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

COURT (PLENARY)

CASE OF AXEN v. GERMANY

(Application no. 8273/78)

JUDGMENT

STRASBOURG

8 December 1983

In the Axen case,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 48 of the Rules of Court* and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,

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

Having deliberated in private on 23 and 24 March and on 24 and 25 October 1983,

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"). The case originated in an application (no. 8273/78) against the Federal Republic of Germany lodged with the Commission in 1977 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr. Karl-Heinz Axen.

The applicant, who at the outset was designated by the initial X, subsequently consented to the disclosure of his identity.

2. The Commission's request was lodged with the registry of the Court on 17 May 1982, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47). It referred to Articles 44 and 48 (art. 44,

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The request sought a decision from the Court as to the existence of violations of Article 6 para. 1 (art. 6-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 (art. 43) of the Convention), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 28 May 1982, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. W. Ganshof van der Meersch, Mr. G. Lagergren, Mr. F. Matscher, Mr. L.-E. Pettiti and Sir Vincent Evans (Article 43 in fine (art. 43) of the Convention and Rule 21 para. 4).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 para. 5), ascertained, through the Registrar, the views of the Agent of the Government of the Federal Republic of Germany ("the Government") and the Delegates of the Commission regarding the procedure to be followed. On 16 June, he decided that the Agent should have until 30 September 1982 to file a memorial and that the Delegates should be entitled to reply in writing within two months from the date of the transmission of the Government's memorial to them by the Registrar.

5. On 29 June 1982, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

6. The Government's memorial was received at the registry on 30 September. On 3 November, the Secretary to the Commission informed the Registrar that the Delegates would submit their own observations at the hearings. On 1 February 1983, he transmitted to the Registrar the applicant's claims under Article 50 (art. 50).

7. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed on 1 December 1982 that the oral proceedings should open on 21 March 1983.

On 14 March 1983, the Registrar, acting on the President's instructions, requested the Commission to produce several documents; they were received on 18 and 21 March.

8. Mr. Wiarda being unable to attend, Mr. R. Ryssdal, the Vice-President of the Court, assumed the office of President (Rule 9, read in conjunction with Rules 24 para. 1 and 48 para. 3).

9. The hearings were held in public at the Human Rights Building, Strasbourg, on 21 March. Immediately before they opened, the Court had held a preparatory meeting; it had authorised the Agent and the advocates of the Government and the person assisting the Delegates of the Commission to use the German language (Rule 27 paras. 2 and 3).

There appeared before the Court:

- for the Government

Mrs. I. MAIER, Ministerialdirigentin

at the Federal Ministry of Justice, *Agent*,
Mr. P. SCHUSTER, Ministerialrat
at the Federal Ministry of Justice, Head of the Section concerned with civil and labour court procedure,
Adviser;

- for the Commission
Mr. S. TRECHSEL,
Mr. A. WEITZEL, *Delegates*,
Mr. H.J. SCHÜLER, the applicant's lawyer before the Commission, assisting the Delegates (Rule 29 para. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mrs. Maier for the Government and by Mr. Trechsel, Mr. Weitzel and Mr. Schüler for the Commission, as well as their replies to its questions.

10. At the hearings the Agent of the Government had stated that she would be filing certain documents; they were received on 6 April.

AS TO THE FACTS

11. The applicant, a German national born in 1914, is resident in Hamburg.

On 6 August 1950, he drove his car into the parked and unlighted trailer of a lorry belonging to a firm. His mother, a passenger in the car, died from her injuries and Mr. Axen himself was severely injured.

The driver of the lorry and two other persons, namely a garage owner and a filling-station assistant, who had undertaken to repair the trailer and tow it off the road, were convicted by the Lüneburg Regional Court (Landgericht) on 31 January 1951 of negligently causing death and personal injuries.

12. Mr. Axen brought actions for damages against the driver and the owner of the lorry before the Hamburg Regional Court and against the garage owner and the filling-station assistant before the Lüneburg Regional Court.

The first action concluded with two judgments of the Hanseatic Court of Appeal (Hanseatisches Oberlandesgericht) in Hamburg, one of 23 January 1968 awarding the applicant about DM 41,000 for loss of earnings and the other of 6 August 1973 awarding him DM 8,000 for non-pecuniary damage.

13. In the proceedings against the garage owner and the filling-station assistant, the Celle Court of Appeal (Oberlandesgericht) awarded Mr. Axen on 16 January 1969 compensation of DM 40,000 for non-pecuniary damage, subject to deduction of the DM 8,000 awarded by the Hamburg Court of Appeal. Mr. Axen appealed on points of law (Revision), but the

Federal Court of Justice (Bundesgerichtshof) dismissed the appeal on 29 September 1970.

14. As regards the claims for loss of earnings, the Celle Court of Appeal awarded the applicant on 27 February 1975 a lump-sum of about DM 39,000 together with an annuity, subject to deduction of the compensation already granted in Hamburg. The Court of Appeal was ruling on an appeal by the applicant against a judgment of 12 May 1972 of the Lüneburg Regional Court.

The hearings before these courts and the pronouncement of their decisions took place in public.

15. Mr. Axen filed with the Federal Court of Justice an appeal on points of law (Revision) against the Celle Court of Appeal's judgment. The appeal related to the quantum of his loss of earnings.

In his memorial of 18 May 1976, setting out the grounds of appeal (Revisionsbegründung), he complained of the Court of Appeal's failure to grant his request that an expert be heard on the subject of the reports made by other experts concerning his loss of earning capacity; according to him, the Court of Appeal should at least have called for a further expert opinion (Obergutachten). He also challenged the method used by the Court of Appeal for assessing the respective share of responsibility of the persons involved in the accident. A last ground of appeal concerned the question whether the Court of Appeal was entitled to take into account the social security benefits received by the applicant.

16. On 26 October, the 6th Chamber of the Federal Court refused to grant Mr. Axen legal aid, on the ground that the appeal offered no prospects of success.

17. On 8 December 1976, the applicant's lawyer asked the 6th Chamber to hold a hearing in the case. On 15 December, its President informed him that the Chamber was going to deliberate on the possibility of examining the appeal without oral argument. The President directed that the lawyer should have until 20 January 1977 to file any observations he might wish to make. The latter acknowledged receipt of this communication on 16 December 1976, but submitted no comments. However, on 7 January 1977 his client sent to him a letter protesting against the proposed procedure. A copy was sent to the Federal Court, but it could not be included with the papers in the case since it was not a document prepared by the applicant's lawyer, only the latter having the right of audience before that Court.

On 8 March 1977, the 6th Chamber of the Federal Court of Justice, without holding a hearing, unanimously rejected the appeal. Its judgment (Beschluss) was neither pronounced in open court nor published but was served on the applicant on 15 March 1977 pursuant to Article 329 of the Code of Civil Procedure (Zivilprozessordnung), which provides (translation): "decisions adopted by courts after a hearing must be

pronounced" and "decisions which are not pronounced shall be communicated to the parties in such manner as may be found appropriate".

The judgment read as follows (translation):

> "Having informed the parties and sought their views (gehört), the 6th Chamber of the Federal Court, at its session of 8 March 1977 ..., considered unanimously that it was not necessary to hold a hearing and decided ...:
>
> the appeal ... is dismissed. The appellant is to bear the costs of the proceedings ..."

18. The decision not to hold a hearing was based on section 1 of the Federal Court of Justice (Reduction of Work-Load in Civil Cases) Act of 15 August 1969 (Gesetz zur Entlastung des Bundesgerichtshofs in Zivilsachen). Originally this Act was due to expire on 15 September 1972 but its validity was extended until 15 September 1975 by an Act of 7 August 1972. The Act, as so extended, applied to proceedings in appeals on points of law concerning decisions delivered or notified between 15 September 1969 and 15 September 1975; it therefore covered the examination of the applicant's appeal, which was directed against a judgment of 27 February 1975 (sections 4 para. 2 and 6 of the 1969 Act; sections 1 and 3 of the 1972 Act; sections 3 para. 3 and 5 of the Appeals on Points of Law in Civil Cases (Modification of Procedure) Act of 8 July 1975 - Gesetz zur Äenderung des Rechts der Revision in Zivilsachen).

Section 1 para. 2 of the Act of 15 August 1969 provided as follows (translation):

> "A court determining an appeal on points of law (Revisionsgericht) may take its decision without holding a hearing if it unanimously considers that the appeal is ill-founded and that oral argument is not necessary. The parties shall be informed and asked for their views (gehört) beforehand. The judgment (Beschluss) shall record that the conditions for adopting this procedure are satisfied; no further reasons need be given."

19. On 4 April 1977, the applicant appealed to the Federal Constitutional Court against the Celle Court of Appeal's judgment of 27 February 1975 and the Federal Court of Justice's judgment of 8 March 1977; in a supplementary memorial of 16 April he complained of the above-mentioned legislation itself, relying, inter alia, on Article 6 (art. 6) of the Convention.

In a ruling given on 14 July 1977 by a panel of three judges, the Federal Constitutional Court decided not to hear the appeal. It considered that, in so far as the appeal concerned the legislation, it was inadmissible as being out of time and that, as regards the judicial decisions complained of, it did not offer sufficient prospects of success since there had been no violation of a right specifically guaranteed by the Basic Law and notably Article 3 thereof.

PROCEEDINGS BEFORE THE COMMISSION

20. In his application lodged with the Commission on 1 September 1977 (no. 8273/78), Mr. Axen complained of the fact that the Federal Court of Justice had not held a public hearing and alleged that the Federal Constitutional Court, when rejecting his appeal as being out of time, had misapplied the law. He relied on Articles 1, 6 para. 1, 17 and 18 (art. 1, art. 6-1, art. 17, art. 18) of the Convention.

On 19 July 1979, the Commission declared the application admissible as regards the proceedings before the Federal Court; it declared the second complaint inadmissible as being manifestly ill-founded. In its report of 14 December 1981 (Article 31 (art. 31) of the Convention), the Commission expressed the opinion by twelve votes to three that there had been no violation of Article 6 para. 1 (art. 6-1).

The report contains one dissenting opinion.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

21. At the close of the hearings on 21 March 1983, the Government invited the Court "to hold that there has been no violation of the applicant's rights under Article 6 (art. 6) of the Convention".

AS TO THE LAW

22. The applicant complained of the fact that the Federal Court of Justice had dismissed his appeal without previously holding a public hearing and had not pronounced its judgment of 8 March 1977 publicly (see paragraph 17 above). He alleged that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention, which reads:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] tribunal .... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Government contended, on the contrary, that this two-fold absence of publicity did not contravene the Convention. A majority of the

Commission was of the same opinion, whereas a minority of three of its members agreed with Mr. Axen.

23. It should be noted from the outset that solely the Revision proceedings leading to the judgment of 8 March 1977 (see paragraphs 15-17 above) are in issue. Before the Court, the applicant did not raise any complaint regarding the earlier procedure, the Lüneburg Regional Court and the Celle Court of Appeal having pronounced judgment publicly following hearings conducted in public (see paragraph 14 above).

I. PRELIMINARY OBSERVATIONS

24. In their oral pleadings, the Government contested the expediency of referring the present case to the Court. They drew attention to the fact that the Act of 15 August 1969, pursuant to which the Federal Court of Justice decided to forego hearings, had in the meantime ceased to be in force (see paragraph 18 above). Furthermore, so they argued, the applicant was in reality pursuing an unattainable goal, namely to obtain, through his application, increased compensation by means of the variation of a domestic judicial decision. The Commission, for its part, was said to be seeking to have the Court undertake an abstract review of the compatibility with the Convention of a rule of domestic law, whereas the Convention did not provide for review of this kind.

The Delegates of the Commission took formal exception to this criticism.

Although the Government, in arguing this point, have not raised a preliminary objection in the proper sense, the Court deems it necessary to answer their remarks.

The Court observes that it is not part of its function to evaluate the expediency of the decision to bring a case before it. In this domain the Commission exercises an autonomous power conferred on it by Article 48, paragraph (a) (art. 48-a), of the Convention; the same is true, moreover, of the Contracting States listed in paragraphs (b), (c) and (d) (art. 48-b, art. 48-c, art. 48-d).

Having said that, the Court would recall that in proceedings originating in an "individual" application (Article 25) (art. 25), it has to confine itself, as far as possible, to an examination of the concrete case before it (see, amongst many other authorities, the Minelli judgment of 25 March 1983, Series A no. 62, p. 17, para. 35). Accordingly, the sole task of the Court is to determine whether the manner in which the contested legislation was applied to Mr. Axen was consonant with Article 6 (art. 6) of the Convention. The mere fact that such a determination could have consequences for other cases that also concerned the operation of the above-mentioned Act does not mean that the determination would be the result of an abstract review of the Act’s compatibility with the Convention.

Again, it matters little that the Act of 15 August 1969 is no longer in force, since the applicant has not thereby regained the right claimed by him under Article 6 para. 1 (art. 6-1) (see notably, mutatis mutandis, the Silver and others judgment of 25 March 1983, Series A no. 61, pp. 31-32, para. 81). It likewise matters little that the correct interpretation of Article 6 para. 1 (art. 6-1) in the instant case is not one of his major sources of concern: the complaints he made in this regard nonetheless constitute the object of the proceedings (see, mutatis mutandis, the Corigliano judgment of 10 December 1982, Series A no. 57, p. 12, paras. 30-31).

25. The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1 (art. 6-1) namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, p. 18, para. 36, and also the Lawless judgment of 14 November 1960, Series A no. 1, p. 13).

26. Whilst the member States of the Council of Europe all subscribe to this principle of publicity, their legislative systems and judicial practice reveal some diversity as to its scope and manner of implementation, as regards both the holding of hearings and the "pronouncement" of judgments. The formal aspect of the matter is, however, of secondary importance as compared with the purpose underlying the publicity required by Article 6 para. 1 (art. 6-1). The prominent place held in a democratic society by the right to a fair trial impels the Court, for the purposes of the review which it has to undertake in this area, to examine the realities of the procedure in question (see notably, mutatis mutandis, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, para. 30).

27. The applicability of Article 6 (art. 6) to the present facts was not disputed and, moreover, is to be inferred from the established case-law of the Court (see notably the Delcourt judgment of 17 January 1970, Series A no. 11, pp. 13-15, paras. 25-26, and the Pakelli judgment of 25 April 1983, Series A no. 64, p. 14, para. 29).

The manner of application of this text depends, however, on the particular circumstances of the case (ibid.). The Court, concurring with the Government and the Commission, considers that account must be taken of the entirety of the proceedings conducted in the domestic legal order; what has to be determined is whether in the present instance their final phase had, like the earlier phases, to be accompanied by each of the guarantees laid down in Article 6 para. 1 (art. 6-1).

II. ABSENCE OF PUBLIC HEARINGS

28. As was permitted by section 1 para. 2 of the Act of 15 August 1969, the Federal Court of Justice decided to dispense with a hearing since it unanimously considered the appeal on points of law to be ill-founded and oral argument to be unnecessary; beforehand, it had duly sought the views of the parties (see paragraphs 17 and 18 above).

For the applicant and the minority of the Commission, the Federal Court's decision not to hold a hearing was contrary to the Convention; in the opinion of the Court, however, that decision can be seen to be justified by the special features of the proceedings viewed as a whole.

In the first place, the Lüneburg Regional Court and the Celle Court of Appeal had heard the case in public before giving their respective rulings (see paragraphs 14 and 23 above). As for the Federal Court of Justice, which determines solely issues of law, it could - short of holding hearings - only dismiss Mr. Axen's appeal on points of law and make final the judgment which the Celle Court of Appeal had delivered at the close of proceedings whose compatibility with the publicity requirements of Article 6 (art. 6) has not been contested; had the Federal Court been minded to reverse the appeal court judgment, section 1 para. 2 of the Act of 15 August 1969 would not have been applicable and oral argument would thus have been compulsory under German law.

The Court accordingly finds that the absence of public hearings before the Federal Court of Justice did not, in the particular circumstances, infringe Article 6 para. 1 (art. 6-1).

III. ABSENCE OF PUBLIC PRONOUNCEMENT

29. Despite its title in German ("Beschluss" and not "Urteil"), the decision delivered on 8 March 1977 by the 6th Chamber of the Federal Court of Justice constituted a "judgment" for the purposes of Article 6 para. 1 (art. 6-1). That decision could only dismiss the appeal on points of law and the reasons were limited to recording the conclusion to dispense with a hearing (see paragraphs 17 and 18 above); in accordance with Article 329 of the German Code of Civil Procedure, the decision was simply served on the parties but not pronounced in open court (see paragraph 17 above). For the applicant and the minority of the Commission, this state of affairs violated the Convention.

30. The terms used in the second sentence of Article 6 para. 1 (art. 6-1) - "judgment shall be pronounced publicly", "le jugement sera rendu publiquement" - might suggest that a reading out aloud of the judgment is required. Admittedly the French text employs the participle "rendu" (given), whereas the corresponding word in the English version is "pronounced" (prononcé), but this slight difference is not sufficient to dispel the

impression left by the language of the provision in question: in French, "rendu publiquement" - as opposed to "rendu public" (made public) - can very well be regarded as the equivalent of "prononcé publiquement".

At first sight, Article 6 para. 1 (art. 6-1) of the European Convention would thus appear to be stricter in this respect than Article 14 para. 1 of the 1966 International Covenant on Civil and Political Rights, which provides that the judgment "shall be made public", "sera public".

31. However, many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public. The authors of the Convention cannot have overlooked that fact, even if concern to take it into account is not so easily identifiable in their working documents as in the travaux préparatoires of the 1966 Covenant (see, for instance, document A/4299 of 3 December 1959, pp. 12, 15 and 19, paras. 38 (b), 53 and 63 (c) in fine).

The Court therefore does not feel bound to adopt a literal interpretation. It considers that in each case the form of publicity to be given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1 (art. 6-1).

32. In the present case, the Federal Court of Justice, which determines solely issues of law, rejected the applicant’s appeal by its decision of 8 March 1977. It did so in pursuance of section 1 para. 2 of the Act of 15 August 1969, which applied only to the dismissal of appeals on points of law; that section authorised the Federal Court to dispense with a hearing after recording, in the reasons for its decision, merely that the conditions set out therein were satisfied. Beforehand, the Federal Court had duly informed the parties and offered them the opportunity of submitting observations on the possible application of the Act. It thereby made final the Celle Court of Appeal’s judgment of 27 February 1975 which had been pronounced in open court.

In the particular circumstances, the absence of public pronouncement of the Federal Court of Justice’s judgment of 8 March 1977 thus did not contravene the Convention; the object pursued by Article 6 para. 1 (art. 6-1) in this context - namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial - was achieved during the course of the proceedings taken as a whole.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of Article 6 para. 1 (art. 6-1).

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this eighth day of December, one thousand nine hundred and eighty-three.

For the President

Marc-André EISSEN
Registrar

Léon LIESCH
Judge

The separate opinion of Mr. Ganshof van der Meersch is annexed to the present judgment, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

L.L.
M.-A.E

CONCURRING OPINION OF MR. GANSHOF VAN DER MEERSCH

(Translation)

I am of the opinion, like my distinguished colleagues, that there was no violation of the rights guaranteed by Article 6 para. 1 (art. 6-1) of the Convention in the concrete case of application of the German Federal Republic's Act of 15 August 1969 which was referred to the Court; however, I cannot agree with one of the reasons on which the Court has based its decision.

I regret that in paragraphs 28 and 32 of the judgment the Court refers, in order to justify the absence of violation, to the fact that the Federal Court of Justice "determines solely issues of law".

Apparently this is not just an obiter dictum, and this impression is reinforced by the fact that in paragraph 31 the Court also cites in support of its decision the example, to be found in several member States of the Council of Europe, of the procedure consisting of the deposit of the judgment in a registry accessible to the public, such procedure being utilised "especially [in] their courts of cassation".