



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

CASE OF BENKESSIOUER v. FRANCE

(95/1997/879/1091)

JUDGMENT

STRASBOURG

24 August 1998

In the case of Benkessiouer v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr F. GÖLCÜKLÜ, *President*,

Mr L.-E. PETTITI,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Mr R. PEKKANEN,

Mr J. MAKARCZYK,

Mr K. JUNGWIERT

Mr E. LEVITS,

Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 21 May and 29 July 1998,

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

PROCEDURE

1. The case was referred to the Court by the French Government (“the Government”) on 19 September 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 26106/95) against the French Republic lodged with the European Commission of Human Rights (“the Commission”) under Article 25 by a French national, Mr Ahmed Benkessiouer, on 6 September 1995.

The Government’s application referred to Article 48 of the Convention. The object of the application 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 § 1 of the Convention.

Notes by the Registrar

1. The case is numbered 95/1997/879/1091. 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 A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30), Mr D. Wedrychowski, of the Strasbourg Bar. Having been designated before the Commission by the initials A.B., the applicant subsequently agreed to the disclosure of his identity.

3. On 25 September 1997 the President of the Court, Mr R. Ryssdal, decided, under Rule 21 § 7 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the case of *Couez v. France*¹. The Chamber to be constituted for that purpose included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On the same day, in the presence of the Registrar, the President of the Court drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr A. Spielmann, Mr N. Valticos, Mr R. Pekkanen, Mr J. Makarczyk and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr Gölcüklü replaced Mr Bernhardt as President of the Chamber, Mr E. Levits, substitute judge, became a full member of the Chamber, and Mr K. Jungwiert, substitute judge, replaced Mr Matscher, who was unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, Mr M. Perrin de Brichambaut, the applicant's lawyer and the Delegate of the Commission, Mr J.-C. Soyer, on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 1 and 17 April 1998 respectively. In a letter of 15 April 1998 the Secretary to the Commission indicated that the Delegate wished to be given an extension of time for submitting his observations. The President of the Chamber granted him this and the Delegate lodged his observations on 29 April 1998.

5. On 24 February 1998 the Chamber decided to dispense with a hearing in the case, having satisfied itself that the conditions for this derogation from its usual procedure had been met (Rules 26 and 38).

1. Case no. 94/1997/878/1090.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr Benkessiouer is a French national who was born in 1940. He is an established civil servant working for the Post Office and lives in Nice.

7. On 21 January 1991 he made an application for extended sick-leave, but the medical board decided on 15 March 1991 that he was fit for work. On 21 March 1991 the applicant was notified of the Post Office's refusal to grant him extended sick-leave and was requested to resume his duties. He did not comply with that request, however, and produced several doctor's certificates between 27 April and 31 July 1991. After further medical examinations carried out at the instance of the Post Office, the applicant was pronounced fit to resume work. As Mr Benkessiouer nevertheless still refused to return to work, it was decided on 26 November 1991 that he should be listed as being absent without excuse since 5 November 1991. On 18 December 1991 he was informed that he would shortly be dismissed if he did not return to his job.

A. The proceedings in the Paris Administrative Court

8. On 29 August 1991 the applicant applied to the Paris Administrative Court for judicial review of the Post Office's decisions to refuse him extended sick-leave, to suspend payment of his salary with effect from 5 November 1991 for failure to perform his duties and to put him on notice to return to work or face dismissal. Relying on the damage allegedly caused him by those three decisions and on the administrative harassment he had experienced, he sought 400,000 French francs (FRF) in damages from the Post Office.

9. In all, Mr Benkessiouer filed thirteen supplementary pleadings between 15 November 1991 and 31 July 1992.

10. In an application of 21 May 1992 the applicant applied to the Administrative Court for a stay of execution of the decision to suspend payment of his salary.

11. On 17 June 1992 the Administrative Court ordered an expert medical opinion.

12. On 18 June 1992 the applicant lodged a further application with the Paris Administrative Court, seeking judicial review of the decision whereby the Post Office mutual insurance company had reduced the amounts reimbursed in respect of the costs of his medical examinations and medicines to 70% or 75%. He also sought FRF 200,000 in supplementary damages for the damage sustained on account of unexpected further medical

examinations and the non-payment of his salary from 5 November 1991 onwards.

13. On 31 July 1992 the applicant filed a pleading.

14. The medical expert filed his report on 10 August 1992. He concluded that on 5 November 1991 Mr Benkessiouer had not been fit to resume work. On 18 August 1992 the report was communicated to the respondent. The Post Office challenged it and applied for a second expert opinion.

15. In a judgment of 15 February 1996 the Paris Administrative Court joined the applicant's three applications.

It quashed the decisions to refuse extended sick-leave and to suspend payment of his salary and, holding that those unlawful decisions rendered the Post Office liable to its employee, awarded the applicant FRF 20,000 damages for the damage he had sustained.

The court dismissed the third application of 18 June 1992 (see paragraph 12 above). It held that the decision to put the applicant on notice to return to work or face dismissal was not amenable to judicial review; it ruled that the claim for damages for the unexpected further medical examinations was ill-founded; and, lastly, it declared inadmissible the claim for damages for failure to deliver a registered letter and the application for judicial review of the decision to reduce the amounts reimbursed in respect of the costs of medical examinations and medicines, on the ground that it had no jurisdiction.

B. The proceedings to seek an interim award

16. On 9 June 1993 Mr Benkessiouer lodged an application with the Paris Administrative Court for an interim award of FRF 400,000.

In an order of 20 August 1993 the Administrative Court dismissed the application, holding that it had not been established that the Post Office had a liability to the applicant for the purposes of Article R. 129 of the Administrative Courts and Administrative Courts of Appeal Code.

17. On 13 October 1993 Mr Benkessiouer appealed against that order to the *Conseil d'Etat*, which transferred it on 1 December to the Paris Administrative Court of Appeal under Article R. 80 of the Administrative Courts and Administrative Courts of Appeal Code. On 31 January 1994 the applicant produced supplementary observations, and on 9 May 1994 the Post Office filed its defence.

In a judgment of 27 October 1994 the Administrative Court of Appeal upheld the Administrative Court's order of 20 August 1993.

18. On 21 November 1994 the applicant applied to the *Conseil d'Etat*, which ruled against him on 19 May 1995.

II. RELEVANT DOMESTIC LAW

19. Law no. 90-568 of 2 July 1990 on the organisation of the public post and telecommunications service, which established from 1 January 1991 a public-law entity, the Post Office, described as a provider of a public service, lays down in Chapter VIII, “Staff”:

Section 29

“The staff of the Post Office ... shall be governed by special rules made pursuant to Law no. 83-634 of 13 July 1983 laying down the rights and duties of civil servants and to Law no. 84-16 of 11 January 1984 making provisions governing the civil service...”

20. The relevant sections of Law no. 84-16 of 11 January 1984 making provisions governing the civil service provide:

Section 34

“A civil servant in post shall be entitled to:

...

(2) sick-leave of up to one year in all during a period of twelve consecutive months in the event of duly certified illness making it impossible for the person concerned to carry out his duties. The civil servant shall then remain on full salary for a period of three months and shall be paid half his salary for the following nine months...

However, if the illness arises from one of the exceptional causes referred to in Article L. 27 of the Civilian and Military Retirement Pensions Code or from an accident that occurred in the performance of his duties or when performing them, the civil servant shall be paid his full salary until he is able to resume his duties or is retired. He shall further be entitled to reimbursement of medical fees and expenses directly entailed by the illness or accident.

(3) extended sick-leave of a maximum length of three years in cases in which it is established that the illness makes it impossible for the person concerned to carry out his duties, requires prolonged treatment and care, is disabling and has been confirmed as serious. The civil servant shall remain on full salary for one year and shall be paid half his salary for the following two years...”

Section 69

“Other than in the event of desertion of post ..., civil servants may only be dismissed in accordance with the statutory provisions on reduction in numbers of managerial staff, whereby those concerned are either redeployed or compensated.”

21. Decree no. 86-442 of 14 March 1986 on the appointment of civilian and military medical boards, physical-fitness requirements for admission to posts in the public service and rules on sick-leave for civil servants provides:

Section 6

“In each *département* a medical board competent for the staff mentioned in section 15 below shall be established and attached to the Commissioner of the Republic...”

Section 7

“The medical boards shall be responsible for giving the appropriate authority, as laid down in the present Decree, an opinion on medical disputes which may arise in connection ... with the granting and renewal of sick-leave...”

They shall mandatorily be consulted on:

...

(2) the granting of extended sick-leave and extended leave of absence;

...”

Section 15

“The civilian and military medical boards of the *départements* shall be competent for civil servants carrying out their duties in the *départements* concerned, except for the heads of external departments referred to in section 14 above and subject to the provisions of the last paragraph of that section.”

PROCEEDINGS BEFORE THE COMMISSION

22. Mr Benkessiouer applied to the Commission on 6 September 1995. He alleged a violation of Article 6 § 1 and Article 8 of the Convention.

23. The Commission (Second Chamber) declared the application (no. 26106/95) partly admissible on 16 October 1996. In its report of 28 May 1997 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 6 § 1 of the Convention. The full text of the Commission’s opinion is reproduced as an annex to this judgment¹.

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission’s report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

24. In their memorial the Government asked the Court to dismiss Mr Benkessiouer's application.

25. The applicant asked the Court to

“Hold that the French State has violated Article 6 § 1 of the European Convention on Human Rights in connection with the proceedings brought by Mr Benkessiouer in the Paris Administrative Court on 29 August 1991;

Consequently hold that the French State should pay Mr Benkessiouer the sum of FRF 500,000 in compensation for the pecuniary damage sustained, plus statutory interest payable from the lodging of the application on 26 February 1994;

Order the French State to pay the sum of FRF 500,000 in compensation for the non-pecuniary damage sustained by Mr Benkessiouer, plus statutory interest payable from 26 July 1994.”

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

26. Mr Benkessiouer complained of the length of the various proceedings he had brought in the administrative courts. He relied on Article 6 § 1 of the Convention, which provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

A. Applicability of Article 6 § 1

27. The Government's primary submission was that Article 6 § 1 did not apply to the instant case. They argued that the *Huber v. France* judgment of 19 February 1998 (*Reports of Judgments and Decisions* 1998-I) was applicable by analogy, as the two cases related to the career and termination of service of a civil servant and originated in extended sick-leave. While the consequences for Mr Benkessiouer of the administrative authorities' decisions were also partly pecuniary, that factor did not suffice to make the

proceedings in issue “civil” ones (see the Huber judgment cited above, pp. 115–16, § 37). The consequences flowed from the initial decision to refuse Mr Benkessiouer extended sick-leave; that decision, however, primarily concerned the development of the career of a civil servant. As to the payment of damages, it was directly dependent on a finding that the impugned decisions had been unlawful. Furthermore, the relevant legislation in this instance (see paragraphs 19–21 above) conferred unilateral discretionary powers on the State and these were based on the public service and not, as in the case of private-law employees, on contract and agreement.

28. The Commission submitted that the applicant’s claim manifestly did not relate to his “recruitment” or “career” or to the “termination” of his service. Mr Benkessiouer’s position was indistinguishable from that of an employee who was a party to a contract of employment governed by private law. The applicant’s right to receive his salary was a “civil” one within the meaning of Article 6 § 1, which therefore applied in the case.

More specifically, the Delegate pointed out that in the Huber case the proper functioning of the public service had been directly in issue, as the case had concerned the sending on compulsory leave of a teacher whose pupils “on account of [his] physical or mental state”, were “exposed to immediate danger”; in that instance the discretionary assessment by the authorities taking, as it were, a public-safety measure had become a decisive consideration.

29. The Court draws attention to its settled case-law, according to which disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1 (see, among other authorities, the Neigel v. France judgment of 17 March 1997, *Reports* 1997-II, p. 410, § 43). That provision is nevertheless applicable where the claim in issue relates to a “purely economic” right – such as payment of salary (see the De Santa v. Italy, Lapalorcia v. Italy and Abenavoli v. Italy judgments of 2 September 1997, *Reports* 1997-V, p. 1663, § 18, p. 1677, § 21, and p. 1690, § 16, respectively) or pension (see the Francesco Lombardo v. Italy judgment of 26 November 1992, Series A no. 249-B, pp. 26–27, § 17, and the Massa v. Italy judgment of 24 August 1993, Series A no. 265-B, p. 20, § 26) – or an “essentially economic” one (see the Nicodemo v. Italy judgment of 2 September 1997, *Reports* 1997-V, p. 1703, § 18).

30. Unlike the position in the Neigel and Huber cases, where what was in issue was essentially the applicants’ reinstatement in the public service, Mr Benkessiouer’s claims in the Paris Administrative Court were intended mainly to secure the quashing of the decisions to refuse him extended sick-

leave and suspend payment of his salary (see paragraph 8 above); a grant of such leave would have enabled the applicant to enjoy the salary benefits set out in section 34 of Law no. 84-16 of 11 January 1984 (see paragraph 20 above).

The Court thus finds that Mr Benkessiouer was claiming an essentially economic right which did not mainly put in issue the authorities' special rights.

31. The Court accordingly concludes that the applicant's claims were civil ones within the meaning of Article 6 § 1, which therefore applies in the case.

B. Compliance with Article 6 § 1

32. The Court must accordingly determine whether "a reasonable time" was exceeded. The Commission and the applicant said that it had been and the Government that it had not.

33. The Court notes that the first set of proceedings in the Paris Administrative Court began on 29 August 1991, when the application was made to it (see paragraph 8 above), and ended on 15 February 1996, when that court gave judgment (see paragraph 15 above). It therefore lasted four years, five months and fifteen days.

The second set of proceedings, for an interim order, began on 9 June 1993 with the application to the Paris Administrative Court (see paragraph 16 above) and ended on 19 May 1995, when the *Conseil d'Etat* gave judgment (see paragraph 18 above). It therefore lasted one year, eleven months and ten days.

34. The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (see, among many other authorities and *mutatis mutandis*, the Ceteroni v. Italy judgment of 15 November 1996, *Reports* 1996-V, p. 1756, § 22).

35. The Government pointed out, in the first place, that the proceedings for an interim order had been of short duration both in the Paris Administrative Court and in the Administrative Court of Appeal and the *Conseil d'Etat*. The proceedings brought on 29 August 1991 had concerned a complex issue; furthermore, the applicant had contributed to prolonging them by lodging three applications on different dates (on 29 August 1991, 21 May 1992 and 18 June 1992 – see paragraphs 8, 10 and 12 above), which the court had had to join before ruling on them, and by filing thirteen pleadings, which encumbered the preparation of the trial.

36. The Court notes that the proceedings for an interim order were completed within a reasonable time. It finds, on the other hand, as the Commission did, that there was a long period of inactivity attributable to the

judicial authorities in connection with the proceedings which began on 29 August 1991: between 10 August 1992, when the expert's report was filed (see paragraph 14 above), and 15 February 1996 (see paragraph 15 above).

A "reasonable time" was consequently exceeded and there has therefore been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

37. Article 50 of the Convention provides:

"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

38. Mr Benkessiouer sought 500,000 French francs (FRF) for the pecuniary damage he considered he had sustained on account of the suspension of payment of his salary and the refusal to pay the balance of his medical expenses and the cost of medicines that was not reimbursed by his social-security scheme. He also claimed FRF 500,000 in respect of non-pecuniary damage, for the "intolerable administrative harassment" he considered he had experienced and the "untold distress" in which his family had allegedly been plunged on account of the refusal to grant him extended sick-leave.

39. The Government pointed out that Mr Benkessiouer had not sustained any damage as a result of the length of time it had taken to hear his case.

40. The Delegate of the Commission considered the applicant's claims excessive. He submitted that a finding of a violation of Article 6 § 1 would on its own compensate for non-pecuniary damage; as to pecuniary damage, he wished to leave the matter to the Court's discretion.

41. As regards pecuniary damage, the Court discerns no causal link between the violation of Article 6 § 1 and the damage sustained by Mr Benkessiouer. As to non-pecuniary damage, the excessive length of the main proceedings may reasonably be supposed to have caused the applicant anxiety and tension. Making its assessment on an equitable basis, the Court awards him FRF 30,000 under this head.

B. Default interest

42. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.36% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by seven votes to two that Article 6 § 1 of the Convention applies in the case and that there has been a violation of it;
2. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months, 30,000 (thirty thousand) French francs for non-pecuniary damage;
 - (b) that simple interest at an annual rate of 3.36% shall be payable from the expiry of the above-mentioned three months until settlement;
3. *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 24 August 1998.

Signed: Feyyaz GÖLCÜKLÜ
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Pekkanen;
- (b) dissenting opinion of Mr Pettiti joined by Mr Gölcüklü.

Initialled: F. G.
Initialled: H. P.

CONCURRING OPINION OF JUDGE PEKKANEN

1. I voted in favour of the view that Article 6 § 1 of the Convention was applicable in this case, for the reasons set out in my dissenting opinions in the cases of *Spurio*, *Gallo*, *Zilaghe*, *Laghi*, *Viero*, *Orlandini*, *Ryllo*, *Soldani*, *Fusco*, *Di Luca* and *Saluzzi*, *Pizzi*, *Scarfò*, *Argento* and *Trombetta v. Italy* (see the Court's judgments of 2 September 1997, *Reports of Judgments and Decisions* 1997-V) and in the case of *Huber v. France* (judgment of 19 February 1998, *Reports* 1998-I).

2. As I had the opportunity to state in those cases, the term "civil servant" has been used by the Court in a manner which suggests that it covers all the administrative officials in State or local-authority service who are not employed under a contract governed by private law. A civil servant is, according to the Court's case-law, protected by Article 6 § 1 only if the dispute concerns, not his or her recruitment, career or termination of service, but, for instance, a purely economic entitlement. In addition, it is a requisite for the applicability of Article 6 § 1 that the discretionary powers of the administrative authority in question should not be in issue. In my opinion, that approach gives rise to drawbacks on two counts.

Firstly, it covers all civil servants without distinction, irrespective of their position in the hierarchy or the type of duties performed. However, States have an understandable and an acceptable interest in deciding such issues, without being subject to judicial control, only in respect of senior officials who exercise public authority.

Secondly, this approach had the result that the civil servants of several member States were unequally protected by the Convention inasmuch as those who were governed by public law were partly deprived of the safeguards in Article 6 while some of their colleagues, employed under private law, enjoyed them, notwithstanding the similarity of their duties.

3. In my opinion, a distinction should be drawn between those civil servants who exercise public authority and those who do not. Such a distinction has been recognised by the Court of Justice of the European Communities (see, for example and *mutatis mutandis*, case no. 473/93, *Commission v. Luxembourg*, judgment of 2 July 1996). In the instant case the applicant was a Post Office employee – not exercising public authority – who had sought extended sick-leave and eventually had recourse to the courts, as he was entitled to do under French law. Depriving him of the procedural safeguards enshrined in Article 6 solely on the basis that he was a civil servant would scarcely have been compatible with any conception of fairness and would have been discriminatory *vis-à-vis* all other potential litigants to whom the same courts are required to afford those safeguards.

DISSENTING OPINION OF JUDGE PETTITI,
JOINED BY JUDGE GÖLCÜKLÜ

(*Translation*)

I voted with the minority in favour of the view that Article 6 of the Convention did not apply.

The Benkessiouer case raises once again the problem of the substantive scope of the European Convention.

The reasons given in my dissenting opinion in the Couez v. France judgment of 24 August 1998, *Reports of Judgments and Decisions* 1998-V, apply, in particular, to paragraphs 29 and 30 of the present judgment (which correspond to paragraphs 24 and 25 of the Couez judgment).

Mr Benkessiouer's case concerned the arrangements for granting extended sick-leave, the examination of such a case being dependent on the interpretation of the Civil Service Code, on the terms of supervision by the authorities and on the interpretation given by the administrative courts and the appropriate authorities.

The consequences of the decision concerning salary did not mean that the dispute concerned an essentially economic right (see paragraph 30).

Discretionary rights of the authorities were therefore not in issue.

The reasoning I set out in my dissenting opinion in the Couez case therefore applies to this case and my conclusion is the same.

The general principles governing the Civil Service Code and the European Convention were analysed in detail in the Le Calvez v. France judgment of 29 July 1998, *Reports* 1998-V.

Reference should be made to that as complementing this opinion.

Certainly it might be desirable for European law on the subject to be unified in the future, but such a reform is a matter for the member States by signing and ratifying a Protocol to the Convention.