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

COURT (CHAMBER)

CASE OF DE CUBBER v. BELGIUM (ARTICLE 50)

(Application no. 9186/80)

JUDGMENT

STRASBOURG

14 September 1987

In the De Cubber 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. G. WIARDA, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Sir Vincent EVANS,
Mr. R. BERNHARDT,

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

Having deliberated in private on 22 May and 24 August 1987,

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 October 1983. It originated in an application (no. 9186/80) against the Kingdom of Belgium lodged with the Commission on 10 October 1980 by a Belgian citizen, Mr. Albert De Cubber.

2. In a judgment of 26 October 1984, the Court held that there had been a violation of Article 6 § 1 (art. 6-1) of the Convention in that the case of the applicant - who had been sentenced by the Oudenaarde court on 29 June 1979 to several years' imprisonment - had not been heard by an impartial tribunal (Series A no. 86, paragraphs 23-36 of the reasons and point 1 of the operative provisions, pp. 13-20).

The only outstanding matter to be settled is the question of the application of Article 50 (art. 50) in the present case. As regards the facts, the Court will therefore confine itself here to giving the pertinent details; for further particulars, reference should be made to paragraphs 7 to 20 of the aforementioned judgment (ibid., pp. 8-12).

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* Note by the Registrar: The case is numbered 8/1983/64/99. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

3. In a note filed on 16 April 1984, Mr. De Cubber had claimed just satisfaction for pecuniary and non-pecuniary damage.

As the Government had not taken a stand on this question, the Court, in its judgment of 26 October 1984, reserved it and invited the Government to submit their written comments within the next two months and, in particular, to notify the Court of any agreement reached between them and the applicant (paragraph 37 of the reasons and point 2 of the operative provisions).

4. The President granted an extension of this time-limit on 13 December 1984 and again on 12 March 1985.

5. Acting on the Court's instructions, the Registrar wrote to the Agent of the Government on 29 October 1984. His letter, which made reference to the wording of and the case-law on Article 50 (art. 50), enquired - "without prejudice to the decision which the Court might take on the point in question" - whether the Belgian authorities considered that Belgian law provided "any means whereby full reparation can be made for the consequences of the breach found in the present case" (see, mutatis mutandis, the Piersack judgment of 26 October 1984, Series A no. 85, p. 13, § 5).

On 3 April 1985, the Agent replied that the Minister of Justice had just requested the procureur général (State prosecutor) attached to the Court of Cassation to challenge before the latter Court the Ghent Court of Appeal's judgment of 4 February 1980, which had confirmed the main points in the Oudenaarde court's decision (Series A no. 86, p. 9, § 13). The Minister had taken this step pursuant to Article 441 of the Code of Criminal Procedure, which provides as follows:

> "Where, on production of formal instructions which he has received from the ... Minister of Justice, the procureur général attached to the Court of Cassation impugns before the Chamber hearing appeals on points of law in criminal cases, involving serious, lesser and petty offences (en matière criminelle, correctionnelle et de police), judicial acts or judgments as being contrary to the law, such acts or judgments may be annulled ...."

6. Subsequently - from May 1985 to February 1987 -, the Registrar was in touch with the Agent of the Government and the applicant's lawyer on numerous occasions with a view to having the applicant's claims examined - and, if appropriate, settled - without awaiting the outcome of the proceedings pending before the Court of Cassation.

7. On 20 February 1987, the Agent of the Government indicated that the Court of Cassation had given judgment on 27 January.

The representative of the procureur général had summarised his final submissions in the following terms:

> "The Belgian State is under an obligation to make such reparation as is possible under domestic law for the consequences of the violation found by the European Court

in its judgment of 26 October 1984 and to recognise that judgment as being final and binding.

Recourse to the procedure laid down by Article 441 of the Code of Criminal Procedure enables this result to be achieved. There is no impediment in the fact that in 1980 your Court in large measure dismissed an appeal by De Cubber on points of law where the underlying facts were identical to those underlying the present challenge, since the Belgian State's obligations under the European Court's judgment constitute matters of law of which your Court was unable to take cognisance when it ruled on De Cubber's appeal in 1980.

To sum up, those obligations warrant a finding that the present challenge is both admissible and well-founded."

The Court of Cassation declared the State prosecutor's application inadmissible, for the following reasons:

"...

Whereas the Court of Cassation, a judicial body, is not to be identified with one of the Contracting Parties mentioned in Article 50 (art. 50) of the Convention for the Protection of Human Rights and Fundamental Freedoms, in the present case the Belgian State;

Whereas, in the event of dismissal of an accused's appeal on points of law against a decision determining a criminal charge against him, a challenge to that dismissal, submitted, on the instructions of the Minister of Justice, in accordance with Article 441 of the Code of Criminal Procedure and grounded on an illegality alleged to be prejudicial to the convicted person, is admissible only if that illegality arises from facts disclosed or discovered after dismissal of the appeal and those facts are brought to light by material that was not before the Court of Cassation in its earlier proceedings, so that it could not take cognisance of them at that time;

Whereas the existence of a fact of this kind is not revealed by the judgment delivered on 26 October 1984 by the European Court of Human Rights, which judgment deals solely with a question of law on which the Court of Cassation ruled in its judgment of 15 April 1980;

..."

8. The applicant supplied further particulars of his claims for just satisfaction in a memorial filed at the registry by his lawyer on 24 March 1987. The Government replied thereto on 30 April.

On 21 May, the Secretary to the Commission communicated its Delegate's observations to the Registrar.

9. On 11 May, Mr. De Cubber presented new claims for compensation, which he had drafted himself. These claims, and also the comments on his lawyer's memorial and on the Delegate's observations that he submitted on 5 August, were transmitted to his lawyer by the Registrar.

10. On 22 May, the Court decided that, in the particular circumstances, there was no need to hold oral hearings.

AS TO THE LAW

11. 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."

The applicant's claims under this provision were for compensation for damage as well as reimbursement of costs and expenses. He also sought a declaration to the effect that the sums awarded were to be free from attachment.

I. DAMAGE

A. Claims of the applicant

12. In his observations Mr. De Cubber began by observing, "for the record more than anything", that, including the duration of his detention on remand, he had spent four years and fifty-three days (from 4 April 1977 to 27 May 1981) in prison for the offences giving rise to the proceedings which led to the Ghent Court of Appeal's judgment of 4 February 1980. He considered that he would not have been in custody for so long if the violation found by the European Court had not occurred.

13. Whilst acknowledging that the quashing of the aforesaid judgment would probably not have prevented the institution of fresh criminal proceedings, the applicant further maintained that a prosecution in respect of the acts committed before he was taken into custody would have been time-barred. He accordingly concluded that "the detention undergone following that judgment, or the detention on remand warranted by that decision" had to be regarded as "invalid" and, as his "principal plea", claimed compensation for the 1,514 days during which he was detained.

14. Mr. De Cubber also drew attention to a fresh sentence, of five years' imprisonment, which he had received on 26 June 1986. This sentence, which had been confirmed by the Brussels Court of Appeal on 6 March 1987, had been based on the fact that he was classified in law as a recidivist, an aggravating circumstance without which the court would have been able to impose at most a sentence only half as long. Whilst accepting that it was difficult to make a "prognosis", he claimed that the new sentence should probably not have exceeded eighteen months. In short, there was a period of forty-two months, or 1,260 days, which he considered "invalid".

15. Taking his age, state of health and family situation into account, Mr. De Cubber evaluated the pecuniary and non-pecuniary damage resulting from unjustified detention at 2,000 BF per day, giving a total of 5,548,OOO BF for 2,774 days.

16. Finally, the applicant asserted that a "conditional sentence" of imprisonment imposed by the judgment of 4 February 1980 should be deemed "null and void", failing which the damage sustained would be even greater.

B. Observations of the Government and of the Commission

17. The Government submitted that the allegation of pecuniary and non-pecuniary loss in the sum of 5,548,000 BF by reason of imprisonment for four years and fifty-three days was "totally misconceived".

18. As regards pecuniary damage, the Government's arguments may be summarised as follows:

- The Ghent Court of Appeal had itself recalled that the applicant was already a recidivist and there was nothing to suggest that the sentence would have been less severe if the violation found had not occurred.

- In no circumstances would the quashing of the judgment of 4 February 1980 have led to the applicant's acquittal.

- As regards the applicant's fresh sentence, it was true that the Brussels Court of Appeal had indeed noted that he was classified in law as a recidivist; however, although it was legally entitled to rely on this as a ground for imposing a penalty in excess of the maximum laid down for cases where recidivism is not taken into account, it had not done so. The applicant therefore could not claim that had he not been so classified the sentence would have been only half as long as that passed on 6 March 1987.

- In short, Mr. De Cubber's position had in no way been affected by the breach of Article 6 (art. 6) and his allegation of pecuniary damage was "totally unwarranted and unfounded".

19. As to non-pecuniary damage, the Government took the view that the European Court's judgment had already provided the applicant with "moral satisfaction". They declared, however, that they were willing to pay a sum of 75,000 BF under this head, "having regard to the fact that Mr. De Cubber had legitimate grounds for questioning the impartiality of the Oudenaarde court".

20. In the view of the Commission's Delegate, since the Ghent Court of Appeal's judgment had not been quashed, there was no possibility in the present case of reaching a result coming close to restitutio in integrum. Yet one could not speculate as to what the outcome of the proceedings in question would have been had there been no violation of the Convention. In the Delegate's opinion, Mr. De Cubber had not established that he had sustained pecuniary damage as a result of the breach of Article 6 (art. 6); on

the other hand, he had suffered non-pecuniary loss for which sufficient satisfaction was not provided by the European Court's judgment of 26 October 1984. The Delegate was therefore in favour of awarding more than the Government proposed, but he did not suggest a figure.

C. Decision of the Court

21. The Court notes firstly that the conditions for the application of Article 50 (art. 50) are satisfied: the proceedings in Belgium after 26 October 1984 (see paragraph 7 above) have not redressed the violation found in its judgment of that date; they have not brought about a result as close to restitutio in integrum as was possible in the nature of things (see, a contrario, the Piersack judgment of 26 October 1984, Series A no. 85, pp. 15-16, § 11). On 27 January 1987, the Court of Cassation declared inadmissible the application which the procureur général attached to that Court had submitted to it on the instructions of the Minister of Justice; it did not quash the Ghent Court of Appeal's judgment of 4 February 1980, with the result that the applicant's case was not referred back to another court for retrial (see paragraphs 5 and 7 above). The European Court therefore has to determine, in the context of Article 50 (art. 50), the consequences which its judgment of 26 October 1984 entails for the Belgian State, the latter being responsible for the functioning of the totality of its institutions (see, amongst other authorities, mutatis mutandis, the Foti and Others judgment of 10 December 1982, Series A no. 56, p. 21, § 63, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 13, § 32, and the Lingens judgment of 8 July 1986, Series A no. 103, p. 28, § 46).

22. It follows from the Strasbourg judgment that in the present case an award of just satisfaction can only be based on the fact that "the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt" (Series A no. 86, p.16, § 30). That judgment pointed out that whilst the European Court itself had no reason to doubt the investigating judge's impartiality, his presence on the bench during the trial at first instance provided grounds for "some legitimate misgivings" on Mr. De Cubber's part (ibid., p. 16, § 30). By way of clarification, the Court made two further observations: firstly, the defect "involved matters of internal organisation" since its source was the very composition of the trial court; secondly, "the Court of Appeal [had not cured] that defect since it [had not quashed] on that ground the judgment of 29 June 1979 in its entirety" (ibid., p. 19, § 33).

23. The Court cannot speculate as to what the outcome of the proceedings in question would have been had the violation of the Convention not occurred; there is nothing to show that the result would probably have been more favourable to the applicant. The arguments he adduced on this point are not convincing.

On the dates when the Oudenaarde court and the Ghent Court of Appeal gave their decisions the question of a time-bar to prosecution did not arise. Besides, it is not established that if the Court of Cassation had quashed the Ghent judgment, such a bar would have applied to the acts Mr. De Cubber committed before he was taken into detention and would have "invalidated" that detention.

Again, the "conditional sentence", the validity of which Mr. De Cubber contested (see paragraph 16 above), was not in fact implemented. In any case, it was actually an alternative sanction, consisting of three months' imprisonment, to be undergone in the event of his not paying the fine of 20,000 BF imposed by the Ghent Court of Appeal on 4 February 1980.

Finally, the proceedings that led to the imposition on 26 June 1986 of a fresh sentence, which was confirmed by the Brussels Court of Appeal on 6 March 1987 (see paragraph 14 above), cannot be regarded as relevant, since the Oudenaarde court itself had already taken note, on 29 June 1979, of the fact that the accused was a recidivist (Series A no. 86, p. 9, § 12).

In short, no causal link between the violation of the Convention and the length of the detention has been established.

24. On the other hand, the presence on the trial-court bench of the person who had previously acted as investigating judge provided grounds for some legitimate misgivings on Mr. De Cubber's part (see the judgment of 26 October 1984, Series A no. 86, p. 16, § 30). In this respect, he sustained non-pecuniary damage which is not fully compensated for by the Strasbourg judgment. Taking its decision on an equitable basis, as required by Article 50 (art. 50) (see, amongst other authorities, mutatis mutandis, the Colozza judgment of 12 February 1985, Series A no. 89, p. 17, § 38), the Court awards the applicant compensation of 100,000 BF under this head.

II. COSTS AND EXPENSES

A. Introduction

25. The applicant sought reimbursement of court costs and of lawyer's fees and disbursements.

According to the Court's established case-law, to be entitled to an award of costs and expenses under Article 50 (art. 50) the injured party must have incurred them in order to seek, through the domestic legal system, prevention or rectification of a violation, to have the same established by the Commission and later by the Court or to obtain redress therefor (see, as the most recent authority, the Feldbrugge judgment of 27 July 1987, Series A no. 124, § 14). Furthermore, it has to be shown that the costs and expenses were actually incurred, were necessarily incurred and were reasonable as to quantum (ibid.).

B. Costs incurred in Belgium

26. Mr. De Cubber claimed two amounts in respect of costs incurred in Belgium. The first - 39,742 BF - represented the costs awarded against him by the Oudenaarde court on 29 June 1979 (30,784 BF) and by the Ghent Court of Appeal on 4 February 1980 (8,958 BF). The second - 8,221 BF - corresponded to the costs he had been ordered to pay by the Court of Cassation on 15 April 1980.

27. The Government did not submit any observations on this point.

28. The Commission's Delegate referred to the criteria applied by the Court in the Piersack case and expressed the view that this claim was reasonable.

29. Reimbursement of the court costs relating to the proceedings before the Oudenaarde court and the Ghent Court of Appeal on the merits of the case cannot, in the Court's opinion, be ordered, there being no sufficient connection between those costs and the violation it found.

On the other hand, the applicant is entitled to be paid the costs referable to the proceedings which he himself instituted before the Court of Cassation, since in one of the grounds of his appeal he sought "rectification" of the violation of Article 6 (art. 6) "through the domestic legal system" (see the above-mentioned Feldbrugge judgment, § 14). The amount involved is 8,221 BF.

C. Costs incurred in Strasbourg

30. In connection with the proceedings before the Convention institutions, the applicant claimed 150,000 BF for lawyer's fees and 20,000 BF for sundry expenses.

In addition, he estimated at 50,000 BF the costs he would have to bear if the Court held a hearing on the application of Article 50 (art. 50).

31. For the Government, the figure of 100,000 BF put forward by the applicant on 24 September 1986 was acceptable. However, they considered the figure of 220,000 BF that was finally claimed (in the memorial of 24 March 1987; see paragraph 8 above) to be unwarranted and exaggerated; they pointed out in this connection that the item of 50,000 BF was hypothetical.

32. The Commission's Delegate relied on the criteria applied by the Court in the Piersack case and expressed the opinion that Mr. De Cubber's claim was reasonable.

33. The Court sees no reason to doubt that the applicant actually incurred the expenses in question, save those which he anticipated for his lawyer's attendance at a hearing on Article 50 (art. 50) but which did not arise as no such hearing was held (see paragraph 10 above). As to whether the expenses were necessarily incurred and were reasonable as to quantum,

the Court notes that Mr. De Cubber did not apply for legal aid before the Convention institutions and that the costs and fees enumerated are not abnormally high. The sum of 170,000 BF should therefore be reimbursed to the applicant.

III. REQUEST THAT THE SUMS AWARDED BE DECLARED FREE FROM ATTACHMENT

34. The applicant requested the Court to declare in its judgment that the sums awarded under Article 50 (art. 50) were to be free from attachment. He provided no information as to the probability of such a measure.

35. As it has been formulated, this issue is therefore hypothetical and abstract. Accordingly, it is not an issue which can be determined by the Court, especially as neither the Agent of the Government nor the Delegate of the Commission submitted any observations on it.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the Kingdom of Belgium is to pay to the applicant 100,000 (one hundred thousand) Belgian francs for damage and to reimburse to him 178,221 (one hundred and seventy-eight thousand two hundred and twenty-one) Belgian francs in respect of costs and expenses;

2. Rejects the remainder of the claim for just satisfaction;

3. Holds that there is no call to rule on the request that the sums awarded to the applicant be declared free from attachment.

Done in English and in French, and notified in writing on 14 September 1987 pursuant to Rule 54 § 2, second sub-paragraph, of the Rules of Court.

Gérard WIARDA
President

Marc-André EISSEN
Registrar