

In the case of Baegen v. the Netherlands (1),

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 Rules of Court B (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr B. Walsh,
Mr R. Macdonald,
Mr J. De Meyer,
Mr S.K. Martens,
Mrs E. Palm,
Mr R. Pekkanen,
Mr A.B. Baka,
Mr P. Kuris,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 28 September and 24 October 1995,

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

Notes by the Registrar

1. The case is numbered 51/1994/498/580. 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.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 ((P9).

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 December 1994, 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. 16696/90) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a Netherlands national, Mr Wilhelmus Elisabert Baegen, on 6 April 1990.

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 the respondent State of its obligations under Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention.

2. 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 27 January 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr B. Walsh, Mr R. Macdonald, Mr J. De Meyer, Mrs E. Palm, Mr R. Pekkanen, Mr A.B. Baka and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 4)

(art. 43).

3. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government") and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 28 July 1995.

4. On 11 July 1995 the Commission produced to the Court certain documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. On 8 December 1994 the Registrar had sent to the applicant the enquiry provided for in Rule 35 para. 3 (d). Despite repeated attempts by the Registrar to obtain a response from the applicant, none was received and on 26 July 1995 the applicant was informed by the Registrar that the Court would proceed with the case on the assumption that he had decided not to take part in the present proceedings.

6. By letter received on 18 August 1995 the Government requested the Court to strike the case out of its list pursuant to Rule 51 para. 2.

7. On 28 September 1995 the Chamber decided to dispense with a hearing in the case, having satisfied itself that the condition for this derogation from its usual procedure had been met (Rules 27 and 40).

AS TO THE FACTS

I. Particular circumstances of the case

8. The applicant is a Netherlands national born in 1957 and resident in Utrecht.

9. On the morning of 1 February 1986 a woman referred to hereinafter as Ms X made a statement to the Utrecht municipal police to the effect that she had been raped by two men.

10. Ms X opted to remain anonymous in the subsequent criminal proceedings on the ground that she feared reprisals from the men who had raped her.

Her home address, however, was mentioned in the police case file.

11. On the same day the responsible police officer made a request in writing for a medical examination of Ms X. A copy of this request, which bears Ms X's full name, was among the documents submitted by the applicant to the Commission.

Items of Ms X's underclothing were sent to a forensic laboratory for examination.

12. The applicant was arrested on 10 February 1986. Ms X was confronted with him through a two-way mirror. She stated that she recognised the applicant as the first of the men involved in raping her but did not remember whether she had also been raped by the second man.

She again identified the applicant as the rapist two days later when she was confronted with him in person, saying that she recognised not only his appearance but also his voice.

13. On 14 February 1986 the police examined a third witness, Y, who like Ms X wished to remain anonymous for fear of reprisals.

14. On 24 February 1986 a second suspect was arrested. Although initially he denied all knowledge of what had happened, he later stated

that the applicant and Ms X had had sexual intercourse and that Ms X had consented thereto.

15. On 25 March the applicant was informed by the police that traces of semen had been found in Ms X's underwear and that it had been possible to identify the blood group and genetic type. When asked to lend his co-operation to blood and saliva tests he refused.

16. In the context of a preliminary investigation, the witness Y was heard on oath by an investigating judge (rechter-commissaris) of the Utrecht Regional Court (arrondissementsrechtbank) on 16 July 1986. Y repeated the statement he had made earlier to the police.

17. On 4 August 1986 the investigating judge heard the second suspect, who also repeated the statement which he had made to the police.

18. On 28 August 1986 the investigating judge heard Ms X on oath, as there were reasons to assume that she would not appear in open court for fear of reprisals, which fear the investigating judge considered well-founded. The record of the interview states that Ms X's identity was known to the Utrecht municipal police. Ms X confirmed her statements to the police. On 28 August 1986 the record of the interview with Ms X was sent to counsel for the applicant, who was invited to submit any additional questions to be put to Ms X. Counsel for the applicant acknowledged receipt of the record by letter of 1 September 1986, but did not submit any questions.

19. At the request of counsel for the applicant, the investigating judge heard Y again on 14 October 1986. On that occasion, Y replied to certain written questions submitted by counsel for the applicant.

20. On 31 August 1987 the applicant was summoned to appear before the Regional Court of Utrecht on 2 October 1987. Before the Regional Court he denied the charge. At no point in the proceedings before the Regional Court did either the applicant or his lawyer request the Regional Court to hear any witnesses.

On 16 October 1987 the Regional Court convicted the applicant of rape and sentenced him to twelve months' imprisonment.

21. On 20 October 1987 the applicant filed an appeal to the Amsterdam Court of Appeal (gerechtshof). On 2 September 1988 counsel for the applicant submitted certain documents from the case file concerning a certain E., who was suspected of having raped a person on 24 September 1986. In that case file the identity of the victim was disclosed.

22. The Court of Appeal heard the case on 6 September 1988. The applicant continued to protest his innocence. In his pleadings counsel for the applicant requested the Court of Appeal to suspend its hearing or else refer the case back to the investigating judge so that Ms X might be subjected to further interrogation. Counsel referred to the documents which he had submitted from the case file of criminal proceedings against E. and claimed categorically that the alleged victim in that case was the same person as Ms X. He submitted that in the case of E. it clearly appeared from several statements by witnesses that Ms X was known for approaching men in a sexually explicit manner.

23. In its judgment of 20 September 1988 the Court of Appeal quashed the judgment of the Regional Court for technical reasons, convicted the applicant of rape, and sentenced him to twelve months' imprisonment. It rejected the request of counsel for the applicant to suspend the hearing or to refer the case back to the investigating judge in order to have Ms X re-examined, considering that it had been sufficiently informed.

24. An appeal on points of law filed by the applicant on 20 September 1988 was rejected by the Supreme Court (Hoge Raad) on 10 October 1989, one month and ten days before the European Court of Human Rights delivered its judgment in the case of *Kostovski v. the Netherlands* (judgment of 20 November 1989, Series A no. 166).

II. Relevant domestic law and practice

25. For a statement of the relevant domestic law and practice at the time of the events complained of, reference is made to the Court's above-mentioned *Kostovski* judgment.

PROCEEDINGS BEFORE THE COMMISSION

26. In his application (no. 16696/90) of 6 April 1990 to the Commission the applicant complained that he had not had a fair trial in that he had been convicted on the basis of statements made by an anonymous witness whose desire to remain anonymous was in any event unfounded. Moreover, he alleged that the rights of the defence had been unduly restricted since, although he had consistently challenged the reliability of the statements in question, neither he nor his counsel had been able to question that witness directly. He relied on Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention, which guarantee everyone charged with a criminal offence the right to a fair trial and the right to examine or have examined witnesses against him.

27. The Commission declared the application admissible on 9 December 1993. In its report of 20 October 1994 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) (fourteen votes to twelve).

The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment (1).

1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 327 B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

28. The Government concluded their memorial by expressing the opinion that there had been no violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

AS TO THE LAW

29. On 8 December 1994 the Registrar advised the applicant in writing, as required by Rule 35 para. 1 of Rules of Court B, that his case had been referred to the Court and invited him to confirm in writing that he wished to take part in the proceedings and to designate a lawyer to represent him. The applicant did not respond.

Similarly, he did not react to reminders which were sent to him on 11 May and 27 June 1995.

30. By letter dated 10 August and received by the Registrar on 18 August 1995 the Agent of the Government suggested that the non-participation of the applicant constituted a "fact of a kind to provide a solution of the matter" and requested the Court to strike the case out of its list in accordance with Rule 51 para. 2 of Rules of Court B, which provides:

"When the Chamber is informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter, it may, after consulting, if necessary, the parties and the Delegates of the Commission, strike the case out of the list.

The same shall apply where the circumstances warrant the conclusion that a party who filed an application by virtue of Article 48 para. 1 (e) (art. 48-1-e) of the Convention does not intend to pursue the application or if, for any other reason, further examination of the case is not justified."

31. By letter received on 28 August 1995 the Secretary to the Commission advised the Registrar that the Delegate had no objection to the case being struck out of the list.

32. The Court, for its part, considers that the conditions for the application of Rule 51 para. 2, second sub-paragraph, are satisfied in the present case. In particular, in its opinion, by reason of the failure of the applicant to come forward despite repeated reminders by the Registrar, further examination of the case is not justified. It notes, in addition, the position adopted by the Government and the Commission.

Furthermore, the Court observes that in a number of previous cases it has had occasion to express itself on the rights of the defence in cases involving anonymous prosecution witnesses (see, particularly, the Kostovski judgment cited above, which postdates the judgment of the Netherlands Supreme Court in the present case) and that another case against the same Contracting State raising related issues is currently pending before it. In these circumstances it cannot be said that there is any reason of public policy for continuing the present proceedings (Rule 51 para. 4 of Rules of Court B).

33. Accordingly, it is appropriate to strike the case out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Done in English and in French, and notified in writing under Rule 57 para. 2, second sub-paragraph, of Rules of Court B, on 27 October 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar