



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

COURT (CHAMBER)

CASE OF CAN v. AUSTRIA

(Application no. 9300/81)

JUDGMENT

STRASBOURG

30 September 1985

In the Can 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. F. GÖLCÜKLÜ,

Mr. F. MATSCHER,

Mr. J. PINHEIRO FARINHA,

Mr. L.-E. PETTITI,

Mr. B. WALSH,

Mr. C. RUSSO,

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

Having deliberated in private on 27 June and 25 September 1985,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 15 October 1984, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 9300/81) against the Republic of Austria lodged with the Commission on 14 April 1981 by Mr. Elvan Can, a Turkish national under Article 25 (art. 25).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). Its object 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. 3 (c) and Article 5 para. 3 (art. 6-3-c, art. 5-3).

2. In response to the inquiry 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 pending before the Court and designated the lawyer who would represent him (Rule 30).

* Note by the Registrar: The case is numbered 11/1984/83/130. 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. The Chamber of seven judges to be constituted included, as *ex officio* members, Mr. F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 22 October 1984, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. J. Pinheiro Farinha, Mr. E. Garcia de Enterria, Mr. L.-E. Pettiti, Mr. B. Walsh and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr. Garcia de Enterria and Mr. Bernhardt, who were prevented from taking part in the consideration of the case, were replaced by Mr. F. Gölcüklü and Mr. C. Russo, substitute judges (Rules 22 para. 1 and 24 para. 1).

4. Having assumed the office of President of the Chamber (Rule 21 para. 5), Mr. Wiarda consulted, through the Deputy Registrar, the Agent of the Austrian Government ("the Government"), the Delegate of the Commission and the lawyer for Mr. Can regarding the need for a written procedure (Rule 37 para. 1). On 3 December 1984, he directed that the Agent and the lawyer should each have until 31 January 1985 to file a memorial and that the Delegate should be entitled to reply in writing within three weeks from the date of the transmission to him by the Registrar of whichever of the aforesaid pleadings should last be filed.

However, the President subsequently granted to the Government several extensions of their time-limit since they were conducting settlement negotiations with the lawyer for the applicant. The latter's memorial was received by the Registrar on 4 February.

5. The negotiations proved successful and the Permanent Representative of Austria to the Council of Europe informed the Registrar on 11 June of the terms of the friendly settlement to which they had led (see paragraph 14 below). At the same time, he advised the Registrar that the Government requested the Court to strike the case out of the list (Rule 48 para. 2 of the Rules of Court); in a letter of 28 May, received at the registry on 3 June, Mr. Can's lawyer had indicated that he agreed to such a course. On 19 June, the Permanent Representative also notified the Court of an initial step that had been taken by the Government (see paragraph 14 below).

The Delegate, for his part, considered that the friendly settlement in question could be regarded as based on respect for human rights; the Deputy Secretary to the Commission so informed the Registrar on 12 August.

6. On 25 September, the Court decided to dispense with hearings, having found that the requisite conditions for this derogation from the usual procedure were satisfied (Rules 26 and 38 of the Rules of Court).

AS TO THE FACTS

7. Elvan Can is a Turkish citizen born in 1947. In 1971, he settled in Austria with his wife. He was arrested by the Gmunden police on 17 August 1980, on suspicion of having participated in an offence of arson (Brandstiftung) committed on 8 August and involving a restaurant which he managed on behalf of an Austrian citizen, Mrs. E.R. She too was arrested, as was a brother of the applicant, who was presumed to have started the fire.

On 19 August, an investigating judge ordered that the applicant be detained on remand at Wels, as he thought that there was both a danger of absconding and a danger of suppression of evidence (Fluchtgefahr and Verdunkelungsgefahr; Article 180 para. 2, sub-paragraphs 1 and 2, of the Code of Criminal Procedure).

8. Mr. Can subsequently made a number of applications for release in which he claimed that there was no reason to keep him in custody and pleaded, *inter alia*, the Convention.

The Review Chamber (Ratskammer) of the Wels Regional Court (Kreisgericht) rejected the first three applications on 2 September 1980, 30 September 1980 and 13 January 1981; on 6 October 1980 and 19 January 1981, Elvan Can lodged appeals with the Linz Court of Appeal (Oberlandesgericht) but they were dismissed on 22 October 1980 and 28 January 1981.

A fourth application, made on 23 February 1981, was also apparently unsuccessful. However, on 30 April 1981 a fifth, dated 22 April, was granted by the Review Chamber, in the sense that it ordered Mr. Can's release on certain conditions, including the deposit of 90,000 Schillings as security. Mr. Can, who claimed to be unable to find such a sum and who had offered - as an alternative - to put up 20,000 Schillings, which had been collected by relatives and compatriots, appealed to the Linz Court of Appeal. That Court confirmed the Review Chamber's order on 27 May 1981. A sixth application (28 August 1981) was likewise rejected by the Review Chamber (16 September 1981) and by the Court of Appeal (2 October 1981).

The Court of Appeal also gave authority, on 28 January, 25 February and 8 April 1981, for the detention on remand to be continued, if thought fit, for a total of up to seven, eight and ten months, respectively (Article 193 of the Code of Criminal Procedure).

The various decisions listed above referred, basically, to the persistence of suspicions and of the danger of absconding, as well as to the scope and complexity of the investigations. On the other hand, after 22 October 1980 they no longer mentioned the danger of suppression of evidence: under Article 193 of the Code of Criminal Procedure, such a danger can ground detention on remand only for a maximum of two months, or three months if

the second-instance court so authorises on application by the investigating judge or the public prosecutor's department.

At a hearing before the trial court on 12 November 1981, Elvan Can was released, subject to depositing 20,000 Schillings as security.

9. At the outset of his detention - for example on 15 and 30 September 1980 -, the applicant was permitted to consult with his lawyer, Mr. Zitta, and his assistants only under supervision. This was because Article 45 para. 3, second sentence, of the Code of Criminal Procedure provides that, until such time as the indictment (Anklageschrift) has been served, a court officer (Gerichtsperson) must be present at such a consultation if the suspect's detention is grounded partly or exclusively on the danger of suppression of evidence. A similar rule applies to correspondence (Article 45 para. 4).

On 6 October 1980, the applicant sought leave to consult with Mr. Zitta in the absence of any third party; in his view, Article 45 para. 3 of the Code of Criminal Procedure was contrary to Article 6 para. 3 (c) of the Convention (art. 6-3-c) and, as a result, to the Austrian Constitution. Leave was refused by the investigating judge on 9 October and, on 14 October, Mr. Can applied to the Review Chamber of the Wels Regional Court, but to no avail: on 13 March 1981, the Chamber also rejected the application, without referring the matter to the Constitutional Court (Verfassungsgerichtshof) as Mr. Can had requested it to do.

10. On 14 January 1983, the Wels Regional Court convicted Mr. Can of being an accomplice to arson and sentenced him to fourteen months' imprisonment. The Supreme Court (Oberster Gerichtshof) dismissed, on 15 November and 13 December 1983, his appeal (Berufung) and his appeal on points of law (Nichtigkeitsbeschwerde).

11. The applicant has since returned to Turkey with his family.

PROCEEDINGS BEFORE THE COMMISSION

12. Before the Commission, to which he applied on 14 April 1981 (application no. 9300/81), Elvan Can complained both of the duration of his detention on remand - fourteen months and twenty-six days - and of the initial supervision of his consultations with his lawyer. On the first point he relied on Article 5 para. 3 (art. 5-3) of the Convention and on the second, on Article 6 para. 3 (c) (art. 6-3-c).

13. The Commission declared the application admissible on 14 December 1983. In its report of 12 July 1984 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 5 para. 3 (art. 5-3) (eleven votes against one) and of Article 6 para. 3 (c) (art. 6-3-c) (unanimously). The full text of the Commission's opinion and of the

separate opinion contained in the report is reproduced as an annex to the present judgment.

AS TO THE LAW

14. The Government and the applicant have arrived at the following friendly settlement (see paragraph 5 above):

"1. Payment to the applicant of lump-sum compensation of 100,000 Austrian Schillings.

2. Payment, in respect of costs and expenses incurred in the domestic proceedings, of lump-sum compensation of 54,336.62 Austrian Schillings.

3. The above-mentioned compensation will be paid by the Austrian Federal Government, through Mr. Rudolf Zitta, not later than one month after conclusion of the settlement. The settlement will enter into force when Mr. Rudolf Zitta informs the Ministry of Foreign Affairs that the applicant Elvan Can has accepted the settlement proposal.

In addition, the Austrian Federal Government undertake to reimburse Mr. Elvan Can for any scale fees which he may have to pay in Austria for the settlement, such payment to be made within one month of the fixing of those fees.

4. Authorisation by the Austrian National Bank for the remittance to Mr. Elvan Can, in Turkey, of the lump-sum compensation of 100,000 Austrian Schillings will be produced.

5. The Austrian Federal Government have no objection to the publication, in appropriate form, of the decision of the European Commission of Human Rights (no. 9300/81) and of the friendly settlement.

6. The applicant was granted legal aid for the proceedings before the European Commission and Court of Human Rights and will retain the benefit thereof after termination of the proceedings before the Court by means of a settlement. The applicant's costs and expenses in the Strasbourg proceedings are therefore not covered by the settlement.

If the applicant's costs and expenses in the proceedings before the European Court of Human Rights and in the negotiations leading to the friendly settlement are not paid under the legal-aid scheme, the Austrian Federal Government undertake to reimburse the applicant for these items as well (Mr. Elvan Can, care of his lawyer, Mr. Rudolf Zitta).

Within the framework of the complete reform of the Code of Criminal Procedure which is in preparation, the Austrian Federal Government will propose to the legislative assemblies new rules on the supervision of consultations between a suspect in detention on remand and his lawyer when there is a danger of suppression of evidence (Article 45 para. 3 of the Code of Criminal Procedure). When so doing, they

will take account of the observations of the European Commission of Human Rights in its report of 12 July 1984 in the present case."

The Government accordingly requested the Court, with Mr. Can's agreement (see paragraph 5 above), to strike the case out of the list pursuant to Rule 48 para. 2 of the Rules of Court, which reads:

"When the Chamber is informed of a friendly settlement ..., it may, after consulting, if necessary, ... the Delegates of the Commission ..., strike the case out of the list."

The Delegate of the Commission has been consulted and has raised no objection (see paragraph 5 above).

The Permanent Representative of Austria to the Council of Europe has also informed the registry that "as an initial step, the Austrian Federal Government will communicate the contents of the Commission's report of 12 July 1984 to all the Austrian courts, through their presidents, and to the prosecution authorities" (see paragraph 5 above).

15. The Court takes formal note of the friendly settlement reached by the Government and the applicant. The applicant regards the settlement as being clearly in accordance with his own interests; nevertheless, the Court must satisfy itself that there are no reasons of public policy (*ordre public*) of a kind which would necessitate the continuation of the proceedings (Rule 48 para. 4).

16. In this connection, the Court recalls in the first place that in several earlier cases it has determined issues analogous to that arising in the instant case under Article 5 para. 3 (art. 5-3) of the Convention (see the following judgments: *Wemhoff*, 27 June 1968; *Neumeister*, 27 June 1968; *Stögmüller*, 10 November 1969; *Matznetter*, 10 November 1969; *Ringeisen*, 16 July 1971 - Series A nos. 7, 8, 9, 10 and 13, respectively). It has thereby clarified the scope of the engagements undertaken by the Contracting States in this area.

17. Exactly the same cannot be said of the second issue arising, namely the supervision to which, on account of the danger of suppression of evidence, consultations between a detained suspect and his lawyer are subject in Austria (see paragraph 9 above). The Court was recently faced with a somewhat similar problem, which it resolved by finding a violation of Article 6 para. 1 (art. 6-1), but this concerned a convicted prisoner who was serving his sentence in the United Kingdom and wished to institute civil proceedings (see the *Campbell and Fell* judgment of 28 June 1984, Series A no. 80, pp. 13-15, paras. 17-22, p. 25, para. 44 (d), and p. 49, paras. 111-113).

However, the Court's case-law does already provide certain indications as to the answer to the question - dealt with in paragraphs 45 to 50 of the Commission's report - whether and to what extent Article 6 para. 3 (art. 6-3), or a particular sub-paragraph thereof, is applicable at the stage of the preliminary investigations (see, *mutatis mutandis*, the *Engel and Others*

judgment of 8 June 1976, Series A no. 22, pp. 38-39, para. 91, the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, p. 20, para. 48, and the above-mentioned Campbell and Fell judgment, Series A no. 80, pp. 44-45, paras. 95-99).

Above all, the respondent Government have undertaken to submit to the legislative assemblies a draft of new rules on the supervision in question and, when so doing, to take into account the unanimous opinion which the Commission expressed in its report. In addition, the Government have now already communicated the contents of the report to all the Austrian courts and to the prosecution authorities, thereby indicating the approach which the Government will propose should be adopted in the reform.

18. Accordingly, the Court, like the Delegate of the Commission (see paragraph 5 above), considers that the solution adopted by the Government and the applicant is based on respect for human rights as guaranteed by the Convention. Consequently, 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 54 para. 2, second sub-paragraph, of the Rules of Court, on 30 September 1985.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the joint concurring opinion of Mr. Matscher and Mr. Pinheiro Farinha is annexed to the present judgment.

G.W.
M.-A.E.

CAN v. AUSTRIA JUDGMENT
SEPARATE OPINION OF JUDGES MATSCHER AND PINHEIRO FARINHA
SEPARATE OPINION OF JUDGES MATSCHER AND
PINHEIRO FARINHA

(Translation)

Like our colleagues, we find that the friendly settlement concluded between the Austrian Government and the applicant meets the conditions which, under Rule 48 paras. 2 and 4 of the Rules of Court, must be satisfied before a case can be struck out of the list.

Apart from the equitable nature of the settlement, we see the essence of these conditions as being that it must be ensured that, by reason of the undertakings entered into by the Government within the framework of the settlement, the situations underlying the application in question will not recur or, in other words, that the causes of the situation complained of are eliminated. In such circumstances, the friendly settlement is based on respect for human rights as guaranteed by the Convention (see Article 28 (b) of the Convention) (art. 28-b).

The Chamber unanimously found that these conditions were satisfied in the present case. Having regard to the Court's responsibilities under Article 19 (art. 19) of the Convention, the Chamber was thus entitled to decide to strike the case out of the list.

On the other hand - and this is where we differ from the approach of the majority of the Chamber -, there is no room in a judgment striking a case out of the list for the inclusion of any observations on what the Court's opinion might have been if it had had to determine the merits of the case, or on the opinion it had expressed in similar cases, the existence of any established case-law of the Court on the issue in question being a matter that is totally irrelevant for a decision to strike out.