure described by law" (Article 5 § 1) (art. 5-1).

The following dates are of significance in this regard. On 17 May 1984, the Attorney General requested the extension of the applicant's placement at the Government's disposal. Under Article 37 (h) of the Netherlands Criminal Code, the Court of Appeal was required to take its decision within a period of two months, that is, by 17 July 1984. However, the decision was only taken on 21 September 1984, more than two months beyond the time-limit. The applicant's previous placement had already expired on 8 July 1984 (cf. paragraph 11 of the judgment).

In cases involving deprivation of liberty, the various procedural guarantees in Article 5 (art. 5) are of the utmost importance and should be given equal weight. The finding that a decision has not been taken "speedily", in violation of Article 5 § 4 (art. 5-4), should not have absolved the Court from examining the guarantees under paragraph 1 of that Article (art. 5-1).