



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

COURT (CHAMBER)

CASE OF KOSTER v. THE NETHERLANDS

(Application no. 12843/87)

JUDGMENT

STRASBOURG

28 November 1991

In the case of Koster v. the Netherlands*,

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 J. CREMONA, *President*,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr A.N. LOIZOU,

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

Having deliberated in private on 28 September and 22 October 1991,

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 12 November 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12843/87) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a Netherlands national, Mr Jacobus Petrus Koster, on 31 March 1987.

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

* The case is numbered 56/1990/247/318. 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), which came into force on 1 January 1990.

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

to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 para. 3 (art. 5-3).

2. In response to the enquiry made in accordance with Rule 33 para. 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. The Chamber to be constituted 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 para. 3 (b)). On 22 November 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr J. De Meyer, Mrs E. Palm and Mr A.N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 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 para. 1).

On 5 and 10 April 1991 Mr Koster's lawyer and then the Government informed the Registrar that they would not be submitting memorials. On 4 July the Registrar received the applicant's claims under Article 50 (art. 50) of the Convention.

5. On 22 August the Commission communicated to the Registrar various documents which he had requested from it on the instructions of the Court.

6. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 11 February 1991 that the oral proceedings should open on 23 September (Rule 38).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day; Mr Ryssdal, who was unable to attend, was replaced as President by Mr J. Cremona, the Vice President of the Court (Rule 21 para. 5, second sub-paragraph). The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr K. DE VEY MESTDAGH, Deputy Legal Adviser,

Ministry of Foreign Affairs,

Agent,

Mrs M.W.J. BECHGER, Senior Legal Officer,

Ministry of Justice,

Mr J.J. BUIRMA, Head

of the Military Criminal Law and Criminal Procedure

Department, Ministry of Defence,

Advisers;

- for the Commission

Mr H.G. SCHERMERS,

Delegate;

- for the applicant

Mr E. HUMMELS, advocaat en prokureur,

Counsel.

The Court heard addresses by Mr de Vey Mestdagh for the Government, by Mr Schermers for the Commission and by Mr Hummels for the applicant.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Jacobus Koster, a Netherlands national, currently resides at Gainesville, Florida (United States of America).

9. On 11 March 1987, while completing his compulsory military service, despite being warned he repeatedly refused to obey an order that he should take receipt of a weapon and a uniform.

Accordingly he was arrested on the same day at 3.45 p.m. and then kept in custody, the measure being confirmed by the officer commanding his unit at 4.30 p.m. He was questioned by the military police (Koninklijke marechaussee) at 7 p.m.

10. On Friday 13 March the applicant, assisted by a lawyer appointed to act for him, appeared before the investigating officer (officier-commissaris) assigned to the case.

11. Before the Military Court, which sat in private on Monday 16 March, Mr Koster's lawyer pleaded that the length of his detention had exceeded the four-day limit which, he argued, derived from Article 5 para. 3 (art. 5-3) of the Convention. He added that the Military Court did not have the necessary independence and impartiality to rule on questions of this nature.

However, the Military Court confirmed the earlier detention and extended it by thirty days, in order, so it stated, to maintain military discipline. In its opinion, Article 5 para. 3 (art. 5-3) did not lay down specific time-limits. The court had moreover sat as soon as possible, regard being had to the fact that its military members had been participating in two-yearly major manoeuvres at the time; moreover, the fourth day following the arrest had been a Sunday. In addition, the European Commission had recognised, in its opinion on the applications in the cases of van der Sluijs (no. 9362/81), Zuiderveld (no. 9363/81) and Klappe (no. 9387/81), that the Military Courts were competent to rule on such questions.

12. On 9 September 1987 the Supreme Military Court sentenced the applicant to a term of one year's imprisonment, from which was deducted the time which he had already spent in detention.

II. RELEVANT NATIONAL LAW

13. At the material time, criminal procedure for army and air force personnel, including in particular the matter of arrest and detention on remand, was governed by the Army and Air Force Code of Procedure (Rechtspleging bij de Land- en Luchtmacht - "the Military Code"), as last amended on 24 November 1978. It was repealed with effect from 1 January 1991.

14. Every officer and non-commissioned officer was empowered to arrest military personnel of lower rank suspected of a serious offence, provided the circumstances required immediate deprivation of liberty (Article 4 of the Military Code). The resulting detention was not to exceed twenty-four hours, unless it was extended by the commanding officer in accordance with Article 7 (Article 5).

15. The commanding officer had to deal with the matter without delay. He could order that the suspect be placed or kept in detention on remand, in particular if this proved necessary to maintain military discipline. He was to report to the commanding General any cases of detention exceeding four days (Article 7, first, second and sixth paragraphs).

16. The General ordered that the accused be brought for trial before the Military Court, if this was necessary (Article 11, first paragraph). That order was to be formulated in writing and indicate whether or not it was appropriate to release the accused, the grounds for keeping him in custody laid down in Article 7 being applicable by analogy (Article 14, first and second paragraphs).

17. Detention ordered or continued in the decision referring the serviceman for trial was not to exceed fourteen days unless extended, by terms of thirty days, by the Military Court at the request of the auditeur-militair (Article 31). Every accused detained under the referral decision had to be heard by the officier-commissaris as speedily as possible and in any event within four days of referral; for this purpose, he could be assisted by an adviser (Article 33, first paragraph). Before extending the detention, the Military Court was to give the accused and his adviser the opportunity to put forward their views (Article 33, second paragraph).

18. A directive of 21 March 1983 governed the bringing before a judicial authority of military personnel in custody. It provided as follows:

"In accordance with Article 5 para. 3 (art. 5-3) of the European Convention on Human Rights, where a serviceman is placed in custody, care is to be taken to ensure that, within four days of his arrest, his case is brought before the Military Court, sitting in private, for confirmation or extension of the detention.

To this end, the following rules should be observed:

1. Every officer or non-commissioned officer who arrests a member of the military personnel suspected of an offence shall inform the officer commanding the serviceman's unit as soon as possible.

2. If, after having questioned the accused, the officer commanding considers that the detention should be continued or extended, he shall inform the prosecuting officer (auditeur- militaire/fiscaal) by telephone not later than two days after the arrest, either in person, or through a person delegated by him (for example the officer commanding the relevant detachment of military police).

3. If the accused appears before the auditeur-militaire, the latter shall fix, with the officer commanding or in his name, the time and place so as to ensure that under normal circumstances, within four days of the arrest:

- (a) the accused can be brought before the auditeur-militaire;
- (b) the latter can communicate his opinion to the authority with competence to refer the case to the Military Court;
- (c) that authority can make an order so referring the accused (which shall also include a decision on the matter of the detention);
- (d) the accused can be interviewed by the commanding officer;
- (e) the auditeur-militaire can raise the question of the confirmation/extension of the detention of the accused in the Military Court.

4. The different armed services shall adapt their regulations accordingly (VS27-1 and VVKM 142)."

19. By a ministerial decree of 19 December 1983 this directive had been incorporated in the Regulation on the application of military criminal and disciplinary law (Voorschrift Toepassing Militair straf- en tuchtrecht KL/Flu).

PROCEEDINGS BEFORE THE COMMISSION

20. In his application of 31 March 1987 to the Commission (no. 12843/87), Mr Koster complained that he had not been brought "promptly" before the Military Court, as was required under Article 5 para. 3 (art. 5-3).

21. The Commission declared the application admissible on 6 September 1989. In its report of 3 September 1990 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of the above-

mentioned provision. 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 PARA. 3 (art. 5-3)

22. The applicant complained that the failure to bring him before the Arnhem Military Court until five days after his arrest was not consistent with the promptness required under Article 5 para. 3 (art. 5-3), which is worded as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power"

23. The Government explained that the lapse of time in question had occurred because of the weekend, which fell in the intervening period, and the two-yearly major manoeuvres, in which the military members of the court had been participating at the time.

At the hearing before the Court, they conceded nevertheless that there had been a failure to comply with the directive of 21 March 1983 which, taking as its basis Article 5 para. 3 (art. 5-3) of the Convention, laid down that the Military Court was to sit within four days of an arrest (see paragraph 18 above).

24. The use in the French text of the word "aussitôt", with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features (see the *de Jong, Baljet and van den Brink* judgment of 22 May 1984, Series A no. 77, p. 25, para. 52), the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 para. 3 (art. 5-3), that is to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority (see the *Brogan and Others* judgment of 29 November 1988, Series A no. 145-B, pp. 32-33, para. 59).

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 221 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

25. Like the Commission, the Court considers that the manoeuvres in question did not justify any delay in the proceedings: as they took place at periodical intervals and were therefore foreseeable, they in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of the Convention, if necessary on Saturday or Sunday.

Accordingly, and even taking into account the demands of military life and justice (see the *de Jong, Baljet and van den Brink* judgment, cited above, Series A no. 77, p. 25, para. 52), the applicant's appearance before the judicial authorities did not comply with the requirement of promptness laid down in Article 5 para. 3 (art. 5-3).

26. At the hearing on 23 September 1991 counsel for the applicant raised a further complaint, namely that the Military Court could not be regarded as a "judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5 para. 3 (art. 5-3), since it lacked independence, two of its three members being (low-ranking) officers who were appointed for two years only.

The Delegate of the Commission observed that this complaint had not been raised before the Commission.

The Court notes that, according to the Commission's decision on the admissibility of the application, the applicant only complained of not having been brought "promptly" before the Military Court. Having regard to the wording of the application, the Court shares this view and accordingly finds that it lacks jurisdiction to examine this complaint.

II. APPLICATION OF ARTICLE 50 (art. 50)

27. 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."

28. Mr Koster claimed in the first place 2,400 guilders for damage. He argued that in order to comply with Article 5 para. 3 (art. 5-3) the military authorities ought to have released him pending the hearing in the Military Court. His anti-militarist beliefs had, he maintained, made his detention all the more distressing.

In the opinion of the Government and the Commission, the applicant sustained no damage other than the lack of a prompt judicial review, as the length of his detention on remand was deducted in its entirety from the main sentence (see paragraph 12 above).

The Court takes the view that the feeling of frustration which the violation found may have engendered does not warrant the award of pecuniary compensation. The finding of a violation of Article 5 (art. 5) constitutes in itself sufficient just satisfaction in this respect.

29. The applicant also sought a sum of 11,376 guilders for the expenses and fees, which he itemised, of the lawyer who represented him before the Commission and the Court. He further claimed 250 guilders for out-of-pocket expenses incurred in relation to the Strasbourg proceedings. The Government did not submit any observations in this connection.

The amount claimed is consistent with the criteria laid down in the Court's case-law. It should therefore be awarded in its entirety, less the sum already paid by the Council of Europe as legal aid, namely 9,382.50 French francs.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of paragraph 3 of Article 5 (art. 5-3);
2. Holds that the Netherlands is to pay to the applicant, within three months, 11,626 (eleven thousand six hundred and twenty-six) guilders, less 9,382f.50 (nine thousand three hundred and eighty two French francs and fifty centimes) in respect of costs and expenses;
3. Dismisses 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 28 November 1991.

John CREMONA
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the separate opinion of Mr De Meyer is annexed to this judgment.

J.C.
M.-A.E.

SEPARATE OPINION OF JUDGE DE MEYER

(Translation)

In my view the additional complaint invoked at the hearing by counsel for the applicant* raised a question not of jurisdiction, but of admissibility.

The Court undoubtedly had jurisdiction to examine this complaint**. It could at the most decide that it was no longer admissible at this stage of the proceedings.

* Paragraph 26 of the judgment.

** See the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 29-30, paras. 47-52 (in particular para. 49).