

In the case of *Muyldermans v. Belgium**,

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,
Mrs D. Bindschedler-Robert,
Mr B. Walsh,
Mr C. Russo,
Mr R. Bernhardt,
Mr J. De Meyer,
Mr N. Valticos,
Mr J.M. Morenilla,
Mr F. Bigi,

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

Having deliberated in private on 26 September and 22 October 1991,

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

Notes by the Registrar

* The case is numbered 59/1990/250/321. 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.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 December 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. 12217/86) against the Kingdom of Belgium lodged with the Commission under Article 25 (art. 25) by a Belgian national, Mrs Marie-Louise Muyldermans, on 22 December 1983.

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). The object of the request 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 para. 1 (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that she wished to take part in the proceedings and

designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Mr J. De Meyer, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 21 February 1991, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mrs D. Bindschedler-Robert, Mr F. Matscher, Mr J. Pinheiro Farinha, Sir Vincent Evans, Mr C. Russo, Mr N. Valticos and Mr J.M. Morenilla (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr B. Walsh, and Mr R. Bernhardt, substitute judges, replaced Sir Vincent Evans and Mr Pinheiro Farinha, who had resigned and whose successors at the Court had taken up their duties before the deliberations (Rules 2 para. 3, 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, after consulting, through the Registrar, the Agent of the Belgian Government ("the Government"), the Delegate of the Commission and the applicant's lawyer, gave instructions concerning the written procedure on 11 March 1991.

5. On 21 May and 11 June 1991 the Registrar received from the Deputy Agent and then Mrs Muyldermans's lawyer the text of an agreement concluded on 11 May between the Government and the applicant.

On the instructions of the President, the Registrar, on 22 May, invited the Delegate of the Commission to submit his observations within one month and, on 5 June, asked the Government to keep the Court informed of the progress of the draft Law referred to in the agreement. Their replies reached the registry on 10 June and 15 July respectively (see paragraphs 16 and 17 below).

6. Mr Ryssdal being unable to participate in the deliberations on 26 September 1991 and Mr Matscher in those on 22 October, the former was replaced by the Vice-President, Mr J. Cremona, and the latter by Mr F. Bigi, substitute Judge, from those dates (Rules 21 para. 5, 22 para. 1 and 24 para. 1).

7. On 22 October 1991 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. Mrs Marie-Louise Muyldermans worked as an accountant in the post office of Courcelles (Hainaut).

9. In the night of 5 to 6 September 1979, a sum of 4,976,200 Belgian francs disappeared from the cashier's desk. The investigation opened by the Charleroi police terminated on 22 May 1980 with an order closing the case.

10. In a written statement intended to justify her position to her superiors, the applicant cited her inexperience and her lack of training. The postmaster also attributed to these factors the faults imputed to her, but the regional director noted that she had failed to comply with certain elementary instructions regarding security.

As the guilty party could not be identified, the Chief Inspector of the Post Office decided that the officials directly responsible should be held liable for any negligence

which had made possible or facilitated the theft.

11. Mrs Muyldermans' accounts in which the deficit appeared were automatically submitted to the Audit Court, which ruled on the question on 5 May 1982 in private and on the basis solely of the administrative file (Law of 29 October 1846). It found that the applicant had failed to perform properly several of her duties and ordered her to reimburse the Post Office the sum of 2,000,000 Belgian francs. By two judgments of the same day, it found two other officials, L. and C., liable to pay the balance of the deficit.

12. The three officials appealed to the Court of Cassation. Mrs Muyldermans alleged a violation of Article 6 (art. 6) of the Convention on the ground that the Audit Court had examined her case without holding an adversarial and public hearing.

13. On 30 June 1983 the Court of Cassation dismissed her appeal finding that Article 6 para. 1 (art. 6-1) was not applicable to the case before it.

On the other hand, on the same day, it quashed the judgments concerning L. and C. (see paragraph 11 above). It considered that the latter were subordinate officials who did not have the status of accountants in relation to the Treasury and the Audit Court therefore lacked jurisdiction to rule in their regard.

PROCEEDINGS BEFORE THE COMMISSION

14. In her application of 22 December 1983 to the Commission (no. 12217/86), Mrs Muyldermans relied on Article 6 para. 1 (art. 6-1) of the Convention inasmuch as she had not received a public hearing and there had been no adversarial argument or oral submissions; she claimed in addition that the judgment of the Audit Court had the effect of depriving her of all or part of her assets, thus infringing Article 1 of Protocol No. 1 (P1-1).

15. On 17 January 1989 the Commission declared the second complaint inadmissible; however, it found the first one admissible. In its report of 2 October 1990 (Article 31) (art. 31), it expressed the opinion, by nine votes to two, that there had been a breach of Article 6 para. 1 (art. 6-1) of the Convention. The full text of its opinion and of the dissenting opinion contained in the report is reproduced as an annex to the present judgment*.

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 214-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

16. The Registrar of the Court received on 21 May 1991 from the Deputy Agent of the Government, then on 11 June from the applicant's lawyer, communication of an identical text signed on 13 May by Mrs Muyldermans and Mr De Bluts, the Belgian State's lawyer, and worded as follows:

"1° The Belgian Government have agreed in principle not to enforce the judgment of the Audit Court of 5 May 1982 in which the applicant was ordered to pay BEF 2,000,000. This decision

will be enshrined in a legislative provision without delay.

2° The Belgian Government have agreed in principle to amend the Act of 29.10.1846 on the organisation of the Audit Court and the Law of 28.6.1963 on public accounts.

An extremely detailed draft Law will shortly be put before Parliament; the draft Law meets the objections raised in the European Commission's report in the present case.

3° In addition to points 1 and 2 above, which meet the criticisms levelled by the applicant in her application and which, once put into effect, will in themselves constitute 'just satisfaction', the applicant has requested:

(a) the reimbursement by the Belgian Government of the costs and fees incurred in the proceedings brought by her in Strasbourg, which she assesses at ... BEF 50,000

(b) payment as compensation for the pecuniary damage resulting from the various steps taken, travel, etc., which she assesses at ... BEF 20,000

that is to say a total of BEF 70,000, which the Belgian Government agree to pay as part of this overall settlement.

The applicant states that she accepts the friendly settlement proposed above.

She acknowledges that the payment of the above-mentioned sum will constitute full and final reparation for the pecuniary and non-pecuniary damage alleged by her and will cover all the costs incurred by her in this case.

She agrees not to proceed with the case pending at Strasbourg and not to institute any subsequent proceedings against the Belgian Government."

The Delegate of the Commission was consulted (Rule 49 para. 2) and, on 10 June 1991, expressed the view that the friendly settlement proposed was a fair one and that the Court could therefore strike the case out of its list (see paragraph 5 above).

17. In a letter of 9 July 1991, the Deputy Agent of the Government provided the following details, which the Registrar on the instructions of the President had requested from him on 5 June:

"... I have the honour to inform you that the Cabinet has already approved the draft Law which includes the legislative provision by which the Government waive enforcement of the Audit Court's judgment of 5 May 1982 in which the applicant was ordered to pay BEF 2,000,000.

This Law will be put before Parliament forthwith, but the Parliamentary debate is not expected to take place until October.

The draft Law amending the Law of 29 October 1846 on the organisation of the Audit Court and the Law of 28 June 1963 amending and supplementing the laws on public accounting will be laid before the Cabinet at its next meeting for approval.

Once the draft has been approved it will be submitted to the Conseil d'Etat for its opinion.

It will be possible in principle for this draft Law likewise to be introduced when Parliament reconvenes in early October."

18. The text of the draft Law was annexed to this letter. It contains inter alia the following provisions:

Article 3
(amending Article 8 of the Law of 1846)

" ...

Where the final account discloses a debit, the Minister or the official specifically delegated by him to this end, or the permanent delegation of the regional council, shall decide whether it is necessary to institute proceedings against the accountant in the Court for reimbursement of the sum in question.

..."

Article 5
(amending Article 10 of the Law of 1846)

"The accountant and the authorising officer shall be summoned by bailiff's writ ...

...

The public authority instituting the proceedings shall lodge the file with the Court registry, where it may be consulted by the parties and their lawyers from the day of the summons until the day before the hearing."

Article 6
(amending Article 11 of the Law of 1846)

"The majority of the members of the chamber, not including the registrar, shall be present in order to be able to examine and rule on a case. Only the members who have participated in every step of the investigation proceedings may take part in the deliberations. Where proceedings are conducted against an accountant, the member of the Court who closed the account of this accountant may not sit.

The party issuing the summons shall be represented by a lawyer or by an official whom he has appointed specifically to this end.

The accountant and the authorising officer shall appear in person. They may be assisted by a lawyer. The Court may give leave to the party summoned to be represented by a lawyer if he establishes that he is unable to appear in person.

The parties may lodge a memorial.

The hearing shall be held in public. The Court may, however, decide, by a reasoned judgment, that it shall take place in private because a public hearing would constitute a risk to public order or to morals or on any other grounds set out for in Article 6 para. 1 (art. 6-1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, approved by the Law of 13 May 1955.

..."

19. The following extracts from the explanatory memorandum may be cited:

"...

... the rules governing the procedure [in force] are, for the sake of efficiency, extremely simple: the accountant whose accounts disclose a debit is not summoned before the Court (only an accountant who has failed to submit his accounts in due time is so summoned and solely to render his account, not to explain any debit which may arise); the Court takes its decision on the basis of documents without adversarial argument or a public hearing; nor is the delegated authorising officer heard; neither the delegated authorising officer nor the financial comptroller may appeal to the Court of Cassation against the judgments of the Court ordering them to pay damages or a fine.

It is necessary to amend this old system in order to provide greater protection for the rights of the officials subject to the jurisdiction of the Court, regardless of the requirements of efficiency in the field of the inspection of public accounts. The adoption of a new procedure became even more desirable in view of the fact that, examining an application lodged by an accountant convicted by the Audit Court, the European Commission of Human Rights expressed the opinion on 2 October 1990 that the procedure in force before the Audit Court was in breach of Article 6 para. 1 (art. 6-1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, inasmuch as the procedure was neither adversarial nor public. Since then, the Commission has brought the case before the European Court of Human Rights which has not yet ruled thereon.

Before the Commission the Government had maintained, primarily, that the procedure before the Audit Court did not concern civil rights and obligations and did not constitute criminal proceedings so that it fell outside the scope of Article 6 para. 1 (art. 6-1) of the Convention. This approach was moreover that taken by the Court of Cassation ... The Commission did not follow the Government's view on this point. It considered that the accountant's obligation was 'mixed [,] with the private aspects predominating'. This point of view is debatable. However, it must be taken into account in view of the possibility of other applications being lodged by convicted accountants. In any event, a reform is justified by the outdated - and deficient - nature of the existing procedure, which, while it protects the interests of the public authorities, does not make sufficient allowance for those of the accountants. The present draft is therefore intended to ensure that this procedure is hereafter in conformity with Article 6 (art. 6) of the Convention and, generally, more symmetrical in regard to the relationships between the public authorities and the accountants. The Government have, in addition, taken this opportunity to put forward amendments on various other points.

...

The draft is intended to introduce before the Audit Court a genuine adversarial and public oral procedure. Under the current system there is no oral argument, nor are there even any parties ...: the Court receives the file from the relevant authority (including a justificatory memorial drawn up by the accountant) and rules on the basis of the documents, without hearing either the accountant or a representative of the authority.

If reform were to be limited to prescribing that the Court

must hear the accountant and must do so in a public hearing, it would undoubtedly meet the criticisms of the European Commission of Human Rights, but this would not be entirely satisfactory. In the absence of an adversary, the accountant would to some extent have to plead against his judges and would have, from the outset, the impression of already having been judged, as the Court summons him on the basis of the file drawn up by the competent authority.

That is why the Government have opted for a solution which radically changes the procedure. It is proposed that it should be the authority which, in the event of a deficit, summons the accountant before the Court, like a plaintiff in civil proceedings. The matter will no longer come before the Court automatically: the authority will always have to refer it to the Court. In addition, there will be a genuine adversarial oral procedure before it in a public hearing, between the authority concerned and the accountant ...

..."

20. The Court takes formal note of the agreement concluded between the Government and Mrs Muyltermans. It observes that this agreement will give satisfaction to the latter. It notes in addition that Article 6 (art. 6) of the draft Law amending the Laws of 29 October 1846 and 28 June 1963 provides that the Audit Court shall hold adversarial and public hearings, a solution intended - as appears from the explanatory memorandum - to meet the criticisms of the Commission (see paragraphs 60-68 of the report). Its adoption by the relevant Belgian authorities would remove any reason of public policy (ordre public) such as would necessitate a decision by the European Court on the merits of the case (Rule 49 para. 4).

Accordingly, the Court concludes that it is appropriate to strike the case out of its 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 55 para. 2 of the Rules of Court on 23 October 1991.

Signed: John CREMONA
President

Signed: Marc-André EISSEN
Registrar