

In the case of *Probstmeier v. Germany* (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr I. Foighel,
Mr R. Pekkanen,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr K. Jungwiert,
Mr U. Lohmus,
Mr J. Casadevall,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 23 January and 29 May 1997,

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

Notes by the Registrar

1. The case is numbered 125/1996/744/943. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

PROCEDURE

1. The case was referred to the Court by a German national, Mrs Mechthilde Probstmeier ("the applicant"), on 18 September 1996, and by the Government of the Federal Republic of Germany ("the Government") on 23 October 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47).

It originated in an application (no. 20950/92) against Germany lodged by Mrs Probstmeier with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) on 9 June 1992.

The applicant's application bringing the case before the Court referred to Article 48 of the Convention (art. 48), as amended by Protocol No. 9 (P9), which Germany has ratified; the Government's application referred to Articles 32 and 48 of the Convention (art. 32, art. 48). The object of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. On 18 September 1996 the applicant designated the lawyer who would represent her (Rule 31 of Rules of Court B). The President gave the lawyer leave to use the German language in both the written and the oral proceedings (Rule 28 para. 3). The applicant, who was initially designated by the letters M.P., subsequently consented to the

disclosure of her identity.

3. On 29 October 1996 the President of the Court, Mr R. Ryssdal, decided, in the interests of the proper administration of justice and in accordance with Rule 21 para. 6, that the present case should be allocated to the Chamber already set up to hear the case of Pammel v. Germany.

4. That Chamber included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr Ryssdal, the President of the Court (Rule 21 para. 4). On 30 March 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr I. Foighel, Mr R. Pekkanen, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr K. Jungwiert, Mr U. Lohmus and Mr J. Casadevall (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

5. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 27 November 1996 and the Government's memorial on 6 December 1996.

On 5 December 1996 the Commission had produced various documents relating to the proceedings before it, as requested by the Registrar on the President's instructions.

On 5 November 1996 the Secretary to the Commission had informed the Registrar that the Delegate would present his submissions at the hearing.

6. On 2 December 1996 the Government requested the Chamber to relinquish jurisdiction immediately in favour of a Grand Chamber (Rule 53). On 20 January 1997 the Chamber decided not to accede to that request.

7. In accordance with the decision of the President, who had also given the Government's Agent leave to plead in German (Rule 28 para. 2), the hearing concerning this case and the case of Pammel v. Germany took place in public in the Human Rights Building, Strasbourg, on 20 January 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mrs H. Voelskow-Thies, Ministerialdirigentin, Federal Ministry of Justice,	Agent,
Mr M. Weckerling, Regierungsdirektor, Federal Ministry of Justice,	
Mr E. Radzwill, Regierungsrat zur Anstellung, Federal Ministry of Justice,	Advisers;

(b) for the Commission

Mr B. Marxer,	Delegate;
---------------	-----------

(c) for the applicant

Mr P. Kloer, of the Munich Bar,	Counsel;
---------------------------------	----------

(d) for Mr Pammel

Mr C. Lenz, of the Stuttgart Bar,	Counsel.
-----------------------------------	----------

The Court heard addresses by Mr Marxer, Mr Lenz, Mr Kloer and Mrs Voelskow-Thies.

At the hearing Mrs Voelskow-Thies also sought leave to reply in writing to the claims under Article 50 (art. 50) lodged by the applicant and Mr Pammel. By an order of 24 January 1997 the President granted her request. The Registrar received the Government's supplementary memorial on 13 February 1997, Mrs Probstmeier's observations in reply on 24 February and those of Mr Pammel on 28 February.

AS TO THE FACTS

I. The circumstances of the case

8. Mrs Mechthilde Probstmeier is a German national born in 1937. She now lives in Karlsruhe.

9. She is the owner of a plot of land 44,271 sq. m in area, which she inherited. This land was leased to the Munich Allotment Garden Association (Kleingartenverein), which, in its turn, sub-let the land to individual tenants.

The initial lease ran from 1 January 1955 to 31 December 1979 with the rent (Pachtzins) amounting to 0.10 German marks (DEM) per square metre per year.

A. The proceedings in the civil courts

10. In a letter of 22 November 1976 the applicant gave notice of intention to terminate the lease with effect from 31 December 1979.

11. On 20 February 1978 she brought proceedings in the Munich Regional Court (Landgericht) seeking an order for possession (Räumung) against the Allotment Garden Association.

12. On 19 April 1978 the Regional Court gave judgment against Mrs Probstmeier, who appealed to the Munich Court of Appeal (Oberlandesgericht).

13. On 6 November 1978, at the parties' request, the Court of Appeal decided to stay the proceedings (das Verfahren auszusetzen) pending a judgment of the Federal Constitutional Court (Bundesverfassungsgericht) on the constitutionality of certain provisions of the Allotment Gardens Act (Kleingartenordnung) concerning the termination of leases.

14. The Federal Constitutional Court gave judgment on 12 June 1979 and the civil proceedings resumed in November 1979.

15. On 14 April 1981 the Court of Appeal once more decided to stay the proceedings pending the promulgation of new legislation on allotment gardens.

16. The new Federal Allotment Gardens Act (Bundeskleingartengesetz), of 28 February 1983, came into force on 1 April 1983, and the proceedings in the Regional Court were resumed on 14 June 1983.

17. On 12 December 1983 the Court of Appeal gave judgment against the applicant.

18. On 19 December 1983 Mrs Probstmeier appealed to the Federal Court of Justice (Bundesgerichtshof), which declared her appeal admissible on 13 December 1984.

B. The proceedings in the Federal Constitutional Court

19. On 24 May 1985 the Federal Court of Justice decided to stay the proceedings and to refer the case to the Federal Constitutional Court in accordance with the first sentence of Article 100 para. 1 of the Basic Law (Grundgesetz) (see paragraph 29 below), submitting the following question:

"1. Is it compatible with Article 14 of the Basic Law [see paragraph 24 below] for a lease granted by a private lessor before the entry into force of the Federal Allotment Gardens Act of 28 February 1983, for a fixed term due to expire before the Act came into force, and in respect of allotment gardens which are not permanent, to expire only on 31 March 1987 pursuant to section 16 (3) of the Act?"

The Federal Court of Justice considered that the question of the constitutionality of section 16 (3) of the Federal Allotment Gardens Act was decisive for the outcome of the proceedings.

20. On 26 June 1987, in separate proceedings, the Hamm Court of Appeal (Oberlandesgericht) referred to the Federal Constitutional Court the question concerning the constitutionality of sections 16 (3) and 16(4) of the Federal Allotment Gardens Act (see paragraph 25 below) raised in the Pammel case (see the Pammel v. Germany judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV).

21. The Federal Constitutional Court decided to join the two cases.

22. After receiving the observations made by the Minister for Town and Country Planning (Raumordnung, Bauwesen und Städtebau) on behalf of the Federal Government, and those of the Organisation of German Towns (Deutscher Städtetag), four other non-governmental organisations, the parties and the Federal Court of Justice, the Federal Constitutional Court decided to extend the review of constitutionality so as to embrace the first sentence of section 5 (1) of the Federal Allotment Gardens Act (see paragraph 25 below).

On 23 September 1992 the First Division (Erster Senat) of the Federal Constitutional Court gave judgment (Reports of the Decisions of the Federal Constitutional Court, BVerfGE, vol. 87, pp. 114-51).

It held that, pursuant to the transitional provisions of section 16 of the Act, rent control continued to apply during the period for which former fixed-term leases had been extended.

The Federal Constitutional Court held that section 16 (3) and the first sentence of section 16 (4) of the Federal Allotment Gardens Act were constitutional, but pointed out that section 16 (3) had to be interpreted in a manner consistent with the Basic Law. On the other hand, it decided that the rent control provided for in the first sentence of section 5 (1) of the Act was contrary to the first sentence of Article 14 para. 1 of the Basic Law, in so far as it concerned leases granted by private lessors, since it imposed an excessive and disproportionate burden on lessors.

23. On 25 April 1993 the Federal Court of Justice gave judgment against Mrs Probstmeier.

II. Relevant domestic law

A. Substantive law

24. Article 14 para. 1 of the Basic Law provides:

"Property and the right of succession shall be guaranteed. Their

content and limits shall be laid down by law."

25. The relevant provisions of the Federal Allotment Gardens Act of 28 February 1983, which came into force on 1 April 1983, are worded as follows:

Section 5(1)

"The rent shall be not more than twice the rent for a lease granted in the same locality for a market garden producing fruit or vegetables, depending on the total area of the allotment. The areas allocated to amenities for common use shall be taken into account when the amount payable in rent for each allotment is calculated."

Section 16

"1. Allotment leases which have not expired by the date of the entry into force of the present Act shall be governed by the present Act from the date of its entry into force.

2. Leases granted before the entry into force of the present Act in respect of allotments which, on the date of the Act's entry into force, are not 'permanent' gardens shall be deemed leases in respect of 'permanent' gardens where the owner of the land is the local authority.

3. Where the leases referred to in subsection 2 concern plots of land not owned by the local authority, they shall expire on 31 March 1987 if they have been granted for a fixed term expiring before that date, otherwise they shall run for the term agreed.

4. Where, before expiry of the lease as provided for in subsection 3, the land occupied by an allotment garden has been designated in the land-use plan as land for 'permanent' allotment gardens, the lease shall be extended for an indefinite period. Where the local authority has decided, before 31 March 1987, to draw up a land-use plan with a view to designating the land to be used for 'permanent' allotment gardens and has made its decision public in accordance with the second paragraph of Article 2 para. 1 of the Town Planning Code (Baugesetzbuch), the lease shall be extended for four years with effect from the date of publication of that decision, the period between the date agreed for expiry of the lease and 31 March 1987 being taken into account. The provisions relating to 'permanent' allotment gardens shall apply with effect from the date on which the land-use plan becomes final."

26. Following the Federal Constitutional Court's judgment of 23 September 1992 a new law amending the Federal Allotment Gardens Act (Bundeskleingartenänderungsgesetz) came into force on 1 April 1994.

27. Section 5 (1) of this new law reads:

"The rent shall be not more than four times the rent for a lease granted in the same locality for a market garden producing fruit or vegetables, depending on the total area of the allotment. The areas allocated to amenities for common use shall be taken into account when the amount payable in rent for each allotment is calculated."

28. The transitional provisions of the law in question provide that in all cases where proceedings were pending on 1 November 1992 but where there has been no final judgment fixing the amount of rent payable, private lessors may retrospectively claim four times the rent for a lease granted in the same locality for a market garden producing fruit or vegetables, with effect from the first day of the month

following the commencement of the proceedings.

B. Procedural law

1. The Basic Law

29. Article 100 para. 1 of the Basic Law provides as follows:

"Where a court considers unconstitutional a law whose validity is relevant to its decision, the proceedings shall be stayed and the question submitted ... to the Federal Constitutional Court if the present Basic Law is considered to have been breached ..."

2. The Federal Constitutional Court Act

30. The composition and functioning of the Federal Constitutional Court are governed by the Federal Constitutional Court Act (Gesetz über das Bundesverfassungsgericht).

31. According to section 2 of the Act, the Federal Constitutional Court is constituted in two divisions, each composed of eight judges.

32. Sections 80 to 82 concern review of constitutionality in connection with a specific case (Konkrete Normenkontrolle), and are worded as follows:

Section 80

"1. Where the requirements of Article 100 para. 1 of the Basic Law are met, a court shall apply directly to the Federal Constitutional Court for a decision.

2. In the reasons for its application the court must state in what respect its decision depends on the validity of the legal provision in issue and what higher-ranking legal rule it is incompatible with. The application must be accompanied by the file.

3. The application by the court shall be independent of any complaint by a party to the proceedings that the legal provision in issue is null and void."

Section 81

"The Federal Constitutional Court shall determine only the point of law."

Section 82

"1. The provisions of sections 77 to 79 shall apply mutatis mutandis.

2. The constitutional organs named in section 77 may join the proceedings at any stage.

3. The Federal Constitutional Court shall also give the parties to the proceedings before the court which has made the application the opportunity to state their views; it shall invite them to participate in the oral proceedings and shall permit the legal representatives present to address it.

4. The Federal Constitutional Court may ask the highest federal courts of justice or the highest Land courts to state: how and on the basis of what considerations they have hitherto interpreted the Basic Law with regard to the point in question; whether, and if so how, they have applied the legal provision in

issue in previous cases; and what related points of law, in their opinion, remain to be determined. It may also ask them for their views on a point of law that has a bearing on its decision. The Federal Constitutional Court shall communicate these submissions to the bodies authorised to state their views."

33. Sections 77 to 79, to which section 82 refers, provide:

Section 77

"The Federal Constitutional Court must give the Bundestag, the Bundesrat, the Federal Government and in addition, where there are differences of opinion concerning the validity of federal law, the Land Governments or, where there are differences of opinion concerning the validity of a provision of Land law, the Parliament and Government of the Land in which that provision was promulgated, the opportunity to state their views [on the matter] within a specified period."

Section 78

"Where the Federal Constitutional Court comes to the conclusion that a provision of federal law is incompatible with the Basic Law or that a provision of Land law is incompatible with the Basic Law or any other part of federal law, it shall declare that provision null and void. Where further parts of the same statute are, for the same reasons, incompatible with the Basic Law or any other part of federal law, the Federal Constitutional Court may likewise declare them null and void."

Section 79

"...

2. In all other respects, subject to the provisions of section 95 (2) or a specific statutory provision, final decisions based on a rule declared null and void pursuant to section 78 shall remain unaffected. Such decisions shall not be enforceable ..."

PROCEEDINGS BEFORE THE COMMISSION

34. Mrs Probstmeier applied to the Commission on 9 June 1992. Relying on Article 6 para. 1 of the Convention (art. 6-1) and Article 14 taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1), she complained of the length of the proceedings in the Federal Constitutional Court and of a discriminatory infringement of her right of property.

35. On 28 June 1994 and 26 June 1995 the Commission declared the application (no. 20950/92) admissible as regards the complaint relating to the length of the proceedings in the Federal Constitutional Court and inadmissible as regards the remainder.

In its report of 25 June 1996 (Article 31) (art. 31) it expressed the opinion by twenty-four votes to five that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1). The full text of the Commission's opinion is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-IV), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

36. In their memorial the Government asked the Court to hold
"that the right of the applicant under Article 6 para. 1 of the Convention (art. 6-1) to a decision within a reasonable time has not been violated".

37. The applicant asked the Court
"to hold that there has been a violation of Article 6 para. 1 of the Convention (art. 6-1) and that Germany must pay the applicant DEM 60,168.43 as compensation for pecuniary damage and DEM 8,882.68 for costs and expenses".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

38. The applicant submitted that the length of the proceedings in the Federal Constitutional Court had exceeded the reasonable time referred to in Article 6 para. 1 of the Convention (art. 6-1), which provides:

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

39. The Government contested this argument, whereas the Commission accepted it.

40. The Court must first determine whether Article 6 para. 1 (art. 6-1) is applicable.

A. Applicability of Article 6 para. 1 (art. 6-1)

41. The Government submitted that there were substantial differences between an individual complaint of unconstitutionality (Verfassungsbeschwerde), as in the Süßmann case (see the Süßmann v. Germany judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV), and an objective review of the constitutionality of legislation carried out in connection with an application for a preliminary ruling, as in the present case. Even though the proceedings in the Federal Constitutional Court were linked to proceedings relating to "civil rights and obligations", they had a different purpose, since they concerned the constitutionality of certain provisions of the Allotment Gardens Act. To link a decision given in response to an application for a preliminary ruling with proceedings in the ordinary courts was to disregard the special function of the Federal Constitutional Court and the specific features of the type of procedure in question. Moreover, in view of the importance of such a decision, which had the force of law, the Federal Constitutional Court could not be required to give judgment within a precise time-limit.

42. The applicant maintained that, according to the criteria established by the Court's case-law, the applicability of Article 6 para. 1 of the Convention (art. 6-1) to the proceedings in issue was not open to doubt. There was evidently a very close link between proceedings in the ordinary courts and a review of constitutionality arising from those proceedings (Konkrete Normenkontrolle), where the decision of the Federal Constitutional Court was always decisive for the outcome.

43. The Commission, which referred to the Court's case-law, also

concluded that Article 6 para. 1 (art. 6-1) was applicable to the proceedings in question.

44. As the Court stated in the Süßmann judgment, it is fully aware of the special role and status of a constitutional court, which, in those States that have made provision for a right of individual petition, affords additional legal protection to citizens at national level in respect of their fundamental rights guaranteed in the Constitution (see the aforementioned Süßmann judgment, p. 1170, para. 37).

45. The Court observes that it has already had to consider on a number of occasions the question of the applicability of Article 6 para. 1 (art. 6-1) to proceedings before a constitutional court.

46. In accordance with its established case-law on the question (see, most recently, the Ruiz-Mateos v. Spain judgment of 23 June 1993, Series A no. 262, p. 19, para. 35, and the aforementioned Süßmann judgment, p. 1171, para. 39), the relevant criterion for determining whether proceedings before a constitutional court should be taken into account in order to establish whether the overall length of proceedings was reasonable is the question whether the result of those proceedings may influence the outcome of the proceedings in the ordinary courts.

47. A particular feature of the present case is that it concerns only the length of the proceedings in the Federal Constitutional Court, as in the Süßmann case, because before the Commission the applicant complained of the length of those proceedings only (see paragraph 26 of the Commission's report). On the other hand, the Süßmann case concerned an individual constitutional appeal, whereas in this case the Federal Court of Justice asked the Federal Constitutional Court to give a ruling on the constitutionality of legislative provisions. In that respect, it therefore more closely resembles the Ruiz-Mateos case (see the aforementioned Ruiz-Mateos judgment, p. 12, para. 15, and p. 14, para. 22).

48. The Court reiterates that proceedings come within the scope of Article 6 para. 1 (art. 6-1), even if they are conducted before a constitutional court, where their outcome is decisive for civil rights and obligations (see the aforementioned Süßmann judgment, p. 1171, para. 41).

49. In the present case the applicant had terminated the lease with the Munich Allotment Garden Association and had sought a possession order against it, with a view to recovering her land (see paragraphs 10 and 11 above). The dispute before the civil courts therefore concerned the applicant's right of property, which is certainly a civil right within the meaning of Article 6 (art. 6) (see, *inter alia*, the Zander v. Sweden judgment of 25 November 1993, Series A no. 279-B, p. 40, para. 27). Moreover, that has not been disputed.

50. The Federal Court of Justice subsequently referred the case to the Federal Constitutional Court for a ruling on the constitutionality of the impugned provisions of the Federal Allotment Gardens Act (see paragraph 19 above).

51. Under German law a court must stay proceedings and refer a case to the Federal Constitutional Court if it considers a law whose validity has a bearing on its decision to be unconstitutional (Article 100 para. 1 of the Basic Law, see paragraph 29 above). In the reasons for its application it must state in what respect the outcome of the proceedings before it depends on the validity of the legislative provision in issue (section 80 (2) of the Federal Constitutional Court Act, see paragraph 32 above).

52. In the present case the proceedings in the Federal Constitutional Court were therefore closely linked to those in the civil courts; not only was the former's decision directly decisive for the applicant's civil right, but in addition, as the proceedings arose from an application for a preliminary ruling, the Federal Court of Justice was obliged to wait for the Federal Constitutional Court's decision before it could give judgment.

53. It follows that Article 6 para. 1 (art. 6-1) is applicable to the proceedings in issue.

B. Compliance with Article 6 para. 1 (art. 6-1)

1. Period to be taken into consideration

54. The period to be taken into consideration is only the time taken for the proceedings in the Federal Constitutional Court, which began on 24 May 1985 when the Federal Court of Justice made its application to the Federal Constitutional Court and ended on 23 September 1992 when the latter gave judgment. It therefore lasted seven years and four months.

2. Applicable criteria

55. The reasonableness of the length of proceedings must be assessed in the light of the circumstances of each case and having regard in particular to the complexity of the case and the conduct of the parties and the relevant authorities (see the aforementioned Süßmann judgment, pp. 1172-73, para. 48).

(a) Complexity of the case

56. In the applicant's submission, the case was not particularly complex; it would have sufficed for the Federal Constitutional Court to transpose to the present case the reservations it had previously expressed in a 1979 judgment about the constitutionality of the provisions of the Federal Allotment Gardens Act establishing a rent freeze (see paragraphs 13 and 14 above).

57. The Government maintained that the case was complex because after the Federal Constitutional Court's 1979 judgment Parliament had promulgated in 1983 an entirely new Allotment Gardens Act, thus creating a new basis for legal issues relating thereto (see paragraph 16 above).

58. The Court, like the Commission, considers that the case was undoubtedly complex. The fact that the Federal Constitutional Court decided of its own motion to extend the review of constitutionality to another provision of the Allotment Gardens Act, ruling on that issue in its judgment of 23 September 1992, in which it set out its reasons at some length, attests to the legal difficulty of the issues raised. The scope of its judgment thus went well beyond the present case. Moreover, the Federal Constitutional Court had to obtain the observations of various authorities before it gave its decision (see paragraph 22 above).

(b) Conduct of the applicant

59. Like the Commission, the Court notes that the applicant was not responsible for any delay to the proceedings. Moreover, no assertion to that effect was made by the Government.

(c) Conduct of the Federal Constitutional Court

60. Mrs Probstmeier submitted that proceedings which had lasted seven years far exceeded a "reasonable time" within the meaning of Article 6 para. 1 of the Convention (art. 6-1) and that it was for the

State to ensure that the Federal Constitutional Court was not burdened with an excessive caseload. Furthermore, the issues raised affected about one million tenants and some one hundred thousand private lessors.

61. The Government emphasised the Federal Constitutional Court's excessive caseload since the end of the 1970s, which had obliged it to deal with more urgent cases, of considerable political and social importance, some of which concerned the after-effects of German reunification. Numerous efforts, they added, had already been made to amend the Federal Constitutional Court Act and lighten the Federal Constitutional Court's burden. However, the possibilities for structural changes were objectively limited if the Federal Constitutional Court were to preserve its role as guardian of the Constitution and fundamental rights.

62. In the Commission's view the length of the proceedings in the present case had been excessive, particularly in view of the special importance of the case for other landlords in the same situation.

63. The Court observes that it has repeatedly held that Article 6 para. 1 (art. 6-1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time (see the aforementioned *Süßmann* judgment, p. 1174, para. 55). Although this obligation cannot be construed in the same way for a constitutional court as for an ordinary court, it is for the European Court in the last instance to verify that it has been complied with, having regard to the particular circumstances of each case and the criteria laid down in its case-law.

64. Moreover, a temporary backlog of court business does not entail a Contracting State's international liability if it takes appropriate remedial action with the requisite promptness (see the *Unión Alimentaria Sanders S.A. v. Spain* judgment of 7 July 1989, Series A no. 157, p. 15, para. 40). However, according to the Court's established case-law, a chronic overload, like the one the Federal Constitutional Court has laboured under since the end of the 1970s, cannot justify an excessive length of proceedings.

65. In the present case the Federal Court of Justice applied to the Federal Constitutional Court for a ruling in May 1985 and the proceedings remained pending there for more than seven years (see paragraphs 19 and 22 above).

66. Unlike the position in the *Süßmann* case, German reunification can have played only a secondary role in the present case because when the reunification treaty was signed, on 3 October 1990, the proceedings had been pending in the Federal Constitutional Court for more than five years.

67. Accordingly, despite the complexity of the case, the length of the constitutional proceedings cannot satisfy the reasonable time requirement laid down in Article 6 para. 1 of the Convention (art. 6-1).

(d) Conclusion

68. In the light of all the circumstances of the case, the Court concludes that the reasonable time required by Article 6 para. 1 (art. 6-1) was exceeded, and that the provision (art. 6-1) in question was therefore breached in that respect.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

69. Under Article 50 of the Convention (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

70. Mrs Probstmeier sought compensation for pecuniary damage in the sum of 60,168.43 German marks (DEM), corresponding to a loss of interest for the period from 1988 to 1994. She asserted that the length of the proceedings in the Federal Constitutional Court had prevented her from applying to the civil courts at the appropriate time for a rent increase, as she was entitled to do under the transitional provisions of the new Allotment Gardens Act 1994 (see paragraph 28 above).

71. The Government maintained that there was no causal connection between any violation which might be found on account of the length of the proceedings and the alleged pecuniary loss. The proceedings in the Federal Court of Justice concerned only Mrs Probstmeier's application for a possession order against the tenants, not a request for the rent to be increased (see paragraphs 11-18 above). That was why only the question of the constitutionality of section 16 of the Federal Allotment Gardens Act, relating to the duration of leases, had been referred to the Federal Constitutional Court (see paragraph 19 above). Furthermore, there was no causal connection either between the Federal Court of Justice's initial application for a preliminary ruling and the fact that the Federal Constitutional Court extended the review of constitutionality of its own motion or between the latter's judgment and the promulgation of a new law enabling private lessors to obtain higher rents retrospectively (see paragraph 28 above).

72. The Delegate of the Commission did not exclude the possibility that the excessive length of the proceedings could have caused the applicant pecuniary loss and asked the Court to award her financial compensation on an equitable basis.

73. The Court notes that in choosing to extend the review of constitutionality to section 5 of the Federal Allotment Gardens Act the Federal Constitutional Court must have considered that the provisions concerning the duration of leases and those concerning rent levels were linked.

Even though Parliament enjoyed a measure of discretion over details (*Gestaltungsbefugnis*) as regards promulgation of the new law following the Federal Constitutional Court's judgment, the Court considers it reasonable to conclude that, as a result of the delay, in breach of Article 6 para. 1 (art. 6-1), found in the present judgment, the applicant suffered a loss of opportunities which warrants an award of just satisfaction in respect of pecuniary damage (see, in particular, *mutatis mutandis*, the *Martins Moreira v. Portugal* judgment of 26 October 1988, Series A no. 143, pp. 22-23, para. 65, and the *Silva Pontes v. Portugal* judgment of 23 March 1994, Series A no. 286-A, p. 16, para. 46).

The damage sustained cannot be precisely calculated. Assessing it as a whole and on an equitable basis, as required by Article 50 (art. 50), the Court awards Mrs Probstmeier compensation in the sum of DEM 15,000.

B. Costs and expenses

74. The applicant further claimed reimbursement of her costs before

the Convention institutions, which she put at DEM 8,882.68, including value-added tax (VAT). Her lawyer's fees are calculated on the basis of the value of the subject-matter, in accordance with the regulations on lawyers' fees (Bundesrechtsanwaltsgebührenordnung - BRAGO) applicable in Germany.

75. The Government argued that the amount claimed for lawyers' fees was incorrectly calculated because it was based on pecuniary damage which had not been established.

76. The Delegate of the Commission submitted that the amounts claimed were reasonable.

77. The Court reiterates that it does not consider itself bound by domestic scales and practices, although it may derive some assistance from them.

On the basis of the information in its possession and its case-law on this question, it considers the amount claimed by the applicant reasonable and awards it in full.

C. Default interest

78. According to the information available to the Court, the statutory rate of interest applicable in Germany at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 6 para. 1 of the Convention (art. 6-1) is applicable in the case;
2. Holds that there has been a breach of Article 6 para. 1 (art. 6-1);
3. Holds that the respondent State is to pay the applicant, within three months, 15,000 (fifteen thousand) German marks for pecuniary damage and 8,882.68 German marks (eight thousand eight hundred and eighty-two marks and sixty-eight pfennigs), including VAT, for costs and expenses;
4. Holds that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;
5. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 July 1997.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the concurring opinion of Mr Foighel is annexed to this judgment.

Initialled: R. R.

Initialled: H. P.

CONCURRING OPINION OF JUDGE FOIGHEL

The applicable criteria for evaluating the reasonableness of the

length of proceedings for the purposes of Article 6 para. 1 (art. 6-1) are clearly stated in paragraph 55, where the Court says that reasonableness must be "assessed in the light of the circumstances of each case and having regard in particular to the complexity of the case and the conduct of the parties and the relevant authorities".

This is further developed in paragraph 63, where it is stated that the obligation in Article 6 para. 1 (art. 6-1) "... cannot be construed in the same way for a constitutional court as for an ordinary court..."

I find this formulation unfortunate. While it is obvious that some constitutional cases may be more complex than some non-constitutional cases, the mere fact that a case is heard by a constitutional court cannot by itself change the criteria mentioned in paragraph 55. This is further underlined by the fact that in some of the member States there is no Constitutional Court.

However, the majority have given me to understand that the formulation in paragraph 63 is not intended to change or add anything to the Court's long-standing jurisprudence.