



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

COURT (PLENARY)

CASE OF KÖNIG v. GERMANY

(Application no. 6232/73)

JUDGMENT

STRASBOURG

28 June 1978

In the König case,

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

Mr. G. BALLADORE PALLIERI, *President*,
Mr. G. WIARDA,
Mr. H. MOSLER,
Mr. M. ZEKIA,
Mr. P. O'DONOGHUE,
Mrs. H. PEDERSEN
Mr. THÓR VILHJÁLMSSON,
Mr. R. RYSSDAL,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. P.-H. TEITGEN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,

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

Having deliberated in private on 18 and 19 November 1977 and from 29 to 31 May 1978,

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

PROCEDURE

1. The König case was referred to the Court by the Government of the Federal Republic of Germany (hereinafter called "the Government") and by the European Commission of Human Rights (hereinafter called "the Commission"). The case originated in an application against the Federal Republic of Germany lodged with the Commission on 3 July 1973 under Article 25 (art. 25) of the Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter called "the Convention") by a German citizen, Dr. Eberhard König.

2. Both the Government's application, which referred to Article 48 (art. 48) of the Convention, and the Commission's request, which relied on Articles 44 and 48, paragraph (a) (art. 44, art. 48-a), and to which was attached the report provided for in Article 31 (art. 31) were lodged with the

registry of the Court within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47) - the former on 28 February 1977, the latter on 14 March 1977. The purpose of the application and the request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

3. On 23 March, the President of the Court drew by lot, in the presence of the Deputy Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Mr. H. Mosler, the elected judge of German nationality, and Mr. G. Balladore Pallieri, the President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. Zekia, Mrs. H. Pedersen, Mrs. D. Bindschedler-Robert, Mr. D. Evrigenis and Mr. G. Lagergren (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and the delegates of the Commission regarding the procedure to be followed. By an Order of 24 March the President decided that the Government should file a memorial within a time-limit expiring on 15 June 1977 and that the delegates of the Commission should be entitled to file a memorial in reply within two months of receipt of the Government's memorial.

5. At a meeting held in private on 23 April in Strasbourg, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, on the ground "that the case raise[d] serious questions affecting the interpretation of the Convention ...".

6. By an Order of 6 July, the President of the Court extended until 15 July the time allowed to the Government for the filing of their memorial. The said memorial was received at the registry on 18 July.

7. On 2 August and 5 September, the Government submitted certain other documents; the Government had given notice of the production of the majority of these documents in their memorial of 18 July.

8. On 20 September, the Secretary to the Commission advised the Registrar that the delegates had elected not to file a memorial in reply to the Government's memorial.

9. After consulting, through the Registrar, the Agent of the Government and the delegates of the Commission, the President directed by an Order of the same date that the oral hearings should open on 16 November.

10. At a meeting held in private on 29 September in Luxembourg, the Court decided that, if the Government so requested, their agents and counsel would be authorised to address the Court in German at the oral hearings, the

Government undertaking inter alia responsibility for the interpretation into French or English of their pleadings and statements (Rule 27 para. 2).

The Government in fact presented such a request on 4 October.

11. On 9 November, the Government communicated certain information to the Court and filed another document.

12. Immediately prior to the opening of the hearings, on 16 November, the Court held a preparatory meeting.

13. The oral hearings took place in public at the Human Rights Building, Strasbourg, on 16 and 17 November.

There appeared before the Court:

- for the Government:

Mrs. I. MAIER, Ministerialdirigentin

at the Federal Ministry of Justice,

Agent,

Mr. J. MEYER-LADEWIG, Ministerialrat

at the Federal Ministry of Justice,

Mr. H. STÖCKER, Regierungsdirektor

at the Federal Ministry of Justice,

Advisers;

- for the Commission:

Mr. J.E.S. FAWCETT,

Principal Delegate,

Mr. G. SPERDUTI,

Mr. A. FROWEIN,

Delegates,

Mr. R. BURGER, who had represented the applicant

before the Commission, assisting the delegates under

Rule 29 para. 1, second sentence (on 17 November only).

The Court heard addresses by Mrs. Maier for the Government and by Mr. Fawcett, Mr. Sperduti, Mr. Frowein and Mr. Burger for the Commission, as well as their replies to questions put by the Court.

14. Several documents that the Court had requested from those appearing at the hearings were supplied on 17 November 1977 by the Commission and on 16 January 1978 by the Government.

On 6 March and 8 May, the Government communicated certain supplementary information and some further documents to the Court.

AS TO THE FACTS

15. The applicant, a German national born in 1918, had taken up practice as an ear, nose and throat specialist in 1949. In 1960, he opened at Bad Homburg (Hessen) in the Federal Republic of Germany a clinic of which he was the owner; he was the only medical practitioner working at the clinic which he ran and managed himself and where he performed, in particular, plastic surgery.

16. On 16 October 1962, proceedings against Dr. König for unprofessional conduct were instituted by the Regional Medical Society (Landesärztekammer) before the Tribunal for the Medical Profession (Berufsgericht für Heilberufe) attached to the Frankfurt Administrative Court (Verwaltungsgericht) and he was declared unfit to practise on 9 July 1964. The Regional Tribunal for the Medical Profession (Landesberufsgericht für Heilberufe) attached to the Hessenadministrative Court of Appeal (Verwaltungsgerichtshof) rejected Dr. König's appeal on 14 October 1970.

The accusations against the applicant upheld by the Regional Tribunal including the following: having offered a beauty specialist 20 % of his fees and one of his patients DM 100 for each client they introduced to him; having persuaded a patient to have treatment not covered by social security by assurances that he would in that case be able to use more effective methods; having refused to make out for one of his clients an account corresponding to the fee actually paid; having, as an ear, nose and throat specialist, performed an operation not falling within the field in which he specialised; having had a beauty specialist assist him during operations; having widely-publicised his practice in the daily and weekly press; having used on his name-plates, notepaper and prescription forms wording contrary to the rules of the medical profession.

17. In 1967, the applicant had his authorisation to run his clinic withdrawn and then, in 1971, his authorisation to practise. Criminal proceedings were taken against him in 1972 for, inter alia, the illegal practice of medicine.

Actions brought by Dr. König to challenge both of these withdrawals have been in progress before the competent administrative courts since November 1967 and October 1971, respectively.

18. The applicant complains of the length of the proceedings taken by him against the withdrawals of the authorisations; he makes no complaint about either the disciplinary proceedings before the professional tribunals or the criminal proceedings.

1. The medical profession in the Federal Republic of Germany

19. In the Federal Republic of Germany, the medical profession is governed partly by Federal law and partly by the law of the Länder. The principal rules relevant for the present case are to be found, in particular, in the Federal Medical Practitioners' Act (Bundesärzteordnung - hereinafter referred to as "the Federal Act") in the version of 4 February 1970 as last amended on 2 March 1974 and 26 March 1975, the Regulations of 28 October 1970 on the grant of the authorisation to practise medicine (Approbationsordnung für Ärzte - hereinafter referred to as "the Regulations") and the Hessen Act on the Professional Bodies and Tribunals for Medical Practitioners, Dentists, Veterinary Surgeons and Pharmacists

(Gesetz über die Berufsvertretungen und über die Berufsgerichtbarkeit der Ärzte, Zahnärzte, Tierärzte und Apotheker - hereinafter referred to as "the Hessen Act") in the version of 18 April 1966.

20. According to paragraph 1 of Article 1 of the Federal Act, the medical practitioner shall have the care of the health of each individual and of the community as a whole. Under paragraph 2, he exercises a liberal profession and not a trade or business.

In order to be able to practise on a permanent basis, an authorisation issued by the appropriate services of the Länder is required. (Articles 2 para. 1 and 12 of the Federal Act and Article 35 of the Regulations). This authorisation is granted on request if the person concerned:

"1. is German ... or is a stateless alien ...,

2. has not been guilty of behaviour showing that he is unfit or unreliable to exercise the profession ...,

3. is not incapable of, or unsuited for, the exercise of the ... profession on account of an infirmity, of some weakness in his mental or physical faculties, or of an addiction (Sucht),

4. after studying medicine for a minimum of six years, including a minimum of eight months' and maximum of twelve months' practical training in a hospital, has passed the medical examination in a place where this Act is applicable.

..." (Article 3 para. 1 of the Federal Act).

If the application is granted, the person concerned receives a document (Approbationsurkunde) certifying that the statutory conditions are satisfied and adding:

"With effect from today's date, he (she) is granted authorisation to exercise the medical profession Such grant authorises the doctor to practise medicine" (Article 36 of the Regulations and Appendix 21 thereto).

If, on the other hand, the authorisation has to be refused for nonfulfilment of one of the conditions, the applicant or his representative must first be given a hearing (Article 3 para. 4 of the Federal Act.)

An authorisation that has been issued must be withdrawn if one of those conditions either was not satisfied at the time of the grant or ceases to be met afterwards (Article 5 of the Federal Act).

21. Anyone wishing to run a clinic must have an authorisation pursuant to the Trade and Business Act (Gewerbeordnung) and is entitled thereto if he fulfils the conditions stipulated by Article 30 para. 1 of the Act (see paragraph 27 below).

Since the management of a clinic is classified as a trade or business, the person running it does not have to be a doctor himself. However, he is required to take all necessary staffing and organisational measures to ensure

the treatment of patients in his institution. He must, therefore, employ one or more doctors responsible for the care of his clients.

The authorisation is withdrawn if it transpires either that the documents supporting the application were incorrect or that the requisite conditions were never, or have ceased to be, satisfied (Article 53 of the same Act; paragraph 27 below).

22. It is not disputed that, according to German law, the right to be authorised to practise medicine and the right to be authorised to run a private clinic are rights conferred on the individual by public law and protected by Article 12 of the Basic Law which guarantees freedom to exercise a profession. Again, exercise of the medical profession, unlike the running of a private clinic, is not considered in the Federal Republic to be a trade or business (see paragraph 20 above); although it also has the purpose of providing an income, its primary aim is disinterested, namely, rendering assistance to mankind.

Medical treatment is a matter for a private-law contract between doctor and patient. Such a contract serves to guarantee the free choice of a medical adviser, maintain a relationship of trust between him and his patient and uphold professional secrecy. However, the contract does not establish a well-defined set of rights and obligations since it imposes on the doctor a duty to provide basically unlimited services to anyone seeking treatment. Moreover, the rules on the medical profession forbid its members to advertise and even regulate in detail the size and content of their name-plates.

Again, medical practitioners cannot fix their fees at will but must comply with the Regulations even when not practising as national health doctors. Minimum and maximum fees for medical services are specified by Federal Government decrees, taking into account the legitimate interests of practitioners and of the persons or organisations having to pay them (Article 11 of the Federal Act).

Those affiliated to the social security health insurance funds – about 80 % of the population – are entitled to medical treatment according to the terms of the legislation and agreements in force. The majority of medical practitioners are approved national health doctors and obliged to treat members of the insurance funds. The Federal Constitutional Court (Bundesverfassungsgericht) has held that such practitioners are not administering a public service but fulfilling a public-law duty and, by their enrolment, are integrated within a system of public law. (Collected Decisions of the Constitutional Court, Vol. 11, pp 30 et seq.).

23. Medical practitioners carry out their duties under the control, inter alia, of their societies and of the professional tribunals, these institutions being governed by Länder Law.

24. Articles 1 and 2 para. 1 of the Hessen Act provide that regional medical societies are public-law associations to which all doctors practising

in the Land belong. Practitioners who fail to register with the competent society or to fulfil their other obligations under its statutes may be fined (Article 7 of the Hessen Act.)

Article 4 para. 1 of the Hessen Act gives the following definition of each society's functions:

- "1. supervision of the discharge of (its) members' professional duties ...,
2. promotion of the further training of society members,
3. promotion of harmonious relations among society members and settlement of any disputes, arising in the exercise of the profession, between members or between them and third persons, without prejudice to the jurisdiction of other authorities,
4. assisting the official health service in the performance of its functions, ..."

The authorities and the societies must assist each other in the fulfilment of their respective functions (Article 5 of the Hessen Act).

The societies are under State supervision which extends to observance of the laws and statutes. The competent Minister may quash any decision contravening these texts (Article 16 of the Hessen Act) and may at any time request information from the societies concerning their affairs (Article 17 para. 1).

25. If the council of the society suspects a practitioner of unprofessional conduct, it refers the matter to the Tribunal for the Medical Profession (Articles 18 and 29 para. 3 of the Hessen Act). Under Article 20 para. 1, the decision at first instance is given by that Tribunal which is attached to the Administrative Court for the locality and has three members, namely the President, or his representative, and two assessors belonging to the defendant's professional group (Article 21 para. 1).

An appeal against the Tribunal's decision may be made to the Regional Tribunal for the Medical Profession attached to the Hessen Administrative Court of Appeal (Articles 41 and 20 para. 2); the appellate tribunal is composed of five members, namely the President, or his representative, two other judges of the Administrative Court of Appeal and two assessors belonging to the defendant's professional group (Article 21 para. 2).

The professional tribunals may impose the following penalties, the second, third and fourth of which may be combined: warning, reprimand, temporary suspension of the right to vote in society proceedings, fine up to DM 10,000 and finding that the individual is unfit to exercise the profession (Article 19 paras. 1 and 3).

The authorisation to practise is not automatically revoked as the result of the last-mentioned finding. Although its ultimate purpose is the individual's exclusion from the profession, it binds neither the Regierungspräsident, who alone has power to withdraw the authorisation, nor any courts which may be called upon to examine the lawfulness of such a withdrawal.

26. Decisions by the Regierungspräsident withdrawing either an authorisation to practise or an authorisation to run a private clinic may be challenged before the administrative courts. However, before the person concerned can bring the matter before the courts, he must first have filed - unsuccessfully - an objection (Widerspruch) with the Regierungspräsident.

2. The withdrawal of the authorisation to run the clinic – proceedings before the 4th Chamber of the Frankfurt Administrative Court

27. On 12 April 1967, at the request of the Regional Medical Society, the Regierungspräsident in Wiesbaden withdrew the applicant's authorisation to run his clinic, claiming that he could not be relied on to conduct the institution properly and lacked the diligence and knowledge required for its technical and administrative management. The Regierungspräsident adverted to an inspection of the clinic which had revealed, in November 1965, numerous irregularities: out of thirty-four medical records, eighteen were not maintained correctly; the training of the staff was insufficient for the work entrusted to them; the equipment in the treatment room left something to be desired; the instruments, some of which were beginning to rust, were in part badly kept; the X-ray machinery lacked safety devices. Inspectors were said to have found in January 1967 that, amongst other things, the operating theatre and its equipment had not been cleaned. The Regierungspräsident relied also on evidence given by several people to the effect that, between 1962 and October 1966, the clinic had in fact been managed by a young employee who was aged eighteen in 1962 and was unqualified. She supervised the staff and took care of the patients and had allegedly confirmed that dog-food was kept in the refrigerator at the clinic and that the applicant allowed men to be present in the rooms outside visiting hours. According to her, Dr. König also made advances to her and one of her colleagues on several occasions.

The decision of the Regierungspräsident was based on the following provisions of the Trade and Business Act:

Article 30 para. 1

"A person running a private clinic, maternity home or mental hospital requires an authorisation from the higher administrative authority. The authorisation may be refused only:

(a) if the facts show that the said person cannot be relied on properly to conduct and manage the institution;

..."

Article 53 para. 2

"The licences ... mentioned in [Article] 30 ... may be withdrawn ... only:

1. ...

2. if it subsequently appears that the person running the institution does not possess the qualifications required for the grant of the licence ... or that the premises or technical equipment of the institution no longer satisfy the requirements for the grant of the authorisation.

..."

28. On 13 July 1967, the applicant filed an objection which was rejected by the Regierungspräsident on 6 October. Dr. König then appealed, on 9 November, to the Frankfurt Administrative Court, the case being assigned on the following day of its 4th Chamber which is competent to hear disputes relating to the law on trade and business activities.

These appeals had the effect of suspending enforcement of the decision complained of.

29. As early as 10 November, the court asked the Regierungspräsident for his observations; it received them on 8 February 1968, after extending the time granted and sending a reminder.

The Regierungspräsident was requested on 27 March to supply further information and he submitted a written pleading on 30 May. He indicated therein that the applicant was to undergo a psychiatric examination whose results would be forwarded to the court later. The court asked the Regierungspräsident about this on 10 June, 25 July and 9 August; he supplemented his earlier observations but told the court on 10 January 1969 that the applicant had not agreed to be so examined.

On 16 January, the court asked the Regierungspräsident to clarify a point in his pleading; this clarification was received by the court on 2 April.

30. In the meantime and until January 1969, the court had tried to obtain from, notably, the Regierungspräsident (10 June 1968) and the competent local authorities (10 October), the addresses of several persons who might be called as witnesses.

The court also endeavoured, as from 8 January 1969, to procure files on the applicant, including those of the professional tribunals (see paragraph 16 above).

On 26 August 1969, the court decided to hear sixteen witnesses at sittings fixed for 25 and 26 November. For this purpose, it tried, for example on 11 and 18 September, to obtain the addresses of witnesses and requested the production of other files concerning Dr. König.

On 27 November, the court fixed 2 December as the date for the oral hearing (*mündliche Verhandlung*) and for the continuation of the taking of evidence from the witnesses, including a certain Mr. Xymenes who had made serious accusations against Dr. König before the Regional Medical Society.

The court sat on 2, 8 and 12 December. It imposed fines (Ordnungsstrafen) of DM 100 and DM 500 on Mr. Xymenes for failing to appear.

On 3 February 1970, the court decided not to hear the appeals (Beschwerden) made by Mr. Xymenes against these penalties on 30 December 1969 and 2 January 1970 and to transmit the file to the Hessen Administrative Court of Appeal. On 17 February, the latter court invited those concerned to present their observations and it set aside the two fines on 9 and 10 March.

31. On 17 April 1970, the file was returned to the Administrative Court which, on 14 May, informed the parties of the state of the proceedings. It asked them to indicate as soon as possible what evidence they proposed to put forward, pointing out that several persons had offered to make statements on the medical treatment given to them by the applicant. The court also stated that, as far as it was concerned, the hearings could be resumed at the end of June or the beginning of July since the lay judges would be available then.

On 29 May, Dr. König indicated that he would abstain from nominating further witnesses if the Regierungspräsident did likewise. However, on 8 June, the latter named a certain number of additional witnesses and, on 6 July, he filed with the court a pleading dealing with the evidence taken so far.

This pleading was sent by the court on 13 July to the applicant for his comments; on 24 September, he requested in writing that seventy-six witnesses be heard should the court decide to hear those mentioned by the Regierungspräsident.

There followed a further exchange of pleadings.

32. On 25 February 1971, the Regierungspräsident informed the court that Mr. Xymenes was detained in prison at Constance and could accordingly be served with a summons to appear.

After advising the applicant, the court wrote on 14 April to the competent authorities in Constance to enquire whether Mr. Xymenes was being held in the prison and, if so, for how long. The prison replied on 27 April that the witness had been released.

33. On 29 April 1971, the judge acting as rapporteur directed that the file be sent back to the President of the Chamber to enable him to fix the date of the hearing, but this instruction was not carried out, probably due to a mistake on the part of the registry.

On 24 May, Mr. Schmidt-Leichner of Frankfurt announced that he was no longer acting as Dr. König's lawyer.

34. The applicant, who on 26 August 1971 had asked the court to fix the date for the hearing without delay, was told on 2 September that the file would be submitted to the President of the Chamber immediately he

returned from holiday. An order of the court set 5 September as the date for such submission.

On 20 October, Messrs. Bossi, Breme and Ufer of Munich told the court that they were now acting for Dr. König.

Following receipt of a letter from the Frankfurt Regional Employment Tribunal (Landesarbeitsgericht), the file was returned to the judge acting as rapporteur on 21 October.

35. On 29 November 1971 and 12 January 1972, the court attempted yet again, but without success, to contact Mr. Xymenes to discover whether he would be able to give evidence in January/February or in February/March 1972.

On 21 February, the court fixed 28 March as the date for a hearing to which it summoned Mr. Xymenes. He did not appear and on 29 March was fined DM 500 by the court which also ordered him to attend a further hearing due to be held on 31 May.

Relying on a medical certificate, Mr. Xymenes on 8 April lodged an objection against this penalty but the court dismissed the objection and sent the file to the Hessen Administrative Court of Appeal. On 26 April, the latter court asked the witness's doctor to supply further details about the said certificate: it received them on 2 May and set the fine aside on 18 May.

The file was returned on 29 May to the Administrative Court which on the same day cancelled the hearing fixed for 31 May, on the ground that the presence of Mr. Xymenes could not be secured.

Pursuant to an order of 7 June 1972, there was a further hearing on 11 July. Once again, Mr. Xymenes did not appear.

On 13 July, the Court fined him DM 500. On 10 August, it directed that the taking of evidence would continue on 19 September. On 22 August, it issued a subpoena against Mr. Xymenes who gave evidence on 19 September.

36. At the conclusion of this last sitting, the court granted the parties the faculty of submitting, by 15 October, their written observations on the result of the examination of witnesses. Dr. König took advantage of this on 13 October.

On 14 November, other lawyers informed the court that they had been instructed by the applicant and requested it to await their written pleading. This document, which arrived on 12 February 1973, commented on the evidence already obtained, repeated the earlier applications for evidence to be taken and made new applications therefore. On the same day, Mr. Demme announced that he was Dr. König's new lawyer. The court transmitted the pleading to the Regierungspräsident on 22 February.

In the meantime, on 30 January, the court had requested Dr. König to produce his records on two of his former patients. Having received only photocopies of the documents in question, the court renewed its request on 22 February and tried to trace a further witness.

37. On 30 March 1973, the court supplemented its order of 26 August 1969 (see paragraph 30 above) and fixed 17 April as the date for the continuation of the taking of evidence and for the oral hearing. At the close of its sitting on 17 April, it indicated that it would give a decision on 8 May.

However, after trying to obtain witnesses' addresses and taking cognisance, on 18 April, of another written pleading from the applicant, the court on 2 May adjourned sine die the date for delivery of its decision; at the same time and also subsequently, it requested Dr. König to supply further information, which was received on 14 May and 9 July. Between these dates, the court also had researches made for the addresses of several witnesses.

The parties supplemented their pleadings on 26 and 30 July 1973.

38. On 16 August 1973, the court decided that there should be a second additional enquiry and, in particular, the hearing of five new witnesses. On the next day, it sent the file to the Bad Kissingen District Court (Amtsgericht) for it to hear one of those witnesses; on 20 August, it directed that the three others should be heard on 21 September but, on 22 August, postponed this to 5 October at Dr. König's request. When the file came back from Bad Kissingen, the court on 19 September asked the Altena District Court to hear another witness.

39. Previously, on 22 August, the applicant had filed with the Hessen Minister of Justice a disciplinary complaint (Dienstaufsichtsbeschwerde) in which he also declared that he challenged "the Frankfurt Administrative Court". For this reason, on 3 October, the court cancelled the hearing due to take place two days later.

On 4 October, the 3rd Chamber of the Administrative Court, which appeared to have jurisdiction in the matter, asked Dr. König to specify which of the judges he was challenging, pointing out that it was not possible to challenge all the members of a Chamber.

The applicant replied on 19 October that his claim was limited to the judge of the 4th Chamber acting as rapporteur and that he objected to certain wording used by the latter in the letters rogatory sent on 19 September to the Altena District Court.

On the same day, Mr. Schilling, acting on behalf of Dr. König, complained about the length of the proceedings to the Federal Constitutional Court. The Administrative Court was invited on 31 October to present its observations and it did so on 9 November, transmitting the file to the Constitutional Court on 15 November. The latter, by a decision of 28 November, refused to hear the complaint on the ground that it did not offer sufficient prospects of success.

Following the return of the file on 10 December, the Administrative Court on 8 January 1974 upheld the challenge against the judge acting as rapporteur.

40. The file was then transmitted by the Administrative Court to the Hessen Minister of Justice to enable him to give a decision on the disciplinary complaint; he received the file on 14 January 1974 and returned it on 8 March. On 22 March, the court sent the file to the Hagen public prosecutor's department (Staatsanwaltschaft) as requested by it and by the President of the Regional Court (Landgericht) of the same town, who needed it in order to examine another disciplinary complaint by Dr. König.

41. On 26 April 1974, the applicant asked the Administrative Court not to hear a witness who it was contemplated should be summoned. This request was repeated on 28 May but rejected on 6 June by the court which decided to hold a hearing on 30 July.

Only some of the witnesses appeared on that day. One was heard at home on 14 August and another gave evidence in writing.

On 14 August, the file was sent to the Hessen Minister of Justice for the purposes of the proceedings instituted by Dr. König on 3 July 1973 before the Commission. On this occasion, the President of the 4th Chamber made known his observations on the outcome of the court's enquiry; he was of the opinion that the partly contradictory statements of the witnesses did not allow a firm conclusion to be drawn on the applicant's activities as manager of the clinic; accordingly, the question arose whether his conduct as a medical practitioner also had to be taken into account; however, it was not for the 4th Chamber to rule on the complaints against Dr. König in this last-mentioned capacity since they were the object of proceedings pending before the 2nd Chamber.

42. On 25 August, the applicant submitted observations on the statements made by one witness and applied for seven further witnesses to be heard. A copy of this pleading, which the court had requested from him on 28 August, was sent on 5 September to the Regierungspräsident who replied on 7 October.

The Hessen Minister of Justice returned the file to the Administrative Court on 28 October.

43. The court had previously been advised that in July the applicant had entrusted his case to another lawyer, Mr. Unruh. The latter returned the brief on 26 November and his successor Mr. Heldmann, who had given notice on 18 October 1974 that he was acting for Dr. König, did likewise on 21 February 1975.

44. On 10 February 1975, the President of the 4th Chamber had a meeting with the applicant who stated that he had let the clinic premises for use as an old people's home and would re-open the clinic - in association with a surgeon - only after being authorised to practise again. Furthermore, he agreed that priority be given to the proceedings, pending before the 2nd Chamber, concerning the exercise by him of his profession.

45. The file was sent on 5 May to the Hessen Minister of Justice for the purpose of the Commission proceedings. It was returned to the court on 26

June and then communicated on 4 July to Dr. König's new lawyer, Mr. Cartus of Karlsruhe, who on 16 April had indicated that he had been instructed. The Court had allowed him two weeks to consult the file and, on 11 July, extended this period to 8 August.

However, on 18 July, Dr. König informed the court that he had withdrawn Mr. Cartus' instructions and requested that he be asked to return the file which Dr. König wished to study himself. The court communicated on 21 July with the lawyer who returned the file on 29 July.

On 1, 4 and 11 August, the applicant and his new lawyer, Mr. Mattern, who acted for him from 22 July to 14 August, requested the court to send them certain documents, including verbatim records of evidence, two of which were despatched to them on 18 August.

From 11 to 23 September, the file was with Mr. Unruh who, since 11 September, had once again been entrusted with Dr. König's case.

46. On 6 November 1975, there was added to the file a second challenge lodged by the applicant with the Hessen Minister of Justice on 10 October (see also paragraph 67 below).

On 2 December, the President of the Chamber wrote to Dr. König to enquire whether his intention was to challenge the members of the Chamber on the ground of bias and, if so, which members.

As regards the duration of the proceedings, the President remarked:

"I wish to point out that we have repeatedly talked about the expediency of continuing the proceedings concerning the authorisation to run a clinic and pending before the 4th Chamber. On those occasions you agreed with me that it was necessary first of all to await the conclusion of the proceedings relative to the authorisation to practise medicine because they had to be regarded as having priority. You also mentioned that you would not re-open your clinic before that date although in law you would be entitled to do so. Should you have changed your mind, please let me know."

Dr. König's lawyer replied on 8 December that the claim related primarily to the President of the 2nd Chamber and the manner in which the last hearing before that Chamber had been conducted. He requested the court not to decide, for the time being, whether his client was challenging the 4th Chamber.

On the subject of the duration of the proceedings, the lawyer declared:

"The question of the conclusion of the proceedings concerning the authorisation to practise medicine has at present priority because in those proceedings immediate enforcement of the administrative decision has been ordered. It is known that there is no order for immediate enforcement of the decision to withdraw the authorisation to run the clinic; consequently, as regards the last two sentences in your letter of 2 December 1975, there is at present no need for the 4th Chamber of the Frankfurt-on-Main Administrative Court to give an early decision."

The applicant withdrew Mr. Unruh's instructions on 25 April 1976.

47. The proceedings before the 4th Chamber accordingly remained suspended and were resumed only after the 2nd Chamber had delivered judgment on 9 June 1976.

Hearings, which originally had been arranged for 17 May 1977 and were then postponed at the applicant's request, took place in June.

On 22 June 1977, the 4th Chamber dismissed the applicant's appeal against the withdrawal of the authorisation to run his clinic. Its judgment was based on the evidence taken during the hearing of seventeen witnesses between November 1969 and August 1974.

Dr. König appealed to the Hessen Administrative Court of Appeal where the case is still pending before the Chamber (Senat) which, on 2 May 1978, ruled on his appeal against the judgment of the 2nd Chamber of the Administrative Court (see paragraph 69 below).

Another lawyer, Mr. Hofferbert of Frankfurt, is representing the applicant before the Administrative Court of Appeal.

48. According to statistics supplied by the Government, purely by way of indication, concerning the action before the 4th Chamber, 1,149 days of the proceedings are attributable to measures taken by the court, 1,725 to measures taken by the applicant and his lawyers and 555 to measures taken by third parties, including the defendant administrative authorities, the professional bodies and the witnesses.

3. The withdrawal of the authorisation to practise medicine - proceedings before the 2nd Chamber of the Frankfurt Administrative Court

49. On 12 May 1971, the Regierungspräsident in Darmstadt withdrew the applicant's authorisation to practise medicine and directed that this decision should have immediate effect (Article 80 para. 2, sub-paragraph no. 4, of the Code of Administrative Procedure - Verwaltungsgerichtsordnung). On the basis of the findings made by the professional tribunals in 1964 and 1970 (see paragraph 16 above), the Regierungspräsident considered that Dr. König had behaved in a manner which disclosed his professional unfitness and his failure to meet medical ethical standards. The Regierungspräsident was acting in pursuance of the following provisions of the Federal Act:

Article 5 para. 2

"The authorisation to practise medicine shall be withdrawn if one of the requirements of Article 3 para. 1, first sentence, sub-paragraph no. 2, ceases to be satisfied."

Article 3 para. 1

"The authorisation to practise medicine shall be granted on request provided the applicant:

1. ...

2. has not been guilty of behaviour showing that he is unfit or unreliable to exercise the profession ..."

50. On 1 June 1971, at the request of the applicant and in order to allow him to refer his patients to other practitioners, the Frankfurt Administrative Court restored the suspensive effect of the objection against the decision of the Regierungspräsident, but only until 30 June. The appeal lodged by Dr. König against this ruling was dismissed by the Hessen Administrative Court of Appeal on 6 July.

51. After the Regierungspräsident had rejected on 17 September 1971 the objection filed by the applicant on 18 May against the withdrawal decision, the latter appealed to the Darmstadt Administrative Court on 20 October 1971. For reasons of jurisdiction, this court on 25 October referred the case to the Frankfurt Administrative Court where it was assigned to the 2nd Chamber which is responsible, inter alia, for questions relating to the law on the medical profession.

52. On 2 November 1971, the Frankfurt Administrative Court notified the Regierungspräsident of the appeal, requesting his comments and production of the files kept by his services.

The written pleading of the Regierungspräsident was filed on 24 January 1972 and communicated to the applicant's lawyer two days later. After being asked by the court on 24 April whether he intended to submit a reply, the lawyer made an application for the time-limit to be extended until the end of May.

The reply in question was filed on 26 June and sent to the Regierungspräsident for comment. Following the receipt on 11 July of a voluminous supplementary pleading from the applicant's lawyer, the Regierungspräsident on 27 July sought an extension until mid-October of the time-limit expiring on 30 July; on 11 August, the court gave leave for the expiry date to be deferred, but only until 15 September.

53. On 5 September 1972, the court ordered that the Regional Medical Society be joined (*Beiladung*) to the proceedings. On 14 September 1972, after requesting the parties and the Regional Medical Society to furnish certain explanations and after calling for the production of certain criminal files, the court proposed a friendly settlement of the case. The suggestion was that Dr. König would cease to practise as a self-employed physician and to run his clinic, whilst the Regierungspräsident would restore his authorisation to exercise his profession subject to certain conditions. The applicant rejected this proposal on 12 October. The court advised the Regierungspräsident of this four days later, reminding him at the same time about the submission of his comments.

54. Those comments were received by the court on 16 January 1973; a written pleading from the Regional Medical Society was filed on 16 February.

Dr. König had changed lawyers on 12 February (see paragraph 36 above). His new adviser, Mr. Demme, inspected the court's file, returning it on 14 March; on 2 May, he also returned the files of the administrative authorities which the court had at his request sent to him on 20 March. On 7 May, he submitted a written pleading which the court communicated for comment to the Regierungspräsident and the Regional Medical Society.

55. On 5 May and 6 August 1973, the court asked the Frankfurt District Court and public prosecutor's department for information as to the state of criminal proceedings instituted against the applicant on 27 July 1972 (see paragraph 71 below).

On 9 August, the public prosecutor's department advised the court that, following a hearing held in the meantime, those proceedings had been stayed because further witnesses and experts were to be summoned.

56. On 14 September 1973, the President of the Administrative Court of Appeal sent a copy of the disciplinary complaint of 22 August to the 2nd Chamber which Dr. König had mentioned when challenging "the Frankfurt Administrative Court" (see paragraph 39 above).

The file was passed to the 3rd Chamber for it to rule on the challenge. Together with the file were communicated declarations made by the members of the 2nd Chamber; in particular, the judge acting as rapporteur indicated that the 2nd Chamber wished to await the result of the criminal proceedings in view of their importance for the question at issue before it.

On 8 October, the 3rd Chamber rejected the challenge on the ground that the applicant had failed to show *prima facie* the existence of justificatory reasons. As soon as this decision had become final, the file was returned, on 26 October, to the 2nd Chamber.

57. The court had decided on 25 September 1973 to suspend its proceedings to await the outcome of the criminal proceedings instituted against the applicant (see paragraph 71 below) as it considered that the latter proceedings were of importance for the action pending before it (Article 94 of the Code of Administrative Procedure).

58. On 19 October 1973, Dr. König had complained to the Constitutional Court of the length of the proceedings pending before the 2nd and 4th Chambers (see paragraph 39 above). Having been requested by the Constitutional Court on 31 October to submit his observations, the President of the 2nd Chamber replied on 6 November that the Chamber proposed to defer its judgment until the close of the criminal proceedings.

The Constitutional Court decided on 28 November not to allow the appeal. It observed, *inter alia*, that, in refusing to fix a date for the hearing as long as it did not know the result of the criminal proceedings, the 2nd Chamber had - up to that time - properly exercised its discretion in the matter. The nine volumes of the case file had been forwarded to the Constitutional Court on 19 November; they were sent back to the Administrative Court on 10 December.

59. On 16 February 1974, the Frankfurt District Court informed the 2nd Chamber that, in the criminal proceedings, detailed expert opinions still had to be obtained and that the trial would not take place before the second half of the year.

On 26 March, the 2nd Chamber asked the District Court to confirm that the applicant remained charged, *inter alia*, with having continued to practise notwithstanding the withdrawal of the necessary authorisation.

60. On a further application by Dr. König, the Constitutional Court on 11 April 1974 asked the 2nd Chamber for a supplementary report on the state of the proceedings and, in view of their duration, for an indication whether he could not be granted some concessions as regards the immediate enforcement of the withdrawal.

The President of the 2nd Chamber replied on the same day. She emphasised that any modification of the decision not to stay such immediate enforcement would endanger the health of the applicant's patients if the accusations against him proved to be founded. The Chamber did not consider that it could take this risk. Furthermore, judicial experience in no way bore out the opinion that the accusation that Dr. König had continued to perform operations could be verified more swiftly by the Chamber than by the District Court, but with the same degree of reliability.

On 30 May, the Constitutional Court decided not to hear the complaint on the ground that it did not offer sufficient prospects of success. The Administrative Court received a copy of this decision on 6 June.

61. Previously, on 25 April 1974, the latter court had informed the applicant that it maintained its decision to await the outcome of the criminal proceedings.

On 8 May, the District Court had confirmed to the 2nd Chamber (see paragraph 59 above) that Dr. König remained charged with having continued to practise after the withdrawal of his authorisation; it had added that a decision within the next six months was hardly likely since the applicant had challenged one of the judges and extensive appellate proceedings were in progress.

62. On 11 July 1974, Dr. König, pleading the length of the proceedings, requested the Administrative Court to restore the suspensive effect of his appeal against the withdrawal decision.

However, the file was sent to the Hessen Minister of Justice who had asked for it on 29 July for the purposes of the Commission proceedings; it was returned to the court on 24 October after the Government's observations on admissibility had been filed in Strasbourg.

Between 11 July and 24 October, the applicant had changed his advisers twice (see paragraph 43 above); until 16 December the file was retained for consultation by Mr. Heldmann, the second of the lawyers so appointed.

63. On 3 January 1975, the 2nd Chamber rejected the request of 11 July 1974. Dr. König, who had withdrawn instructions from his lawyer (see

paragraph 43 above), at once appealed in person to the Hessen Administrative Court of Appeal but it dismissed the application on 4 November. The court, relying on the statements made by witnesses during the proceedings before the 2nd Chamber, took the view that, if the applicant were authorised to practise, he might endanger any clients who consulted him. Dr. König had previously attacked the decision of the 2nd Chamber before the Federal Constitutional Court which, on account of non-exhaustion of remedies, had declined to hear his application.

64. After the return of the file to the Administrative Court on 26 June 1975, the President of the 2nd Chamber and the judge acting as rapporteur agreed on 30 June, in order to expedite matters, not to wait any longer for the result of the criminal proceedings or of the action before the Administrative Court of Appeal. They contemplated holding hearings on 3 September.

The judge acting as rapporteur made, also on 30 June, enquiries of the District Court about the state of those criminal proceedings.

On 10 July 1975, the Constitutional Court decided not to hear a further complaint filed on Dr. König's behalf by Mr. von Stackelberg and objecting, *inter alia*, to the dilatory nature of the proceedings. It considered, amongst other things, that the special features of the case, from both a factual and a legal point of view, and the applicant's unfitness to practise, which had been conclusively found by the Regional Tribunal for the Medical Profession, justified the 2nd Chamber's awaiting the decision in the criminal proceedings and maintaining the immediate effect of the withdrawal of the authorisation. The court added that, furthermore, nothing prevented Dr. König from seeking, principally on the ground of the length of the proceedings, restoration of the suspensive effect of the appeal against the said withdrawal.

65. On 14 July 1975, the 2nd Chamber decided that on 2 and 3 September there would be a sitting devoted to the hearing of evidence and of argument. The parties were informed of this decision two days later.

On 28 and 31 July, the Chamber had researches made for the addresses of some witnesses. On 14 August, it was advised that Mr Mattern, the lawyer instructed by Dr. König on 22 July (see paragraph 45 above), was no longer acting for him. Six days later, the applicant filed a pleading, the Regierungspräsident having submitted one on 14 August.

66. The hearing did take place on 2 and 3 September 1975. After hearing six witnesses, the court directed that there should be a further sitting on 12 November, but it cancelled this on 14 October as the file was with the Hessen Administrative Court of Appeal which had to rule on the appeal of 3 January (see paragraph 63 above).

67. Dr. König, in a letter of 10 October received on 13 October by the Hessen Ministry of Justice, had sought the transfer to another court of the

actions pending before the 2nd and 4th Chambers whose judges, he alleged, could "no longer be described as impartial".

The letter was sent on 16 October by the Minister to the Frankfurt Administrative Court and was put before the 2nd and 4th Chambers on 6 November (see also paragraph 46 above).

On 13 November, the President of the 2nd Chamber wrote to the applicant to enquire whether a formal challenge was being made; the lawyer, Mr. Unruh, who from 11 September 1975 to 25 April 1976 once again acted for Dr. König (see paragraphs 45 and 46 above), replied on 6 December that his client was challenging the President herself. He also asked to be allowed to consult the file; this was held at his disposal at the registry until 13 January 1976 but he did not go to collect it there.

On the last-mentioned date, the file was sent to the Hessen Ministry of Justice for the purposes of the proceedings pending before the Commission. It came back on 17 February to the court which, on 5 March, rejected the challenge.

68. On 15 April 1976, the 2nd Chamber decided that it would hear further witnesses on 12 May.

On 28 April, it refused an adjournment requested on 24 April by Dr. König's lawyer and emphasised that his client had insisted on the urgency of a decision.

Having been told by the applicant on the following day that there would be hearings in the criminal case on 12 May, the Chamber agreed on 6 May to postpone its own sitting until 9 June.

On 1 June, the applicant sought a further adjournment, maintaining that on 9 June he had to prepare for the hearings which were to resume in the criminal court on the next day. The 2nd Chamber, having found that he had had sufficient time for preparation, refused the request on 9 June.

69. On 9 June 1976, after hearing witnesses, the court dismissed Dr. König's appeal against the withdrawal of his authorisation to practise medicine. Its judgment was based on the statements of eight persons heard by it in 1975, most of whom had already given evidence about the same facts before the 4th Chamber, and was communicated on 3 August to the applicant, whose lawyer lodged an appeal on 11 August.

On 13 August, the court sent the file to the Hessen Administrative Court of Appeal which, by judgment of 2 May 1978, dismissed the appeal; this judgment has not yet become final.

70. According to statistics supplied by the Government, purely by way of indication, concerning the action before the 2nd Chamber, 569 days of the proceedings are attributable to measures taken by the court, 841 to measures taken by the applicant and his lawyers and 311 to measures taken by third parties, including the defendant administrative authorities, the professional bodies and the witnesses.

4. The criminal proceedings against the applicant

71. The criminal proceedings against the applicant are not in issue but should be mentioned because of their effect on the action before the 2nd Chamber of the Frankfurt Administrative Court which had postponed its decision pending their outcome (see paragraphs 55-61 and 64 above).

The criminal proceedings originated in a complaint against Dr. König relative to the illegal practice of medicine, causing bodily harm and committing fraud, which the Regierungspräsident in Darmstadt had lodged on 27 July 1972 with the Frankfurt public prosecutor's department.

72. The applicant, who on 10 August 1972 had refused to be questioned by the police, was charged on 11 September before the Frankfurt District Court, sitting as a lay magistrates' court (Schöffengericht). The indictment (Anklageschrift) alleged that, between September 1971 and the beginning of June 1972, he had continued to practise despite the withdrawal of the requisite authorisation (continuing breach of the Federal Medical Practitioners' Act), that he had thereby perpetrated frauds (Article 263 of the Penal Code) and that he had caused, in one case, serious bodily harm (Articles 223 and 223 (a) of the Penal Code).

73. At the close of its sitting on 17 April 1973, the court ordered numerous enquiries. A psychiatrist and a psychologist gave their opinion on one of the alleged victims; he was the only alleged victim called by the public prosecutor's department as a witness and had intervened (Nebenkläger) in the proceedings on 13 November 1972 in order to claim damages.

74. On 14 February 1974, the court decided that, if by 20 April Dr. König had not himself submitted an expert opinion on the state of his mental health, he should be examined by a psychiatrist.

On 1 March, the applicant lodged an objection against this decision and that of 17 April 1973. On 14 March, he stated that he was challenging the President of the lay magistrates' court; after a judge had refused this plea on 6 May, both he and the President were challenged by Dr. König on 15 May.

On 26 May, the District Court dismissed the objection and the challenge and directed that the private expert opinion be submitted not later than 1 August.

75. Two days later, Dr. König repeated his objection of 1 March and at the same time lodged a disciplinary complaint against the President of the lay magistrates' court. The Frankfurt Regional Court dismissed the objection on 10 June 1974; the documents do not disclose the result of the disciplinary complaint.

76. On 29 June, Dr. König challenged the expert nominated by the court and proposed two others. He supplemented this application on 3 July and appealed to the Federal Constitutional Court against the decisions of 14 February and 26 May. On the next day, he requested the District Court to suspend enforcement of the first decision until the Constitutional Court had

given its ruling. On 16 July, the District Court declined to do so and, nine days later, it received a copy of the Constitutional Court's decision rejecting the appeal of 3 July.

On 7 August, the court dismissed an application by Dr. König for a further psychiatric examination of the party claiming damages.

77. On 15 August 1974, the District Court, considering that the potential penalty exceeded that which it had competence to impose, relinquished jurisdiction in favour of the Frankfurt Regional Court.

Under the then Article 24 para. 2 of the Constitution of the Courts Act (Gerichtsverfassungsgesetz), a District Court could "impose neither a penalty of imprisonment for more than three years nor detention for reasons of security (Sicherungsverwahrung)".

78. On 10 October, the 18th Criminal Chamber (Strafkammer) of the Regional Court, to which the case had been assigned, directed that the trial (Hauptverhandlung) should take place on 4, 6 and 11 December. On 25 October, it joined to the pending proceedings a further charge, preferred by the public prosecutor's department on 7 August, alleging that Dr. König had practised on 17 July 1972 in Bad Homburg despite the withdrawal of the requisite authorisation and had caused his patient bodily harm. As the applicant had not appeared, the court on 4 December issued a warrant for his arrest and adjourned the trial sine die.

79. On 1 January 1975, the case was assigned to the 1st Chamber which, however, was composed of the same judges as the 18th Chamber in 1974.

On 2 January, the 1st Chamber ordered that several witnesses be examined on letters rogatory. Witnesses were heard in February and March by the Koblenz, Ahrensburg and Düsseldorf District Courts.

On 24 March, the Chamber revoked the warrant issued on 4 December.

On 15 May, the Vice-President of the Chamber directed that the trial should take place in mid-January 1976; at the same time he ordered that a witness be interrogated again by the Ahrensburg District Court.

80. On 20 June 1975, the Presidential Council of the Regional Court relieved the 1st Chamber of all matters it had to decide as a court of first instance, with effect from 23 June. The proceedings pending against Dr. König were transferred to the 13th Chamber.

The President of the latter Chamber received the case file on 10 July. On 8 August, he postponed the trial until 3, 5, 10 and 12 February 1976; these dates he cancelled on 13 October 1975 for the reason that the Chamber was obliged to deal with another substantial case.

81. On 1 January 1976, all first-instance cases beginning with the letter "K", including the applicant's, were passed to the 25th Chamber of the Regional Court in accordance with the 1976 arrangements for the allocation of cases.

The trial opened before the 25th Chamber on 5 May. On 24 September, after twenty-three days of sittings, the Chamber ordered the discontinuance

of the proceedings (Einstellung des Verfahrens) under Article 153 (a) of the Code of Criminal Procedure.

The Chamber's decision reveals that Dr. König's fault was regarded as very slight. As he had undertaken to pay DM 8,000 to the party claiming damages and DM 20,000 to the Treasury, the Chamber considered that there was no longer any public interest in the proceedings being pursued further. The Chamber noted that the applicant had paid over the amounts in question during the actual hearing and specified that its decision to discontinue the proceedings was final.

PROCEEDINGS BEFORE THE COMMISSION

82. In the application which he lodged with the Commission on 3 July 1973, Dr. König complained of the dilatory nature of the proceedings before the Frankfurt Administrative Court and claimed that he was the victim of a violation of Article 6 (art. 6) of the Convention.

The Commission declared the application admissible on 27 May 1975.

83. In its report of 14 December 1976, the Commission expressed the opinion:

- by ten votes to six, that Article 6 para. 1 (art. 6-1) of the Convention was applicable to the rights claimed by the applicant before the administrative courts;
- by nine votes to six, with one abstention, that in the instant case there was a violation of Article 6 para. 1 (art. 6-1) of the Convention.

The report contains various separate opinions.

FINAL SUBMISSIONS MADE TO THE COURT

84. In her memorial of 18 July 1977, the Agent of the Government submitted as follows:

"I would ... at this stage limit my request to asking the Court to hold

that Article 6 para. 1, first sentence (art. 6-1), of the Convention is not applicable to the administrative court proceedings brought by the applicant against the withdrawal of the authorisation to practise medicine and against the withdrawal of the authorisation to run a private clinic and that the Federal Republic of Germany has accordingly not violated the Convention in the said proceedings".

At the oral hearing on 16 November 1977, the Agent of the Government requested the Court to hold

"that the Federal Republic of Germany has not violated Article 6 (art. 6) of the Convention".

AS TO THE LAW

1. On the alleged violation of Article 6 para. 1 (art. 6-1) of the Convention

85. The Court recalls that neither the disciplinary proceedings against Dr. König - which in the event took place before the professional tribunals - nor the criminal proceedings instituted against him are in issue in the present case (see paragraph 18 above).

The applicant complains of the length of the actions he brought before the Frankfurt Administrative Court (see paragraph 18 above). He alleges that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention which provides:

"In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. 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 Court has therefore to decide whether Article 6 para. 1 (art. 6-1) is applicable in the present case and, if so, whether the criterion of a "reasonable time" appearing in that Article (art. 6-1) was respected in each of the two sets of judicial proceedings concerned.

(a) On the applicability of Article 6 para. 1 (art. 6-1) of the Convention

86. The majority of the Commission is of the opinion that Article 6 para. 1 (art. 6-1) is applicable to the rights claimed by the applicant before the Frankfurt Administrative Court, namely the right to run his clinic and the right to exercise his profession of medical practitioner; it considers these rights to be "civil". The majority is divided into two groups which reach the same conclusion, albeit for different reasons.

The correctness of this opinion is disputed by the Government.

87. The Court notes at the outset that, as is not contested, under the legislation of the State concerned the actions brought by the applicant before the German courts concern "rights". The difference of view between Commission and Government relates only to the question whether the present case involves disputes ("contestations") over civil rights within the meaning of Article 6 para. 1 (art. 6-1) of the Convention.

88. Both the Commission and the Government agree that the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State.

The problem of the "autonomy" of the meaning of the expressions used in the Convention, compared with their meaning in domestic law, has already been raised before the Court on several occasions. Thus, it has decided that the word "charge" appearing in Article 6 para. 1 (art. 6-1) has to be understood "within the meaning of the Convention" (Neumeister judgment of 27 June 1968, Series A no. 8, p. 41, para. 18, as compared with the second sub-paragraph on p. 28 and the first sub-paragraph on p. 35; see also Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19; Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45 para. 110; Engel and others judgment of 8 June 1976, Series A no. 22, p. 34 para. 81). The Court has also recognised, in the context of the case of Engel and others, the "autonomy" of the concept of "criminal" within the meaning of Article 6 para. 1 (art. 6-1) (above-mentioned Engel and others judgment, p. 34, para. 81). Again, the Court has already acknowledged, implicitly, that the concept of "civil rights and obligations" is autonomous (above-mentioned Ringeisen judgment, p. 39, para. 94).

The Court confirms this case-law on the present occasion. Hence, it considers that the same principle of autonomy applies to the concept in question; any other solution might lead to results incompatible with the object and purpose of the Convention (see, *mutatis mutandis*, the above-mentioned Engel and others judgment, p. 34, para. 81).

89. Whilst the Court thus concludes that the concept of "civil rights and obligations" is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States (see, *mutatis mutandis*, the above-mentioned Engel and others judgment, p. 35, para. 82).

90. The Government submit that Article 6 para. 1 (art. 6-1) covers private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law; amongst other things, disputes between an individual and the State acting in its sovereign capacity would be excluded from the ambit of that Article (art. 6-1).

As regards the field of application of Article 6 para. 1 (art. 6-1), the Court held in its Ringeisen judgment of 16 July 1971 that "for Article 6 para. 1 (art. 6-1) to be applicable to a case ('contestation') it is not necessary that both parties to the proceedings should be private persons The wording of Article 6 para. 1 (art. 6-1) is far wider; the French expression

'contestations sur (des) droits et obligations de caractère civil' covers all proceedings the result of which is decisive for private rights and obligations. The English text, 'determination of ... civil rights and obligations', confirms this interpretation. The character of the legislation which governs how the matter is to be determined ... and that of the authority which is invested with jurisdiction in the matter ... are therefore of little consequence" (Series A no. 13, p. 39, para. 94).

If the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity is therefore not conclusive.

Accordingly, in ascertaining whether a case ("contestation") concerns the determination of a civil right, only the character of the right at issue is relevant.

91. The Court recalls firstly that the applicant's appeals before the German administrative courts do not concern the right to be authorised to run a clinic and to be authorised to exercise the medical profession (see paragraphs 20, 21, 28 and 51 above): in challenging the withdrawal of his authorisations ordered by the competent authorities, Dr. König is claiming the right to continue his professional activities for which he had obtained the necessary authorisations. If the proceedings before the administrative courts were successful, the applicant would not be granted new authorisations: the Court would simply annul the withdrawal decisions taken by the Regierungspräsidenten in Wiesbaden and Darmstadt (see Article 42 of the German Code of Administrative Procedure).

Therefore, it remains to be ascertained whether Dr. König's right to continue to run a private clinic and his right to continue to exercise the medical profession are civil rights within the meaning of Article 6 para. 1 (art. 6-1).

92. The Court notes that, in the Federal Republic of Germany, the running of a private clinic is in certain respects a commercial activity carried on with a view to profit, classified by German law as a "Gewerbe". This activity is carried on in the private sector through the conclusion of contracts between the clinic and its patients and resembles the exercise of a private right in some ways akin to the right of property. Private clinics are certainly subject to supervision effected by the authorities in the public interest in order, *inter alia*, to protect health; supervision in the public interest, which moreover exists as a general rule for all private professional activities in the member States of the Council of Europe, cannot of itself lead to the conclusion that the running of a private clinic is a public-law activity. An activity presenting, under the law of the State concerned, the character of a private activity cannot automatically be converted into a public-law activity by reason of the fact that it is subject to administrative authorisations and supervision, including if appropriate the withdrawal of authorisations, provided for by law in the interests of public order and

public health. The Court recalls in this context the *Ringeisen* case in which supervision by the public authorities concerned a contract for sale between private individuals: the Court nonetheless concluded that the right at issue had a civil character (above-mentioned judgment, p. 39, para. 94).

93. The medical profession counts, in the Federal Republic of Germany, among the traditional liberal professions; moreover, Article 1 para. 2 of the Federal Act expressly so provides (see paragraph 20 above). Even under the national health scheme, the medical profession is not a public service: once authorised, the doctor is free to practise or not, and he provides treatment for his patients on the basis of a contract made with them. Of course, besides treating his patients, the medical practitioner, in the words of the above-mentioned Act, "has the care of the health of the community as a whole". This responsibility, which the medical profession bears towards society at large, does not, however, alter the private character of the medical practitioner's activity: whilst of great importance from the social point of view, that responsibility is accessory to his activity and its equivalent is to be found in other professions whose nature is undeniably private.

94. In these conditions, it is of little consequence that here the cases concern administrative measures taken by the competent bodies in the exercise of public authority. Neither does it appear pertinent that, under the law of the State concerned, it is for administrative courts to give the decision on these cases and to do so in proceedings which leave to the court the responsibility for the investigation and for the conduct of the trial. All that is relevant under Article 6 para. 1 (art. 6-1) of the Convention is the fact that the object of the cases in question is the determination of rights of a private nature.

95. Since it thus considers the rights affected by the withdrawal decisions and forming the object of the cases before the administrative courts to be private rights, the Court concludes that Article 6 para. 1 (art. 6-1) is applicable, without it being necessary in the present case to decide whether the concept of "civil rights and obligations" within the meaning of that provision extends beyond those rights which have a private nature.

96. Before the Commission, the applicant claimed, in the alternative, that, in view of the nature of the complaints which led to the decisions he contests, he is in reality faced with a "criminal charge" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention. In its report, the Commission recalled that it had rejected this claim in its decision on the admissibility of the application.

The Court notes first of all that this claim by the applicant related to the same facts as his contention that the actions before the German courts concerned civil rights. This was accordingly not a separate complaint but a formal submission or a mere legal argument. However, once a case is duly referred to it, the Court may take cognisance of every question of law arising in the course of the proceedings and concerning facts submitted to its

examination by a Contracting State or by the Commission. Master of the characterisation to be given in law to the facts, the Court is empowered to examine them, if it deems it necessary and if need be ex officio, in the light of the Convention as a whole (see, inter alia, the judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 30, para. 1; the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 29, para. 49; the Handyside judgment of 7 December 1976, Series A no. 24, p. 20, para. 41; the judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, p. 63, para. 157).

However, the Court does not consider that it has to examine whether in this case paragraph 1 of Article 6 (art. 6-1) is also relevant under the "criminal charge" head. For, although the requirements of Article 6 (art. 6) as regards cases ("contestations") concerning civil rights are less onerous than they are for criminal charges, this difference is of no consequence here: all proceedings covered by Article 6 (art. 6) are subject to the requirement of a "reasonable time", whose observance by the German courts remains to be examined.

(b) On the observance of Article 6 para. 1 (art. 6-1) of the Convention

97. According to the Commission, the duration of the proceedings instituted by the applicant before the administrative courts exceeded the "reasonable time" stipulated by Article 6 para. 1 (art. 6-1) of the Convention. Before the Court, the Agent of the Government conceded that the length of those proceedings was a serious matter. She referred, moreover, to certain proposals under discussion in the Federal Republic of Germany designed to accelerate the procedure before the administrative courts. Although she questions whether, in the circumstances of the case, it is possible to speak of a violation of the Convention, she leaves it to the Court to assess whether the duration of the proceedings was reasonable.

98. In order to be able to arrive at a decision, the Court must first specify the period to be taken into account in the application of Article 6 para. 1 (art. 6-1).

According to the Government and the Commission, time starts to run from the date of the filing of the appeals with the Administrative Court of first instance. The Court does not share this view. As the Court stated in its Golder judgment of 21 February 1975, "it is conceivable ... that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute" (Series A no. 18, p. 15, para. 32). This is the situation in the applicant's case, since he could not seise the competent court before having the lawfulness and the expediency of the impugned administrative acts examined in preliminary proceedings (Vorverfahren) before the administrative authority (Article 68 of the German Code of Administrative Procedure). Consequently, in the present

case, the reasonable time stipulated by Article 6 para. 1 (art. 6-1) starts to run on the day on which Dr. König lodged an objection against the withdrawals of his authorisations.

As regards the period to which Article 6 (art. 6) is applicable, the Court has held that in criminal matters this period covers the whole of the proceedings in question, including appeal proceedings (above-mentioned Wemhoff judgment, pp. 26 and 27, paras. 18 and 20; above-mentioned Neumeister judgment, p. 41, para. 19; Delcourt judgment of 17 January 1970, Series A no. 11, pp. 13-15, paras. 25 and 26). The position - as, moreover, the Government concede - is no different in the case of disputes ("contestations") over civil rights and obligations for which Article 6 para. 1 (art. 6-1) likewise requires that there be - at first instance, on appeal or in cassation - a determination.

99. The reasonableness of the duration of proceedings covered by Article 6 para. 1 (art. 6-1) of the Convention must be assessed in each case according to its circumstances. When enquiring into the reasonableness of the duration of criminal proceedings, the Court has had regard, *inter alia*, to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities (above-mentioned Neumeister judgment, pp. 42-43, paras. 20-21; above-mentioned Ringeisen judgment, p. 45, para. 110). The Court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by Article 6 para. 1 (art. 6-1).

100. Before embarking upon this examination, the Court wishes to emphasise that it is not its function to express an opinion on the German system of procedure before administrative courts which, as the Agent of the Government stated, enjoys a long tradition. Admittedly, the present system may appear complex on account of the number of courts and remedies but the Court is not unaware that the explanation for this situation is to be found in the eminently praiseworthy concern to reinforce the guarantees of individual rights. Should these efforts result in a procedural maze, it is for the State alone to draw the conclusions and, if need be, to simplify the system with a view to complying with Article 6 para. 1 (art. 6-1) of the Convention.

- (i) The proceedings relative to the withdrawal of the authorisation to run the clinic

101. These proceedings, which began on 13 July 1967 when the applicant filed an objection against the withdrawal of the authorisation (see paragraph 28 above), have still not been concluded: the Hessen Administrative Court of Appeal has not yet ruled on Dr. König's appeal

against the judgment of 22 June 1977 of the 4th Chamber of the Frankfurt Administrative Court.

102. It is clearly a matter for serious concern - as the Government moreover admit - that more than ten years and ten months have elapsed without a decision on the merits of the case and that it was necessary to wait for almost ten years for the judgment at first instance.

It is true - and on this point the Court shares the Government's opinion - that the 4th Chamber of the Administrative Court encountered great difficulties in tracing witnesses several of whom had in the meantime changed name or address (see paragraphs 30, 32, 35, 36, 37 and 41 above). This applied particularly to the witness Xymenes whom the Chamber was not able to hear until thirty-three months after the first summons (see paragraphs 30, 32 and 35 above). However, the Government in no way pleaded that the case raised exceptionally complex issues of fact or of law.

The Court appreciates that there was a certain interrelation between this action and the action - pending before the 2nd Chamber of the same court - relative to the withdrawal of the authorisation to practise, since the applicant's activities as manager of a clinic were, to a large extent, indistinguishable from his activities as a medical practitioner. However, this can scarcely have caused complications. On the contrary, the 4th Chamber had at its disposal the file of the Regional Tribunal for the Medical Profession which, on 14 October 1970, had declared Dr. König unfit to practise (see paragraphs 16 and 30 above). On this point the Court notes that the Agent of the Government herself is of the opinion that better co-ordination between the two Chambers would have been desirable.

103. On the other hand, the Government laid great weight on the applicant's behaviour during the proceedings: in their view, Dr. König is personally responsible for about half of the length of the proceedings because of the way in which he organised the conduct of his case. The Government cited especially the frequent changes of lawyer, the juxtaposition of various appeals and the fresh proposals of evidence at different stages.

The repeated changing of lawyers - which was certainly within Dr. König's rights - had repercussions on the progress of the proceedings since the different lawyers inevitably needed some time to acquaint themselves with the file. It must be borne in mind that in fact the delays mentioned by the Government do not total more than a few months (see paragraphs 36 and 45 above). The Court also observes that Dr. König did not discharge his first lawyer until 24 May 1971 that is after nearly four years of procedure (see paragraph 33 above).

The Court likewise considers that some delays necessarily resulted from the applicant's various appeals and the overlapping of proceedings which they occasioned. However, the Court notes that all those appeals were made after the month of July 1973 that is after six years of procedure and at a time

when Dr. König had already been deprived for two years of the authorisation to practise. In fact, the first of the two challenges - which, like the second, was included in a disciplinary complaint and, what is more, was upheld - dates from 22 August 1973 (see paragraph 39 above); it was not until two years later, that is, on 10 October 1975, that Dr. König made - unsuccessfully - the second challenge (see paragraph 46 above). Nevertheless, even before the decision on the first challenge, the applicant had, on 19 October 1973, filed with the Federal Constitutional Court an appeal against the length of the proceedings of which he had also complained as early as 3 July in his application to the Commission (see paragraphs 1, 39 and 41 above). Finally, another disciplinary complaint was filed by Dr. König with the President of the Hagen District Court in April 1974, that is, before the three 1973 proceedings were terminated (see paragraph 40 above). Obviously this overlapping did not make the 4th Chamber's task any easier, although only the challenges of 1973 and 1975 gave rise, in law, to an interruption of its proceedings in the strict sense.

The Court is also inclined to share the Government's view that, by tendering fresh evidence after witnesses had been heard, the applicant put difficulties in the way of the investigation of the case. The evidence before the Court reveals that, after the order of 26 August 1969, the hearing of further witnesses was requested by Dr. König on 24 September 1970, 12 February 1973 and 25 August 1974 (see paragraphs 31, 36 and 42 above); his first request was subject to the proviso that he would abandon it if the Regierungspräsident for his part put forward no further witnesses (see paragraph 31 above). Finally, although the Court supplemented its order of 26 August 1969 on 30 March and 16 August 1973, only the second of these decisions seems to have led to a fresh proposal of evidence from Dr. König (see paragraphs 37, 38 and 42 above).

104. Having regard to the surprising length of the proceedings, the Court has examined each detail of the 4th Chamber's conduct of the case.

Although the Court cannot reproach the Chamber for having insisted on hearing Mr. Xymenes or for having supplemented, after three years and seven months, its order of 26 August 1969, it notes, as did the Commission, that the exchange of pleadings with which the proceedings opened continued until 2 April 1969, that is, for nearly seventeen months. Apart from the researches for the addresses of certain witnesses and the request made to the professional tribunals for their files (see paragraphs 29 and 30 above), the first step in the investigation was not taken until 26 August 1969 when the 4th Chamber made its order on the evidence to be adduced (see paragraph 30 above). The Commission rightly stresses, furthermore, that the Chamber waited for seventeen months before calling for the professional tribunals' files despite the interrelation of the action before it and the action relative to the withdrawal of the authorisation to practise.

Again, the despatch of the file to the authorities and courts to which the applicant had made his various appeals caused appreciable losses of time (see paragraphs 30, 31, 35, 38, 39, 40, 41, 42 and 45 above). To the extent that it was necessary for the competent authority to have the complete file at its disposal, it would have been desirable to consider the possibility of having a copy made.

It must also be observed that the 4th Chamber decided on 10 February 1975, that is, more than seven years after being seised of the case, to postpone its judgment until the outcome of the action relative to the withdrawal of the authorisation to practise which had been pending for more than three years before the 2nd Chamber of the same court (see paragraphs 44 and 51 above). This decision was taken after three orders had been made concerning the evidence to be adduced by the parties and after the hearing of numerous witnesses. On this point, the Government admitted that, with the benefit of hindsight, doubts could arise as to whether the court properly conducted the enquiry. In fact, the European Court is unable to discern what the 4th Chamber, which in 1977 was able to dismiss the applicant's appeal on the basis of evidence taken between November 1969 and August 1974 (see paragraph 47 above), was expecting from the outcome of the proceedings pending before the 2nd Chamber. In this connection, the Court recalls that the latter proceedings had been suspended on 25 September 1973 to await the outcome of the criminal proceedings and were not resumed until 30 June 1975. The Court concludes that, in these circumstances, the 4th Chamber did not have sufficient reason for prolonging the proceedings in this way, even if account is taken of the applicant's consent (see paragraphs 44 and 46 above).

105. In an overall assessment of the various factors, the Court concludes that the delays occasioned by the difficulties in the investigation and by the applicant's behaviour do not of themselves justify the length of the proceedings. Without attaching decisive importance to any one step taken by the 4th Chamber rather than to another, the Court is in fact of the opinion that the principal reason for the length of the proceedings is to be found in the conduct of the case. The Court finds that it would have been possible for the 4th Chamber to bring the proceedings to an end at an earlier date. Taking into account the fact that the proceedings began on 13 July 1967 and ended on 22 June 1977, the Court concludes that the "reasonable time" stipulated by Article 6 para. 1 (art. 6-1) was exceeded.

The Government stressed that Dr. König's appeal had the effect of suspending enforcement of the withdrawal of the authorisation to run his clinic (see paragraph 28 above) and that this feature of the proceedings might have been to his advantage. The Court recognises that this suspensive effect may have a bearing on the interpretation of the concept of "reasonable time". However, in view of the total duration of the proceedings and the prolonged uncertainty in which the applicant found

himself, the Court cannot depart, on the ground of the appeal's suspensive effect, from the assessment at which it has arrived above.

(ii) The proceedings relative to the withdrawal of the authorisation to practise

106. These proceedings began on 18 May 1971 when the applicant lodged his objection against the withdrawal of the authorisation to practise. The 2nd Chamber of the Frankfurt Administrative Court gave judgment on 9 June 1976, that is after more than five years of proceedings, and the Hessen Administrative Court of Appeal on 2 May 1978.

107. Although the length of these particular proceedings is not as great as that of the action relative to the withdrawal of the authorisation to run the clinic, it does not appear to the Court to be less serious.

This action seems less complex than the action before the 4th Chamber of the Administrative Court: not only did the 2nd Chamber encounter fewer difficulties as regards the hearing of the witnesses summoned, but also the enquiry was facilitated by the fact that, as early as 14 October 1970, the Regional Tribunal for the Medical Profession had declared Dr. König unfit to practise (see paragraph 16 above).

As for the interrelation of the two actions, on which the Government relied, it should be noted that this could not have created any complications for the 2nd Chamber: on the contrary, it was able to profit from the results of the investigation conducted by the 4th Chamber whose proceedings had already been in progress for almost four years when Dr. König challenged the withdrawal of the authorisation to practise.

108. Dr. König's behaviour in the action before the 2nd Chamber differs from his behaviour before the 4th Chamber in but a few respects.

The Court notes to begin with that the applicant changed lawyer for the first time on 12 February 1973 that is after sixteen months of procedure (see paragraph 54 above). Again, he filed two challenges which, together with those directed against the 4th Chamber, were included in disciplinary complaints - the first on 22 August 1973 after about two years of procedure, the second on 10 October 1975 (see paragraphs 56 and 67 above). Furthermore, Dr. König made three constitutional appeals against the length of the proceedings, the first on 19 October 1973, the second probably in April 1974 and the third on 10 July 1975 (see paragraphs 58, 60 and 64 above). Before the first appeal to the Federal Constitutional Court, he had also complained of the length of the two actions in his application of 3 July 1973 to the Commission. As for the manner of tendering his evidence, the applicant does not seem to have proceeded in the same way as he did before the 4th Chamber.

Nevertheless, Dr. König's behaviour certainly caused delays. The Court notes, in particular, that the delays mentioned by the Government as attributable to the changes of lawyer seem more important in this action (see paragraphs 54, 62 and 67 above).

109. As regards the procedure followed by the Frankfurt Administrative Court, failure to join the case relative to the withdrawal of the authorisation to practise and the case relative to the withdrawal of the authorisation to run the clinic certainly prolonged the two actions. The Court observes, moreover, that, in the appellate proceedings, the two cases were assigned to the same Chamber of the Hessen Administrative Court of Appeal.

110. Turning next to the conduct of the case by the 2nd Chamber itself, the Court notes that the Chamber was little concerned to advance the proceedings.

The first sitting, for the hearing of witnesses and of argument, was not fixed until 14 July 1975 (see paragraph 65 above). According to the evidence before the Court, the only steps in the investigation taken by the 2nd Chamber between 25 October 1971, when it was seised, and July 1975 were the request of 2 November 1971 to the Regierungspräsident to submit the relevant files, the order of 5 September 1972 calling for the production of certain criminal files and the decision of the same date that the Regional Medical Society be joined to the proceedings (see paragraphs 52 and 53 above). Admittedly, on 14 September 1972 the court suggested a friendly settlement of the dispute but less than a month later Dr. König rejected this proposal (see paragraph 53 above). In addition, the Court notes, as did the Commission, that the 2nd Chamber waited more than 10 months before deciding to join the Regional Medical Society whose requests nevertheless had set the professional tribunals' proceedings in motion and led to the withdrawal of the authorisations (see paragraphs 16, 27, 49 and 53 above).

Again, considerable delays were caused by the despatch of the file to the authorities and courts to which the applicant had made his various appeals (see paragraphs 56, 58, 62, 64, 66 and 67 above). On this point, the Court refers to its findings in connection with the proceedings before the 4th Chamber (see paragraph 104 above).

However, the principal cause of the length of this action is its suspension - decided on 25 September 1973 and maintained until 30 June 1975 - for the purpose of awaiting the outcome of the criminal proceedings taken against Dr. König as early as 27 July 1972.

Although Dr. König's conviction might have had some relevance for the investigation of the case pending before the 2nd Chamber, the Court notes that the charges against the applicant referred to events which occurred perhaps in part before the decision of the Regierungspräsident on the objection but in any event after the withdrawal of the authorisation to practise (see paragraphs 49, 51, 71, 72 and 78 above). Again, although the 2nd Chamber enquired on several occasions about the state of the criminal proceedings, it did not draw in due time the conclusions from the information given to it. In fact, the Court observes that the 2nd Chamber knew as early as 16 February 1974 that the hearings before the criminal court could not be held before the second half of the year; on 8 May, the

latter court had indicated that judgment could hardly be given within six months, since the applicant had challenged one of the judges and extensive appellate proceedings had been instituted (see paragraphs 59 and 61 above). Despite the uncertainties overshadowing the criminal proceedings, the 2nd Chamber still delayed for more than a year before deciding, on 30 June 1975, not to await their outcome any longer.

In the Court's opinion, the 2nd Chamber's suspension of its proceedings for more than twenty-one months was not justified in the circumstances of the case.

111. In an overall assessment of the various factors and taking into account what was at stake in the proceedings, namely, Dr. König's whole professional livelihood, the Court considers that, notwithstanding the delays attributable to the applicant's behaviour, the investigation of the case was not conducted with the necessary expedition.

The Court has borne in mind the arguments which the Agent of the Government based on what she referred to as interim judicial protection (*einstweiliger Rechtsschutz*). In fact, the applicant twice requested, once in 1971 and once in 1974, restoration of the suspensive effect of his appeal against the withdrawal of the authorisation to practise (see paragraphs 50, 62 and 63 above). The 2nd Chamber and subsequently the Hessen Administrative Court of Appeal rejected these requests in reasoned decisions which touched on the merits of the case, the proceedings concerning the second request having, moreover, lasted more than fifteen months in all. The Court does not exclude the possibility that the existence of such a procedure may have an incidence on the assessment of the duration of the principal proceedings. However, in view of the circumstances noted above, the existence of that procedure cannot in the present case affect the overall assessment of the factors taken into account by the Court.

Accordingly, the Court considers that in this case the "reasonable time" stipulated by Article 6 para. 1 (art. 6-1) of the Convention was exceeded.

2. On the application of Article 50 (art. 50) of the Convention

112. Under Article 50 (art. 50) of the Convention, if the Court finds "that a decision or a measure taken" by any authority of a Contracting State "is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said [State] allows only partial reparation to be made for the consequences of this decision or measure", the Court "shall, if necessary, afford just satisfaction to the injured party".

The Rules of Court specify that when the Court "finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 (art. 50) of the Convention if that question, after being raised under Rule 47 bis, is ready for decision; if the question is not ready for decision, the [Court] shall reserve it in whole or in part and

shall fix the further procedure" (Rule 50 para. 3, first sentence, read in conjunction with Rule 48 para. 3).

113. At the hearing on 17 November 1977, the Court, acting in pursuance of Rule 47 bis, invited those appearing before it to present their observations on the question of the application of Article 50 (art. 50) of the Convention in the present case.

Mr Burger's reply reveals that Dr. König is not claiming compensation "for all the damage he had suffered, as the result of interruption of his work as a medical practitioner and operator of a clinic for a period that already exceeds ten years". In point of fact, the applicant leaves to the Court the assessment of "any compensation that he might expect under Article 50 (art. 50)" and also the question whether such compensation should "include the costs of [the] proceedings" before the Commission and the Court.

The Agent of the Government, for her part, declared that she reserved her position.

114. The Court notes that the applicant does not claim compensation for all the material damage allegedly suffered; however, he expects to be granted just satisfaction if the Court concludes that there has been a breach of the Convention, without for the moment indicating the amount of his claim.

The information supplied by the applicant on this point and the observations of the Agent of the Government show that the question of the application of Article 50 (art. 50) of the Convention is not ready for decision; the Court must therefore reserve the question and give a decision on the further procedure relative thereto.

FOR THESE REASONS, THE COURT

1. holds by fifteen votes to one that Article 6 para. 1 (art. 6-1) is applicable to the proceedings relative to the withdrawal of the applicant's authorisation to run his clinic;
2. holds by fourteen votes to two that Article 6 para. 1 (art. 6-1) is applicable to the proceedings relative to the withdrawal of the applicant's authorisation to practise;
3. holds by fifteen votes to one that there has been a violation of Article 6 para. 1 (art. 6-1) as regards the duration of the proceedings relative to the withdrawal of the authorisation to run the clinic;

4. holds by fifteen votes to one that there has been a violation of Article 6 para. 1 (art. 6-1) as regards the duration of the proceedings relative to the withdrawal of the authorisation to practise;
5. holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the question of the application of Article 50 (art. 50);

(b) invites the Commission's delegates to transmit to the Court, within three months from the delivery of this judgment, such claims as may be presented by the applicant and any observations which the delegates may have thereon;

(c) decides that the Government shall have the right to reply to such claims and observations within two months from the date on which the Registrar shall have communicated them to the Government;

(d) reserves the further procedure to be followed on this question.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-eighth day of June, one thousand nine hundred and seventy-eight.

Giorgio BALLADORE PALLIERI
President

On behalf of the Registrar
Herbert PETZOLD
Deputy Registrar

The separate opinions of the following judges are 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:

Mr. WIARDA;
Mr. MATSCHER;
Mr. PINHEIRO FARINHA.

G. B. P.
H. P.

SEPARATE OPINION OF JUDGE WIARDA

(Translation)

I share the opinion set out in the judgment, with the sole exception of the reasons concerning the application of Article 6 para. 1 (art. 6-1) of the Convention to the proceedings before the Frankfurt Administrative Court relating to the withdrawal of the authorisations to run a clinic and to practise medicine.

According to the reasoning in the judgment, the rights at issue in these actions were the right to continue to run a private clinic and the right to continue to practise medicine; these two rights are classified as rights of a private nature and thus as civil rights within the meaning of the Convention.

I agree with the view that, whatever scope the concept of civil rights and obligations within the meaning of the Convention may have, it in any event includes rights and obligations of a private nature in the traditional sense; however, I do not consider that the right to run a clinic and the right to practise medicine can be classified as rights of a private nature within the traditional meaning of that concept.

In my opinion, the classification of a subjective right depends on the classification of the rules of the objective law in which that subjective right has its source.

In German (objective) law, the (subjective) right to run a private clinic and the (subjective) right to practise medicine depend solely on obtaining and conserving the authorisations required by law for this purpose; however, the conditions which must be fulfilled to obtain and conserve such authorisations are found in (objective) public (administrative) law, not in (objective) private law. For this reason, I believe that these rights should be classified not as civil but as public rights.

This does not mean that I cannot agree with the Court's conclusion.

According to the Ringeisen judgment, the question whether a case ("contestation") is to be considered as a case relating to "civil rights and obligations" depends neither on the character of the legislation which governs how the matter is to be determined nor on the character of the authority invested with jurisdiction, but on the character of the rights and obligations for which the result of the proceedings is decisive.

In the present case, the result of the proceedings instituted by Dr. König before the Frankfurt Administrative Court was decisive for the conservation or the restoration of his status as owner and manager of a private clinic and as a medical practitioner, and for the conservation or the restoration of the complex of rights and obligations attaching to such status.

This complex of rights and obligations was mixed in character. Public law played a part (Gewerbeordnung, Bundesärzteordnung), but, in my view, the area governed by private law predominated. Dr. König owned his clinic

and his practice and was exercising his rights of property in the use which he made of them. The clinic, the practice and his patients represented an element of "goodwill" which likewise was in the nature of a private right similar, in some respects, to the right of property. From the legal point of view, the running of the clinic and the exercise of his profession were carried on through the conclusion of contracts.

The withdrawal of the authorisations needed by Dr. König to continue running his clinic and exercising his profession amounted to an interference that in many respects deprived this complex of rights and obligations - for the greater part governed by private law - of the value which they represented.

It was the justification for the withdrawals that was at stake in the proceedings before the Frankfurt Administrative Court which underlie the present case.

For this reason, I believe, that it is legitimate to classify the cases ("contestations") in issue as cases involving "civil rights and obligations" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention.

SEPARATE OPINION OF JUDGE MATSCHER

(Translation)

A. I am not, for the time being, in a position to furnish an abstract, comprehensive definition of the concept of "civil rights and obligations" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention. I should like, however, to try to explain the reasons which prevent me, to my great regret, from accepting the definition of this concept which the Court has just given, even though it limited itself to the requirements of the present judgment.

I think that one must start by noting that the wording of Article 6 para. 1 (art. 6-1) is not clear and unequivocal. To arrive at its meaning, recourse must be had to the methods of interpretation recognised in international law.

Literal, grammatical interpretation does not take us very far.

There is an abundance of writings on the historical background to Article 6 (art. 6). They show us that no very specific and exact ideas on the scope of this provision emerge from the travaux préparatoires.

The materials on the Convention do not, I believe, support the view (already expressed in the Ringeisen judgment and repeated in paragraph 90 of the present judgment) that a comparison of the two official texts may point to interpretation in a particular direction.

The teleological interpretation on which the judgment appears to be principally based (although this is not stated in explicit terms) is limited by the Convention system. The basic idea behind such an interpretation is that the Convention is chiefly intended to protect the individual against the authorities and to provide him with certain guarantees vis-à-vis the latter. This means that the Convention should apply whenever the individual's position vis-à-vis the authorities is in question. However, to draw specific conclusions from this principle, one must above all demonstrate that a right which the Convention was intended to guarantee in a certain way is involved - otherwise, there is a danger of going beyond teleological interpretation and venturing into the field of legislative policy.

The reasoning in the judgment does not demonstrate that the applicant's legal position in the present case is also covered by Article 6 para. 1 (art. 6-1) of the Convention.

The judgment starts by reaffirming the principle of "autonomous" interpretation of the terms of international conventions in general and of the concept of "civil rights and obligations" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention in particular. This is a principle with which I am wholly in agreement (even though I must say that I do not regard the Court's definition of it as wholly unambiguous). In my view, autonomous interpretation means, above all, that the provisions of international conventions must not be interpreted solely by reference to the

meaning and scope which they possess in the domestic law of the contracting State concerned, but that reference must be made, "first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems" (judgment of the Court of Justice of the European Communities, 14 October 1976, (Reports) 1976, p. 1552). Putting it differently, one must look for the "common denominator" behind the provisions in question, since it is legitimate to suppose - in the absence of any legal definition in the Convention itself - that such is the meaning which the Contracting States wished these provisions to have. This "common denominator" can be found through a comparative analysis of the domestic law of the Contracting States. This being so, the result of such an investigation can never be a concept which is totally at variance with the legal systems of the State concerned. In my view, however, the judgment does not take sufficient account of this requirement. It arrives at its conclusion - that Article 6 para. 1 (art. 6-1) of the Convention is applicable to the case which forms the subject of the present application - only by reliance on two types of assertion, both of which I regard as highly questionable:

1. The activities of a doctor, whether as practitioner or as director of a private clinic, are said to have a "private-law" character, apparently by virtue of the fact that these activities chiefly amount (from the legal point of view) to the maintenance of private-law relationships with his clients (paragraphs 92 and 93 of the judgment).

However, this argument seems to me to confuse the special relationship between a doctor and his patients, which is undeniably a matter of private law (insofar as the doctor concerned is not a civil servant), with his professional status which - regardless of whether the State medical service or private practice is concerned - is regulated (each type to a varying extent) by public law in most, if not all, States.

Thus, when the Court states that the doctor's professional situation is to be classified as a civil right within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, it is creating a concept of "civil right" which is not merely "autonomous" within the meaning of the Convention, but which has no foundation in the legal systems of the vast majority of Contracting States.

2. When transposing the conclusions reached in the Ringeisen judgment (Series A no. 13, p. 39, para. 94) to the present case, the Court states (paragraph 90 of the judgment) that "all proceedings the result of which is decisive for private rights and obligations" should themselves be regarded as cases concerning civil rights within the meaning of Article 6 para. 1 (art. 6-1) of the Convention. This, in my view, is an assertion too vague, too elastic, to permit the drawing of any exact conclusions. What does the phrase "is decisive for private rights and obligations" actually mean?

In the Ringeisen case, the conclusion drawn by the Court from this assertion seems to me acceptable and, possibly, even justified since, in that case, the administrative proceedings bore directly on what was undeniably a private-law contract and had no other object.

The situation in the König case is fundamentally different: the object of the administrative proceedings was not one or more specific private-law relationships between Dr. König and his patients; the proceedings were not intended to "be decisive" for these relationships (on which they had only an indirect bearing). The administrative proceedings in question were solely concerned with Dr. König's professional situation as a practitioner and as the director of a private clinic. (There would only have been an analogy between the König and the Ringeisen cases if the latter had been concerned with Mr. Ringeisen's status as an estate agent - which it was not).

In this connection, and contrary to what would seem to be the Court's opinion (paragraph 91 of the judgment), I do not believe, either, that a distinction can be made (as far as Article 6 of the Convention is concerned) (art. 6) between the grant and the withdrawal of an authorisation (to practise medicine or to manage a clinic). Professional status or the legal system governing a gainful activity form an indissoluble whole. The grant and the withdrawal of the authorisation needed to practise or carry on the activity are merely two particular aspects of such status or system: the grant amounts to a finding that the requisite conditions exist and the withdrawal, on the other hand, to a finding that they have ceased to exist. From a qualitative standpoint, both have the same bearing on private-law situations. In conclusion, it is not my impression that the authors of the Convention intended to bring all cases ("contestations") relating to undoubted public-law situations under Article 6 (art. 6) of the Convention, simply by reason of the fact that the outcome of such a case might affect the private-law relationships of the person in question. In any event, in the majority of the Convention States, the relevant proceedings are not organised in the manner envisaged in Article 6 (art. 6) (decision by a tribunal, public hearing, judgment pronounced publicly); this means, according to the conclusions reached in this judgment, that all these States - even when they possess a highly developed system for administrative proceedings - would be in a position that did not comply with Article 6 (art. 6) from the very moment that they ratified the Convention. This seems to me a clear argument in favour of excluding this type of case from the ambit of Article 6 (art. 6) of the Convention.

There is still one objection which has to be refuted: when the scope of Article 6 para. 1 (art. 6-1) of the Convention is discussed, it is often argued that the individual has more need of the procedural guarantees provided by Article 6 para. 1 (art. 6-1) in the case of disputes with the authorities than in the case of disputes with his neighbours: one cannot therefore suppose that

the Convention was intended to establish a system of guarantees specifically for the latter, but not for the former.

I would explain this situation as follows: the history of law (at least, of continental law) shows very clearly that the principles of oral proceedings, publicity and judgment by an independent tribunal in civil matters are merely a corollary of these same principles in criminal cases. When a demand was raised, starting with the French Revolution in 1789 and during the European revolutions of 1848, for legal proceedings which respected these principles, criminal proceedings alone were envisaged. No one would have manned the barricades to secure oral, public proceedings in civil cases! The only reason for introducing these principles for civil cases also – and sometimes even guaranteeing them in constitutional charters – was to follow the pattern adopted for criminal proceedings. Furthermore – and this is also borne out by experience with judicial tribunals – the importance of these principles has always been relatively limited in civil cases (though it must be admitted that some of these principles, in particular, are of value for civil procedure).

I think that this is the general standpoint which we must adopt to understand why the authors of the Convention, too, whilst retaining for the guarantees of Article 6 (art. 6) their primary purpose, did not restrict those guarantees to criminal cases but extended them to all cases which were generally regarded in most Contracting States as coming within the competence of the courts.

I admit that this consideration of the Convention's historical dimension leads to a relatively narrow concept of "civil rights", but I believe that it reflects the meaning and scope of Article 6 para. 1 (art. 6-1), *de lege lata*.

Nor would I deny that, from the *de lege ferenda* standpoint, an extension of the protection of the individual's rights and of the related procedural guarantees, also vis-à-vis the public authorities, is an ideal which should be pursued, especially in view of the latter's constantly increasing encroachment in all areas. Recognising the validity of this aspiration, the Court, whose task is to ensure respect of the rights guaranteed by the Convention, is free to employ even a broad interpretation of these guarantees (this it did, rightly in my view, in the *Ringeisen* case), as long as such interpretation remains covered by the Convention itself. On the other hand, it is for the Contracting States to go further than the Convention if they find this necessary and if they agree on an amendment thereto.

Perhaps it is also going beyond the function of a judgment (or, to be more exact, a separate opinion) to raise *de lege ferenda* considerations and to speculate on the possible consequences of an overbroad interpretation of the concept of civil rights. I should like, nonetheless, to make a few brief comments.

I have doubts as to the utility of invariably using a procedure which fully matched the requirements of Article 6 para. 1 (art. 6-1) of the Convention in

many of the cases which would qualify as "civil law" cases if the line laid down by the Court in the present instance were followed (those concerned with authorisations or concessions of all kinds, insofar as the latter have a bearing on private-law situations). For some of them (particularly professional and disciplinary cases), a procedure of this kind (public and necessarily conducted before a court) would, perhaps, hardly be in the best interests of the persons concerned.

I fully agree that, in these cases too, fair judgment must be given within a reasonable time, following a procedure which gives the person concerned every possibility of asserting his rights and that the decision of the competent authority (when it is administrative in character) should be subjected to review by an independent body (that is, to review by a court). I entirely fail to see however, why the procedure in question should invariably meet all the other requirements of Article 6 para. 1 (art. 6-1) (oral and public proceedings, public pronouncement of judgment).

De lege ferenda, the above considerations would seem to suggest the need for a revision of Article 6 (art. 6) of the Convention which would draw the following distinction (which is not possible under Article 6 as it stands) (art. 6):

(a) criminal and civil cases (i.e. cases traditionally heard by the courts): entitlement to all the guarantees provided for in Article 6 (art. 6);

(b) disputes on other matters (administrative cases): entitlement to a procedure determined by law and guaranteeing a fair hearing of the parties, judgment within a reasonable time, right to judicial review of the administrative decision.

B. Having given a negative vote on questions 1 and 2, it was only logical that I should also give a negative vote on questions 3 and 4, as formulated in the operative provisions of the judgment. I should like, however, to make it clear that I share the Court's unanimous view that, in the case both of the proceedings relating to the withdrawal of the authorisation to run the clinic and of the proceedings relating to the withdrawal of the authorisation to practise, the "reasonable time" referred to in Article 6 para. 1 (art. 6-1) was exceeded (insofar as this provision might have been applicable in the present case).

SEPARATE OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. I find myself in disagreement with the Court's reasoning as regards two paragraphs in the judgment and item 2 of the operative provisions.

2. With regard to paragraph 93 of the judgment, while I agree that the medical profession counts among the traditional liberal professions in the Federal Republic of Germany; that, even under the national health scheme, the medical profession is not a public service; that the doctor, who is free to practise or not, provides treatment for his patients on the basis of a contract; and that the medical practitioner's activity has a private character, I still feel obliged to point out that:

(a) according to paragraph 1 of Article 1 of the Federal Act, the medical practitioner shall have the care of the health of each individual and of the community as a whole; under paragraph 2, he exercises a liberal profession and not a trade or business (paragraph 20 of the judgment);

(b) in order to be able to practise on a permanent basis, an authorisation issued by the appropriate services of the Länder is required (Articles 2 para. 1 and 12 of the Federal Act, Article 35 of the Regulations). This authorisation is granted on request if the person concerned:

1. ...

2. has not been guilty of behaviour showing that he is unfit or unreliable to exercise the profession,

3. ...

4. ... (paragraph 20 of the judgment);

(c) an authorisation that has been issued must be withdrawn if one of those conditions either was not satisfied at the time of the grant or ceases to be met afterwards (Article 5 of the Federal Act; paragraph 20 of the judgment);

(d) although the medical profession also has the purpose of providing an income, its primary aim is disinterested, namely rendering assistance to mankind (paragraph 22 of the judgment).

Bearing these quotations in mind and remembering the Hippocratic Oath, which includes a promise by the doctor that: "With purity and with holiness I will pass my life and practise my art ... While I continue to keep this oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times. But should I trespass and violate this oath, may the reverse be my lot!" - I am bound to conclude that there is a total difference between, firstly, the running of a clinic (a trade or business; paragraph 21 of the judgment) and, secondly, exercise of the medical profession, in which the spiritual element takes precedence over the material element, since "the duties of dignity, disinterestedness and independence which members of the liberal professions must observe apply very strictly to

doctors" (J. Savatier, *La profession libérale, Etude juridique et pratique*, Paris, L.G.D.J., 1947, quoted in the *Encyclopédie Dalloz*, III, 425).

3. With regard to paragraph 95 of the judgment, I cannot agree with the Court in its view of the decision to withdraw the authorisation to practise. I should like to point out that I agree with paragraph 94 and 95 on the decision to withdraw the authorisation to run the clinic.

In my view, the right called in question by the withdrawal of the authorisation to practise is a public, and not a civil, right.

I do not believe that a distinction can be made, under Article 6 (art. 6) of the Convention, between the grant and the withdrawal of an authorisation.

It must be remembered that the administrative proceedings were not concerned directly with one or more specific private-law relationships between Dr. König and his patients, but with his general suitability to practise as a doctor.

Since public law is not concerned with actions but only with the aims which the person in question claims to be pursuing (G. Balladore Pallieri, *La doctrine de l'État*, volume II - Portuguese edition, page 213), since the withdrawal of the authorisation to practise was not intended to regulate specific relationships between Dr. König and his clients - the latter being a matter for private law - but chiefly to safeguard the health of the community as a whole, and since the administrative authorities found that Dr. König no longer fulfilled certain conditions of public order, lying outside the scope of private law, I would say, unlike the Court, that Article 6 para. 1 (art. 6-1) is not applicable to the proceedings relating to the withdrawal of the authorisation to practise.

4. I feel obliged to accept the decision of the majority of the Court that Article 6 para. 1 (art. 6-1) is applicable to the proceedings relating to the withdrawal of the authorisation to practise, and to vote on its application with regard to the duration of the proceedings.

Disagreeing with the Court on the first question - the applicability of Article 6 para. 1 (art. 6-1) of the Convention -, I agree with the final decision and the arguments used to support it.

I would, however, like to indicate expressly that I would have voted for non-violation of the Convention, on the ground of non-applicability of Article 6 para. 1 (art. 6-1) to the proceedings relating to the authorisation to "practise", if there had not been a prior decision on applicability.