CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 61603/00
by Waltraud STORCK
against Germany

The European Court of Human Rights (Third Section), sitting on 26 October 2004 as a Chamber composed of:

Mr I. CABRAL BARRETO, *President*,
Mr G. RESS,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs A. GYULUMYAN, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 15 May 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Waltraud Storck, is a German national who was born on 30 August 1958 and lives in Niederselters (Germany). She was represented before the Court by Mr G. Rixe, a lawyer practising in Bielefeld. The respondent Government were represented by Mr K. Stoltenberg, *Ministerialdirigent*.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background to the case

The case concerns the applicant's placement in various psychiatric institutions, her stay in different hospitals and her medical treatment.

The applicant claimed that she had been placed several times in different psychiatric hospitals against her will at the demand of her father because of family conflicts, although she had been good at school. She claimed that she had been ill-treated, crammed with psychotropics and neuroleptics, and attached to beds, chairs and radiators. When she had tried to flee from one of the institutions, she had been brought back by the police in handcuffs. She claimed that the different stays in psychiatric institutions and the medicaments she had been forced to swallow had ruined her physically and psychologically. She had become ill with poliomyelitis when she was three years old, and the medicaments she had received had been counter-indicated and had caused her to develop a post-poliomyelitis syndrome. From 1980 to 1991/1992, she had temporarily lost the ability to speak.

She is today 100 % handicapped and receives an invalidity pension. She also claimed to be suffering from significant pain, especially in her arms and legs and her vertebral column.

2. The placement of the applicant in various psychiatric institutions and her stay in different hospitals

a. The applicant's placement in different psychiatric institutions

From January 1974 to May 1974 (the applicant was then 15 years old), and from October 1974 to January 1975 (she was then 16 years old), the applicant was placed in the department for children and youth psychiatry of the clinic of the Johann Wolfgang Goethe University of Frankfurt / Main for seven months at her father's demand.

From 29 July 1977 (she was then 18 years old) to 5 April 1979, she had been placed in a private psychiatric institution, the clinic of Dr Heines in

Bremen, at her father's demand. Her father believed her to be suffering from a psychosis. The applicant's mother had suffered from a paranoid-hallucinatory psychosis.

The applicant, who had at that time attained majority, had not been placed under tutelage, had never signed a declaration that she consented to her placement in the institution, and there had been no judicial decision authorising her detention in a psychiatric hospital.

From 5 April 1979 to 21 May 1980, she had been placed in a psychiatric hospital in Gießen. She claimed that she had accidentally been saved from having to stay on there by a patient in the hospital, who accommodated her.

From 21 January to 20 April 1981, she once more received medical treatment in the clinic of Dr Heines, having lost, at that moment, her ability to speak and, according to the doctors, showed signs of autism.

b. The applicant's stays in different hospitals and clinics

On 7 May 1991 the applicant received medical treatment in the clinic for neurology and psychiatry of Dr Horst Schmidt.

From 3 September 1991 to 28 July 1992 the applicant received medical treatment (*stationäre Behandlung*) in the university clinic for psychosomatic medicine and psychotherapy in Mainz, where she regained her ability to speak.

From 22 October to 21 December 1992 the applicant received medical treatment in the department for orthopaedics in a clinic in Frankfurt / Main, and from 4 February to 18 March 1993, she was treated in the department for orthopaedics in a clinic in Isny.

On 18 April 1994 Dr Lempp, a psychiatrist and member of the investigating committee of the Federal Government, prepared an expert report on the applicant's demand. He indicated that "at no point in time, the applicant suffered from a psychosis from the domain of schizophrenia" ("*zu keinem Zeitpunkt lag eine Psychose aus dem schizophrenen Formenkreis vor*") and that her excessive behaviour resulted especially from conflicts with her family.

On 6 October 1999 Dr Köttgen, a psychiatrist, rendered a second expert opinion, again on the applicant's demand. Confirming the findings of Dr Lempp, she considered that the applicant had never suffered from children's schizophrenia, but that she was, at the relevant time, in the midst of a puberty crisis. Because of the wrong diagnosis made at the relevant time, she had received medicaments for many years, the negative consequences of which had already then been known. In particular, due to the applicant's poliomyelitis, she would have had to be treated with the greatest caution possible. In this respect, the situation in the clinic of Dr Heines seemed to have been particularly dramatic: deprivation of liberty without a judicial decision, absence of a legal basis for the detention, a dosage of the medicaments which was too high and was used in order to

question the applicant, as well as methods belonging to "black pedagogy" (*schwarze Pädagogik*).

3. The proceedings brought by the applicant in the national courts

a. Proceedings in the Bremen courts

On 12 February 1997 the applicant, based on the certification of Dr Lempp, brought a motion for legal aid and an action for damages against the clinic of Dr Heines for her detention from 29 July 1977 to 5 April 1979, and from 21 January 1981 to 20 April 1981 in the Bremen Regional Court. She claimed that, on the one hand, her detention had been illegal under German law and, on the other hand, that the medical treatment she received was counter-indicated because of her poliomyelitis. Her detention by force and the medical treatment she had received had ruined both her psychological and physical health.

It was only at that time, on 24 February 1997, that the applicant had access to her medical file of the clinic of Dr Heines, despite her previous and repeated requests.

i. The judgment of the Bremen Regional Court of 9 July 1998

On 9 July 1998 the Bremen Regional Court, after a hearing, allowed the applicant's action for damages, as her detention had been illegal under German law.

It found that the applicant, who had attained majority, had not been placed under guardianship, and her detention had not been ordered by a district court as provided by the Act of 16 October 1962 of the *Land* Bremen on the detention of persons being mentally ill, persons of unsound mind and drug addicts (*Gesetz über die Unterbringung von Geisteskranken, Geistesschwachen und Süchtigen – Unterbringungsgesetz* – see relevant domestic law and practice, below).

According to the Regional Court, such detention would only have been legal if the applicant had given her consent, which had not been the case. On the one hand, she had not signed the admission form filled in on the day of her admission to the clinic. On the other hand, she had not consented tacitly (*konkludente Einwilligung*). The mere fact that she came to the clinic, accompanied by her father, did not suffice to establish a valid consent (*wirksame Einwilligung*). According to the submissions of the private clinic, it could not be excluded that the applicant was not in a position to realise the importance and the consequences of the detention ("*es ist (...) vielmehr nicht auszuschließen, dass die Klägerin zum damaligen Zeitpunkt die Bedeutung und Tragweite der Unterbringung nicht erkennen konnte*"). This resulted, in particular, from the fact that the applicant had been treated with very strong medication since the time of her arrival.

On that point, the Regional Court concluded as follows:

> "Even if one assumed an initial consent by the applicant, it would have lapsed by the uncontested attempts of the applicant to flee and the necessity to fetter her. At these moments, which have not been further specified by the defendant, it would, at the latest, have been necessary to obtain a judicial order."
>
> (« *selbst wenn man doch von einer anfänglichen Einwilligung der Klägerin ausgehen wollte, wäre diese durch die unstreitig erfolgten Ausbruchsversuche der Klägerin und die erforderlich gewordenen Fesselungen hinfällig geworden. Spätestens zu diesen, von der Beklagten nicht näher vorgetragenen Zeitpunkten, wäre die Einholung einer gerichtlichen Anordnung erforderlich gewesen.* »)

The Regional Court found that also for the second period of the applicant's placement in the psychiatric hospital (from 21 January to 20 April 1981), she had not consented to her detention, having regard to the facts that she showed signs of autism and suffered a temporary loss of speech. Therefore, a judicial order would also have been necessary for this period.

As the applicant, consequently, was, in any event, entitled to damages, the Regional Court did not examine the question whether the medical treatment had been adequate or not.

The Regional Court also found that the applicant's claim was not time-barred. According to Section 852 § 1 of the Civil Code, the limitation period of three years for tort claims (*unerlaubte Handlung*) started running only when the victim had knowledge of the damage and of the person responsible for it. The court recalled that a victim could only be perceived to have that knowledge when he was in a position to bring an action for damages which had sufficient prospects of success, so that he could reasonably be expected to bring that action ("*dass ihm die Klage zuzumuten ist*"), having also regard to his state of health. The court referred to the case-law of the Federal Court of Justice (*Bundesgerichtshof*) on this subject.

Even if the applicant might already have been conscious of the fact that she had been placed in the clinic against her will, it was established that during her long stays in the psychiatric hospital, she had been treated with very strong medication. When she was released from the clinic, she still received medical treatment, and she had always been considered as being mentally ill. The applicant had also suffered from serious bodily deficits ("*schwere körperliche Ausfallerscheinungen*") and had, in particular, subsequently lost the ability to speak for more than eleven years (from 1980 to 1991/1992).

According to the Regional Court, it was not before the end of these medical treatments and after the presentation of Dr Lempp's expert report in 1994 – which, for the first time, had concluded that she had never suffered from schizophrenia – that she was sufficiently aware of her situation, of her possible right to damages and of the possibility to bring an action in court. Her motion to be granted legal aid lodged on 12 February 1997 interrupted the period of limitation. Her claim was therefore not time-barred.

ii. The judgment of the Bremen Court of Appeal of 22 December 2000

On 22 December 2000 the Bremen Court of Appeal, following the clinic's appeal, quashed the judgment of the Bremen Regional Court and dismissed the applicant's action.

The Court of Appeal disagreed with the Bremen Regional Court's findings that the applicant had illegally been deprived of her liberty during her stay and treatment in the clinic, since no evidence had been taken on this issue in dispute. The Court of Appeal noted that the applicant had conceded in the appeal proceedings that she had to a certain extent voluntarily ("*bedingt freiwillig*") consented to her stay in the clinic in 1981.

The Court of Appeal left open the question whether the applicant had a compensation claim in tort (*Schadensersatzanspruch aus unerlaubter Handlung*) due to an illegal deprivation of liberty or to damage caused to her body by her medical treatment, because such a claim would, in any event, be time-barred pursuant to Section 852 § 1 of the Civil Code. It considered that the applicant had always been conscious of the fact that she had been detained against her will, independent of the expert opinion rendered by Dr Lempp. Therefore, she had also been in a position to bring an action in court, despite her corporal deficiencies. In fact, according to the jurisprudence of the Federal Court of Justice, it sufficed to be aware of having suffered a damage, without conscience of the entirety of the damage being necessary.

Furthermore, the Court of Appeal found that the applicant did not have a compensation claim on a contractual basis either (*Schadensersatzansprüche aus Vertrag*) following her medical treatment. According to the Court of Appeal, the applicant had not sufficiently proved that she had expressly opposed her stay in the psychiatric hospital. Moreover, a contract between the applicant and the clinic on the applicant's medical treatment could also have been concluded tacitly (*konkludenter Vertrag*). It could not be assumed that this contract had been terminated by each of the applicant's attempts at escape, which were attributable to her illness ("*Es kann nicht angenommen werden, daß dieser konkludent geschlossene Vertrag durch jeden krankheitsbedingten Fluchtversuch beendet worden ist.*"). In fact, when the clinic prevented the applicant from fleeing, it complied with its duty of care ("*Fürsorgepflicht*") as, according to the expert opinion of Dr Rudolf, the applicant was seriously ill at that time and in need of medical treatment.

Independently of this aspect, the Court of Appeal pointed out that the clinic had disputed the applicant's assertion that she had been detained against her will, so that it remained unsettled whether this assertion was true ("*so daß offenbleibt, ob dieser Vortrag überhaupt zutrifft*").

Even if a contract concluded tacitly between the clinic and the applicant, who had at that time attained majority, could not be presumed, there was, in any event, a contract between the clinic and the applicant's father, concluded tacitly for the benefit of the applicant. This contract ran at least from 29 July 1977 to January 1978, when attempts were made to place her in a different psychiatric institution.

Furthermore, the Court of Appeal considered that the applicant's treatment had neither been erroneous, nor had the dosage of her medicaments been too high. The Court relied, in this respect, on the conclusive expert report of Dr Rudolf, a psychiatrist who had been appointed by the Court of Appeal, notwithstanding partly different conclusions reached in the expert reports of the Drs Lempp and Köttgen.

b. Proceedings in the Wiesbaden and Frankfurt courts

The applicant brought an action in the Wiesbaden Regional Court, claiming compensation for the damage due to the allegedly inadequate medical treatment during her stay in the clinic for neurology and psychiatry of Dr Horst Schmidt on 7 May 1991 and on 6 August 1991.

On 18 November 1996 the Wiesbaden Regional Court dismissed the applicant's challenge of an expert for bias.

On 24 February 1997 the Frankfurt / Main Court of Appeal dismissed the applicant's appeal against this decision.

By a judgment rendered on 29 May 1998, the Wiesbaden Regional Court dismissed her claim, as, according to the expert opinions obtained, there were not enough elements to prove that her post-poliomyelitis syndrome had not been treated correctly.

By a judgment rendered on 1 December 1998, the Frankfurt / Main Court of Appeal, following the applicant's appeal, upheld the judgment of the Regional Court.

c. Proceedings in the Gießen Regional Court

On 15 October 1998 the Gießen Regional Court suspended the compensation proceedings brought by the applicant against the operator of the psychiatric hospital in Gießen on the motion of both parties (*Ruhen des Verfahrens*).

d. Proceedings in the Mainz and Koblenz courts

The applicant also brought an action for damages in the Mainz Regional Court against the doctors who had treated her in the Mainz university clinic, claiming that she had been treated for psychosomatic symptoms, while she

had, in fact, been suffering from a post-poliomyelitis syndrome. As the applicant's medical file about her treatment in the clinic had temporarily disappeared, the clinic compiled a substitute file (*Notakte*) of some 100 pages, to which the applicant's lawyer was subsequently granted access.

By a judgment rendered on 5 May 2000, the Mainz Regional Court dismissed her claim, as, according to the expert report obtained, there had not been sufficient elements proving that her post-poliomyelitis syndrome had not been treated correctly.

During the appeal proceedings brought by the applicant in the Koblenz Court of Appeal, the original of the applicant's medical file was found, and the applicant's lawyer was granted access to it.

By a judgment rendered on 30 October 2001, the Koblenz Court of Appeal confirmed its own judgment by default of 15 May 2001, rendered for failure of the plaintiff to attend the hearing (*Versäumnisurteil*), which confirmed the judgment of the Regional Court of Mainz. Relying on three expert reports, the court found in particular that the applicant had neither intentionally nor negligently been subjected to a wrong medical treatment. It stated that the fact that one of the expert reports had been drawn up with the aid of assistant doctors did not prohibit its use in court, as the competent expert had taken full responsibility for the report and had been questioned in court. Even assuming that there had been an error in treatment, the applicant, on whom the burden of proof lay in this respect, did not show that there was a causal link between the error in treatment and the damage to her health. In particular, as there had, in any event, not been a serious error in treatment, it was not necessary to allow the applicant facilitations in complying with this burden of proof (*Beweiserleichterungen*).

e. Proceedings in the Frankfurt / Main Regional Court

By a letter dated 5 March 2001, the Frankfurt / Main Regional Court proposed a friendly settlement between the applicant and the Johann Wolfgang Goethe University Clinic in Frankfurt / Main. It stated that, in the light of the expert opinions given by the Drs Lempp and Köttgen, it was not clearly established whether there had been an error in the diagnosis or whether the diagnosis formulated reflected the standard of knowledge at the relevant time. The Regional Court proposed that the clinic pay a lump sum of 50,000 Deutschmarks (DEM) to the applicant.

At the hearing before the Frankfurt / Main Regional Court on 28 June 2001, the applicant and the Johann Wolfgang Goethe University Clinic agreed to a friendly settlement, which provided a payment of 20,000 DEM by the clinic to the applicant.

f. Proceedings before the Federal Court of Justice

The applicant lodged an appeal on points of law against the judgments of the Wiesbaden Regional Court of 29 May 1998 and the Frankfurt / Main Court of Appeal of 1 December 1998. On 15 June 1999 the Federal Court of Justice refused to grant the applicant legal aid. Thereupon, on 12 July 1999, the applicant withdrew her appeal.

The applicant also lodged an appeal on points of law to the Federal Court of Justice against the judgment of the Bremen Court of Appeal of 22 December 2000, and against the judgments of the Mainz Regional Court of 5 May 2000 and of the Koblenz Court of Appeal of 30 October 2001.

On 15 January 2002 the Federal Court of Justice refused to entertain the applicant's appeal against the judgment of the Bremen Court of Appeal.

On 5 February 2002 the five judges of the Federal Court of Justice competent to adjudicate the applicant's case refused to grant her legal aid with respect to her appeal on points of law against the judgments of the Mainz and Koblenz courts, arguing that the appeal did not have sufficient prospects of success. On 25 March 2002 the same five judges of the Federal Court of Justice dismissed the applicant's appeal against the judgments of the Mainz and Koblenz courts as inadmissible, the applicant not having submitted reasons for her appeal within the statutory time-limit.

g. Proceedings before the Federal Constitutional Court

On 2 February 2002 the applicant lodged a constitutional complaint against the decisions of the Bremen Court of Appeal of 22 December 2000 and the Federal Court of Justice of 15 January 2002. Quoting the relevant Articles of the Basic Law, she claimed that her rights to liberty and human dignity and her right to a fair trial had been infringed, and also argued that her physical integrity had been violated. She set out in detail on 35 pages the conditions of her stay in the various psychiatric institutions, the hearings in and the judgments rendered by the Bremen courts and explained why she considered that her rights had been infringed.

On 19 February 2002 the applicant lodged a constitutional complaint against the judgments of the Mainz Regional Court of 5 May 2000, of the Koblenz Court of Appeal of 30 October 2001 and the decision of the Federal Court of Justice of 5 February 2002 not to grant her legal aid. She claimed that her right to a fair trial had been violated and argued that she had been the victim of a wrong medical treatment. She set out on 22 pages how she had been treated in the Mainz University Clinic, her proceedings in the Mainz and Koblenz courts and why she considered that her said fundamental rights had been violated thereby.

On 6 March 2002 the Federal Constitutional Court refused to entertain the applicant's constitutional complaints. It argued that the complaints were not of fundamental importance ("*keine grundsätzliche Bedeutung*"), as the questions raised by the applicant's complaints had already been resolved in the jurisprudence of the Federal Constitutional Court. Furthermore, it was not the function of the Constitutional Court to deal with errors of law which the applicant claimed to have been committed by the competent civil courts. Her complaints did not disclose a violation of her fundamental rights.

B. Relevant domestic law and practice

1. Provisions on the detention of individuals in a psychiatric hospital

The Law of the *Land* Bremen on the detention of mentally insane, mentally deficient and drug addicts ("*Gesetz über die Unterbringung von Geisteskranken, Geistesschwachen und Süchtigen (Unterbringungsgesetz)*") of 16 October 1962, which was in force at the time of the applicant's stays in the clinic in Bremen, provided in its Section 1 § 2 that a detention within the meaning of that Law meant that the latter is effected contrary or without the will of the person concerned.

According to Section 2 of the said Law, a detention was legal if the person concerned, by his conduct towards himself or others, posed a serious threat to public safety or order, which could not be averted in a different way.

Pursuant to Section 3 of the said Law, the detention had to be ordered by the district court (*Amtsgericht*) on a written motion of the administrative authority.

Section 7 of the said Law provided that the motion for the detention of an individual had to be accompanied by an expert report rendered by the competent public health officer (*Amtsarzt*) or a specialist for mental illnesses on the mental disease of the person concerned, setting out whether and in how far the applicant, by his conduct towards himself or others, posed a serious threat to public safety or order.

According to Section 8 of the said Law, the district court was obliged to assign a counsel to the person concerned, if this was necessary for the protection of his interests.

Pursuant to Section 9 of the said Law, the court had to hear the person concerned before reaching its decision, if this was not likely to have negative effects on his state of health or a communication with him was not possible. In the latter event, the court had to assign him a guardian for the proceedings (*Verfahrenspfleger*), if he had not already been placed under tutelage.

An appeal (*sofortige Beschwerde*) lay against the district court's decision ordering the detention (Section 10 of the said Law). After a period of, in principle, one year, the district court had to decide whether the detention was to be continued; the continuance of the detention could only be ordered on the basis of a new medical expert report (Sections 15 and 16 of the said Law).

2. Provisions on measures of aid and protection of individuals detained in a psychiatric hospital

Section 34 of the Law on Measures of Aid and Protection with respect to Mental Disorders (*Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten*), which entered into force on 9 July 1979, established a commission in the *Land* Bremen, which visits, without prior notice and at least once a year, the psychiatric hospitals in which persons are detained following a court order in accordance with Section 17 of that Law. The task of this visiting commission is, in particular, to control whether the rights of the persons detained are respected, and to give patients the opportunity to raise complaints. Several years after the said Law entered into force, the visiting commission extended its visits to all psychiatric hospitals, beyond the strict wording of Section 34 of the said Law and with the consent of the institutions concerned.

3. Provisions of criminal law on deprivation of liberty

According to Section 239 § 1 of the Criminal Code, a person who deprives another person of his liberty shall be punished with imprisonment of up to five years or a fine. Pursuant to paragraph 3 of the said Section, a person who deprives another person of his liberty for more than one week or caused serious damage to the health of the victim by the detention itself or by an act committed during that detention, shall be punished with a prison sentence of one year to ten years.

4. Provisions of civil law on compensation claims

Pursuant to Section 823 § 1 of the Civil Code, a person who, intentionally or negligently, injures the body or causes damage to the health of another person or deprives that person of his liberty, is liable to compensate the victim for the damage caused thereby. According to Section 823 § 2 of the Civil Code, the same obligation to compensate the victim rests with a person who, intentionally or negligently, violates a law designed for the protection of others, as, for example, Section 239 of the Criminal Code. Under Section 847 § 1 of the Civil Code (in its version in force until 31 July 2002 and applicable to damages caused before that date), damages for pain and suffering can be claimed in the case of an injury to the body or the health, or in the case of a deprivation of liberty.

COMPLAINTS

The applicant complained under Article 5 of the Convention that her placement in different psychiatric institutions against her will was illegal. She also claimed that due to the interpretation of the relevant provisions of national law by the courts and the assessment of the expert evidence by them, she had not had a fair trial as guaranteed by Article 6 of the Convention.

PROCEEDINGS BEFORE THE COURT

On 15 October 2002 a committee of three judges of the Court, pursuant to Article 28 of the Convention, had declared the application inadmissible and rejected it in accordance with Article 35 § 4 of the Convention.

In several letters to the Court, in particular a letter dated 5 November 2002, the applicant had asked the Court to re-open the proceedings.

On 28 January 2003 the Court decided to re-open the proceedings (see, *mutatis mutandis*, *Appietto v. France* (dec.), no. 56927/00, 21 February 2002).

THE LAW

The applicant complained that her placement in different psychiatric hospitals against her will constituted a deprivation of her liberty and amounted to a breach of Article 5 of the Convention, the relevant part of which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (...)
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (...)
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

She submitted that, in particular due to the interpretation of the relevant provisions of national law by the courts and the assessment of the expert evidence by them, she did not have a fair trial within the meaning of Article 6 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

In the Court's view, the applicant, who complained not only that she had been deprived of her liberty in the different psychiatric institutions, but also about the medical treatment she received there against her will, can be taken to have claimed, in substance, that there had also been an interference with her private life as guaranteed by Article 8 of the Convention, which, in so far as relevant, provides:

> "1. Everyone has the right to respect for his private (...) life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The Government's objections

1. Res iudicata

The Government contended that, in the present case, the Court was not competent to render a decision on the merits. On 15 October 2002 a committee of three judges had declared the application inadmissible. According to Article 28, second sentence, of the Convention and Rule 53 § 2, second sentence, of the Rules of Court, this decision shall be final. Consequently, a re-opening of the proceedings afterwards, as was decided by the Court on 28 January 2003, is expressly excluded by these provisions. In particular, Article 28 of the Convention did not contain a provision which was comparable to Article 37 § 2 of the Convention.

The applicant did not comment on this issue.

The Court concedes that neither the Convention, nor the Rules of Court expressly provide a re-opening of proceedings before the Court (see *Karel Des Fours Walderode v. Czech Republic* (dec.), no. 40057/98, ECHR 2004-, 18 May 2004; *Harrach v. Czech Republic* (dec.), no. 77532/01, 18 May 2004).

However, in exceptional circumstances, where there has been a manifest error of fact or in the assessment of the relevant admissibility requirements, the Court does have, in the interest of justice, the inherent power to re-open a case which had been declared inadmissible and to rectify those errors (see, *inter alia*, *V.S. and T.H. v. the Czech Republic*, no. 26347/95, Commission decision of 10 September 1996; *Appietto v. France* (dec.), no. 56927/00, § 8, 26 February 2002; *Karel Des Fours Walderode*, cited above; *Harrach*, cited above).

The Government's objection must therefore be dismissed.

2. Non-exhaustion of domestic remedies

The Government contended that the applicant has not exhausted domestic remedies as required by Article 35 § 1 of the Convention in any of the proceedings brought by her in the German civil courts.

The applicant contested this view.

a. Proceedings in the Bremen courts

With respect to this set of proceedings, the Government took the view that the applicant, even though she had lodged a constitutional complaint against the judgments of the Bremen Regional Court, the Bremen Court of Appeal and the Federal Court of Justice, did not comply with the requirement of exhaustion of domestic remedies. They pointed out that the Federal Constitutional Court had refused to entertain the applicant's constitutional complaint, as she had not substantiated in what way she considered the said decisions of the civil courts to violate her rights guaranteed by the Basic Law. Her constitutional complaint had therefore been inadmissible. Furthermore, the applicant had not complained about a violation of her physical integrity before the Federal Constitutional Court.

The applicant disputed this view. She claimed that she had expressly invoked the provisions of the Basic Law guaranteeing her liberty, human dignity, physical integrity and a fair trial in court, and had laid out in detail the facts underlying her complaints.

The Court reiterates that, whereas Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be brought subsequently before the Court should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, *inter alia*, *Cardot v. France*, judgment of

19 March 1991, Series A no. 200, p. 18, § 34; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1210 et seq., §§ 66, 69; *Janssen v. Germany*, no. 23959/94, Commission decision of 9 September 1998).

The Court notes that the applicant, in her submissions to the Federal Constitutional Court, claimed that her right to liberty and human dignity, her right to physical integrity and her right to a fair trial with respect to errors in her medical treatment had been violated. She set out in detail on 35 pages the conditions of her stay in different psychiatric institutions and the outcome of the various court proceedings initiated by her, arguing why she considered her said rights under the Basic Law to be violated. The Court is therefore satisfied that the applicant has raised the substance of her complaint before the Federal Constitutional Court.

Consequently, the Court considers that the applicant has exhausted domestic remedies as required by Article 35 § 1 of the Convention in respect of this set of proceedings.

b. Proceedings in the Wiesbaden and Frankfurt / Main courts

The Government contended that the applicant failed to exhaust domestic remedies also in respect of her complaints concerning the proceedings before the Wiesbaden Regional Court and the Frankfurt / Main Court of Appeal. She did not lodge a constitutional complaint against the decision of the Frankfurt / Main Court of Appeal of 24 February 1997 dismissing her challenge of an expert for bias. Nor did the applicant, having withdrawn her appeal on points of law, obtain a judgment of the Federal Court of Justice and the Federal Constitutional Court with respect to the contested taking of evidence.

The applicant contested this view. She pointed out that the Federal Court of Justice had rejected her motion to be granted legal aid. Therefore, her appeal on points of law had no prospects of success. The same was true for a complaint to the Federal Constitutional Court, as was proved by that court's decision in further proceedings brought by the applicant. She was consequently not obliged to exhaust these ineffective remedies.

The Court recalls that the requirement of exhaustion of domestic remedies is intended to provide national authorities with the opportunity of remedying violations alleged by an applicant (see, *inter alia*, *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 52, § 38; *Tomé Mota v. Portugal* (dec.), no. 32082/96, ECHR 1999-IX). While recognising the principle that an applicant is excused from pursuing domestic remedies which are bound to fail, the Court nevertheless finds that in such cases an applicant has to show either by providing relevant court decisions or by presenting other suitable evidence that a remedy available to him would in fact have been of no avail. The Court further observes that the existence of mere doubt as to the chances of success of a domestic remedy does not

exempt an applicant from the obligation to exhaust it (see, *inter alia*, *T.A. and Others v. Germany* (dec.), no. 44911/98, 19 January 1999; *Tomé Mota*, cited above).

The Court notes that the decision of the Federal Constitutional Court refusing to entertain the applicant's constitutional complaint following her proceedings in the Bremen courts was rendered on 6 March 2003, that is, long after the applicant had withdrawn her appeal on points of law in the present proceedings on 12 July 1999. In addition to that, the Court finds that the present proceedings are based on factual situations which proved to be different. Therefore, even assuming that an appeal on points of law to the Federal Court of Justice could be regarded as an ineffective remedy in the special circumstances of the case, the Court cannot accept that a constitutional complaint would have been *prima facie* ineffective.

The Court concludes that in the present case no special circumstances existed which absolved the applicant, according to the generally recognised rules of international law, from lodging a complaint to the Federal Constitutional Court.

It follows that the objection of non-exhaustion of domestic remedies raised by the Government must be allowed with respect to these proceedings.

c. Proceedings in the Gießen Regional Court

The Government submitted that the applicant, with respect to these proceedings, has not exhausted domestic remedies, as the proceedings brought by her in the Gießen Regional Court, which had been stayed on the motion of the parties to the proceedings, were still pending at first instance.

The applicant maintained that, with all her previous court proceedings having been of no avail, she had not been obliged to exhaust further ineffective remedies.

The Court, referring to its constant case law cited above, notes that the present proceedings are based on factual situations which proved to be different from those which are the subject of her previous proceedings. It finds, therefore, that in the present case, no special circumstances exempted the applicant from pursuing domestic remedies, thereby availing the domestic courts the opportunity to remedy alleged violations of her fundamental rights.

It follows that the objection of non-exhaustion of domestic remedies raised by the Government must be allowed with respect to this set of proceedings.

d. Proceedings in the Mainz and Koblenz courts

With respect to these proceedings, the Government submitted that the applicant did not challenge as biased the expert in the proceedings before the Mainz Regional Court. They further pointed out that the Federal Court of Justice, on 25 March 2002, dismissed the applicant's appeal on points of

law as inadmissible, as the applicant had not reasoned the appeal within the prescribed time-limit. They also underlined that the applicant failed to lodge a constitutional complaint against this decision. Her constitutional complaint of 18 February 2002 was only directed against the decisions of the Mainz Regional Court, of the Koblenz Court of Appeal and of the Federal Court of Justice of 5 February 2002 refusing to grant the applicant legal aid. Furthermore, the Federal Constitutional Court had refused to entertain the applicant's constitutional complaint, as the applicant had not sufficiently substantiated the complaint, which therefore was inadmissible.

The applicant submitted that she had not challenged the expert in the proceedings before the Mainz Regional Court as biased, because she had only learnt in 2001 that there were reasons justifying such a motion. She maintained that after the refusal of the Federal Court of Justice to grant her legal aid, she did not have to pursue her appeal on points of law or lodge a constitutional complaint also against the decision of the Federal Court of Justice on the merits. None of these remedies had any prospects of success; they were therefore ineffective.

With respect to the fact that the applicant did not challenge the expert in the Mainz Regional Court as biased, the Court recalls that under Article 35 § 1 of the Convention, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Akdivar and Others*, cited above, p. 1210, § 66). The Court notes that the applicant, in substance, complained about the medical competence of the expert in question, the alleged lack of diligence with which he drew up his report and the way in which the Regional Court assessed the expert report and further relevant evidence. It is therefore not convinced that the applicant, at this stage of the proceedings, considered the expert to be biased. Consequently, a motion challenging him for bias would, in any event, not have been a remedy capable of providing redress in respect of the breaches of fundamental rights alleged.

The Court further recalls that, as stated above, an applicant is only excused from pursuing a domestic remedy available to him if he can present suitable evidence that this remedy would in fact, and beyond reasonable doubt, have been of no avail (see, *inter alia*, *T.A. and Others*, cited above; *Tomé Mota*, cited above).

The Court notes that an appeal on points of law to the Federal Court of Justice is one of the remedies which should, in principle, be exhausted in order to comply with Article 35 § 1 of the Convention. However, in the present case, by decision of 5 February 2002 the five judges of the Federal Court of Justice who were also competent to adjudicate the applicant's case refused to grant the applicant legal aid, arguing that her appeal had no reasonable prospects of success. The Court notes that appeals to the Federal Court of Justice, before which the applicant is obliged to be represented by a lawyer, can succeed only on points of law. In the light of the reasons given by

the Federal Court of Justice for refusing to grant the applicant legal aid, it considers that the applicant cannot be accused of having failed to exhaust domestic remedies by not continuing with the appeal proceedings after the Federal Court of Justice's decision of 5 February 2002 (see, *mutatis mutandis*, *Gnahoré v. France*, no. 40031/98, §§ 46-48, ECHR 2000-IX).

The Court underlines that these particular circumstances did not exempt the applicant from lodging a complaint with the Federal Constitutional Court, raising the complaints subsequently brought before this Court. However, the applicant did raise such a complaint, directed against the decisions of the Mainz Regional Court, the Koblenz Court of Appeal, and – in compliance with the finding that the applicant did not have to pursue her appeal on points of law – against the decision of the Federal Court of Justice refusing to grant her legal aid. Endorsing its above reasoning, the Court finds that the applicant must be considered to have raised her complaints in substance before the Federal Constitutional Court also in respect of her complaints brought in this set of proceedings. She set out in detail the stages of the proceedings in the Mainz and Koblenz courts and explained why she considered that various court measures and decisions violated her right to a fair trial. She thereby complied with the requirement of exhaustion of domestic remedies.

The Court concludes that the applicant has exhausted domestic remedies as required by Article 35 § 1 of the Convention in respect of this set of proceedings.

e. Proceedings in the Frankfurt / Main Regional Court

The Government contended that the applicant, by agreeing to a friendly settlement of the proceedings in the Frankfurt / Main Regional Court against the university clinic on 28 June 2001, waived her right to bring her complaints to the domestic courts. She therefore failed to exhaust domestic remedies in these proceedings.

The applicant maintained that all domestic remedies exhausted by her in similar preceding proceedings had proved to be unsuccessful. She risked having to bear considerable costs of the proceedings, including the costs for the expert reports, if her action were dismissed. She therefore did not have to exhaust further ineffective domestic remedies.

In view of its constant case-law on the exhaustion of domestic remedies, cited above, the Court finds that the applicant, by agreeing to a friendly settlement, did not afford the German courts the opportunity of putting right the violations alleged before submitting them to the Court. Once more, it considers that the present proceedings are based on a factual situation which is not comparable to the facts on which the decisions of German courts in further proceedings brought by the applicant against different defendants were based. Therefore, the Court cannot find it established that pursuing her action against the university clinic in the German courts could be regarded on the face of it as ineffective.

The Court concludes that the objection of non-exhaustion of domestic remedies raised by the Government must be allowed with respect to this set of proceedings.

B. As to the merits

1. Complaint concerning Article 5 § 1 of the Convention (in respect of the applicant's stay in the clinic of Dr Heines in Bremen from July 1977 to April 1979)

a. The parties' submissions

i. The Government

The Government submitted that the applicant had not been deprived of her liberty, as she had consented to her stay in the clinic of Dr Heines. In any event, she had not been the victim of a deprivation of liberty which could be imputed to the State. The applicant was detained in a private clinic, and there had not been a court order or other decision by a State entity authorizing the applicant's confinement. The clinic of Dr Heines would not have been entitled to accommodate persons whose detention had been ordered by a court. State entities were, therefore, not been involved in the applicant's detention as a supervisory authority either, as such a supervision is only provided for by law for institutions competent to admit patients confined to a psychiatric hospital by a court order.

The Government further pointed out that Germany did not violate a positive obligation to protect the applicant from an alleged deprivation of liberty by private persons. It was already questionable whether Article 5 of the Convention incorporated such a positive obligation at all. In any event, German law provided multiple instruments for an individual to be protected against interferences with his liberty. Firstly, a confinement to a psychiatric hospital had to be ordered by a judge. Secondly, the competent health authorities disposed of far-reaching supervisory powers to control the execution of these court orders. Thirdly, Section 34 of the Law on Measures of Aid and Protection with respect to Mental Disorders (see relevant domestic law and practice, above), which entered into force on 9 July 1979, introduced visiting commissions to control the detention of persons ordered under the said Law in psychiatric hospitals, thereby creating a further innovative mechanism of protection. Fourthly, a person who deprives another person of his liberty risks incurring a prison sentence of up to ten years under Section 239 of the Criminal Code (see relevant domestic law and practice, above). An individual concerned by an unlawful deprivation of liberty also has the right to claim damages, including non-pecuniary

damages, under Sections 823 and 847 of the Civil Code (see relevant domestic law and practice, above).

The Government further submitted that there had been no violation of Article 5 § 1 of the Convention by a wrong application of the national law. The applicant did not attempt to institute criminal investigations against the persons responsible for her detention in the clinic of Dr Heines. Her civil action for damages against the clinic had been dismissed by the Bremen Court of Appeal. However, even assuming that Article 5 of the Convention had to be taken into consideration by that court in construing the provisions of the German civil law applicable in the case, its interpretation, having regard to the margin of appreciation enjoyed by the Contracting States in this sphere, cannot be regarded as arbitrary.

On the one hand, the Bremen Court of Appeal's calculation of the three-years time-limit in Section 852 § 1 of the Civil Code (see relevant domestic law and practice, above) for the applicant to bring her claims in tort cannot be regarded as unreasonable. The applicant brought her action against the clinic of Dr Heines in 1997, that is, eighteen years after the end of the applicant's first treatment and sixteen years after the end of her second treatment in the clinic. Pursuant to Section 852 § 1 of the said Code, the period of limitation for a claim in tort starts to run when the person concerned learns that a damage has been caused to him by a particular person. As was correctly found by the Bremen Court of Appeal, the applicant knew already at the time when she was confined to the clinic that she had – allegedly – been detained there against her will. This was proved not only by the expert opinions to the effect that she had, in fact, not suffered from schizophrenia at the relevant time, but also by the facts that she was able to learn the profession of a tracer (*technische Zeichnerin*) and to obtain a driving licence, and therefore had the necessary intellectual capacities to have knowledge of the relevant facts. Consequently, the Bremen Court of Appeal could assume that on her release from the clinic in 1981, at the latest, the applicant could both have had the necessary knowledge and could also have been reasonably expected to bring her action in tort against the clinic. In any event, these are questions of fact to be resolved by the competent national courts.

On the other hand, the Bremen Court of Appeal, with respect to the applicant's possible claim for damages caused by the defective performance of a contract, also did not arbitrarily assume that the applicant tacitly concluded a contract with the clinic about her medical treatment. She did not oppose to her admission to the hospital and to her medical treatment. It was also not arbitrary for the court to conclude that this contract had not been terminated by her various attempts to escape from the clinic. The additional findings of that court concerning a possible contract concluded by the applicant's father with the clinic for the benefit of the

applicant – which would not have entitled the clinic to treat the applicant against her will – were therefore not decisive for the findings of that court.

ii. The applicant

The applicant maintained that she had been deprived of her liberty during her stays in the clinic of Dr Heines. Referring to the findings of the Bremen Regional Court, she stressed that she had not consented to her detention in that clinic. She took the view that the deprivation of her liberty was imputable to the State, as State institutions had been involved in her detention in various aspects. Even though the clinic of Dr Heines was a private institution, the State was involved in her stay and treatment in the clinic due to the fact that her sickness was covered by a compulsory health insurance (*gesetzliche Krankenversicherung*), which created a public-law relationship between the clinic and the insurance company. The clinic had also been informed by a doctor, who was working for a State body and had arranged the applicant's admission to the clinic, that the applicant's detention in the clinic necessitated a court order. In addition to that, on 4 March 1979 the police had brought the applicant back to the clinic by force after she had attempted to flee.

The applicant further took the view that Germany violated its positive obligation under Article 5 § 1 of the Convention to protect her from a deprivation of liberty by private persons. She pointed out that, having attained majority, her confinement to the clinic would have required a court order. She contested that the health authorities, by their supervisory powers, could sufficiently control whether this requirement was complied with. She stressed that during her stay in the clinic, which prevented her from fleeing by, *inter alia*, administering her medicaments by force, she was not in a position to secure help from outside. The telephone was monitored by the clinic personnel and it was nearly only her father who visited her, who would not have taken any steps to obtain her release. She pointed out that the possible protection awarded to persons confined to mental institutions by the creation of visiting commissions in Section 34 of the Law on Measures of Aid and Protection with respect to Mental Disorders was not effective in her case. The said Law, the enactment of which proved the acknowledgement by the State of a need for protection in this respect, only entered into force on 9 July 1979, that is, after her first detention in the clinic of Dr Heines. The said Law did also not entitle the health authorities to supervise mental institutions like the clinic of Dr Heines, as this clinic was not authorised to admit persons confined pursuant to a court order. Finally, neither the provisions of the German civil law nor the safeguards of the criminal law offered the applicant an adequate protection against an unlawful deprivation of liberty. While providing retroactive sanctions, they could not prevent the deprivation of liberty itself from occurring or

continuing, which cannot be considered as affording sufficient protection, having regard to the serious nature of an infringement of the right to liberty.

The applicant took the view that the arbitrary way in which the Bremen Court of Appeal interpreted the relevant provisions of the Civil Code amounted to a violation of Article 5 § 1 of the Convention.

Firstly, the Court of Appeal's interpretation of Section 852 § 1 of the Civil Code constituted a disproportionate limitation of her right to claim damages. She could only be expected to have knowledge of a damage caused by a particular person within the meaning of the said Section when she learnt that the doctors' conduct had been unlawful and that the damage which had resulted from the doctors' medical treatment was attributable to a wrong treatment and not to her own state of health. She had always been treated as a mentally insane person who continued receiving medical treatment long after she had been released from the clinic of Dr Heines, and who, at the relevant time, had even lost her ability to speak for more than ten years. She could, therefore, not be considered to have had sufficient knowledge and could not reasonably have been expected to bring her claim as long as she did not have access to her medical file, which was granted to her only on 24 February 1997, that is, after she had brought proceedings in the Bremen Regional Court.

Secondly, as regards the Court of Appeal's assumption with respect to a possible claim for damages caused by the defective performance of a contract that the applicant had tacitly concluded a contract with the clinic, the applicant submitted that this interpretation was absolutely incomprehensible and therefore arbitrary. The same was true for the assumption that she might have agreed to her medical treatment pursuant to a contract concluded by her father with the clinic to her benefit. She stressed that, as was proved by her medical file, she opposed both to her admission to the clinic, to the continuation of her stay in it and to her medical treatment. Her various attempts to flee from the clinic would, in any event, have had to be interpreted as a termination of the alleged contract on her medical treatment. Even assuming the existence of such a contract, it would not have authorised her unlawful detention, the administration of medicaments by force and her fixations.

b. The Court's view

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under Article 5 § 1 of the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. Complaint concerning Article 5 § 1 of the Convention (in respect of the applicant's stay in the clinic of Dr Heines in Bremen from January to April 1981)

The Government submitted that the applicant, as was rightly found by the Bremen Court of Appeal, came to the clinic without being forced to do so, wishing that her medical treatment there be continued, as her state of health had considerably deteriorated. Therefore, she had obviously not been deprived of her liberty.

The applicant contested this view. She maintained that she had been committed to the clinic by her general practitioner due to the onset of strong withdrawal symptoms after she had abruptly stopped taking any medicaments.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under Article 5 § 1 of the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. Complaint concerning Article 5 § 4 of the Convention (in respect of both stays of the applicant in the clinic of Dr Heines in Bremen)

The Government did not comment on this issue.

The applicant, referring to her submissions with respect to Article 5 § 1 of the Convention, pointed out that there was a lack of sufficient safeguards to ensure that individuals who consider themselves to be detained against their will have access to a court to obtain a decision on the lawfulness of their detention. This violated Article 5 § 4 of the Convention.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under Article 5 § 4 of the Convention, the determination of which requires an examination of the merits. The Court concludes, therefore, that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

4. Complaint concerning Article 5 § 5 of the Convention (in respect of both stays of the applicant in the clinic of Dr Heines in Bremen)

The Government, referring to their submissions with respect to Article 5 § 1 of the Convention, took the view that the applicant had not been the victim of a detention contrary to Article 5 § 1. However, even assuming that she had been detained, she would, under German law, be entitled to claim damages. The findings of the Bremen Court of Appeal, in particular with respect to the calculation of the period of limitation and to the assumption of the tacit conclusion of a contract about her medical treatment, cannot be

regarded as arbitrary. Therefore, her compensation claim had not been arbitrarily dismissed.

The applicant, also referring to her submissions with respect to Article 5 § 1 of the Convention, maintained that the way in which the Bremen Court of Appeal interpreted the relevant provisions on limitation amounted to a disproportionate restriction of her compensation claim, which, in practice, deprived her of her right to damages for her unlawful detention. The same applied to the Court of Appeal's conclusion that the applicant, by allegedly tacitly concluding a contract with the clinic, agreed to her detention or her medical treatment.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

5. Complaint concerning Article 6 § 1 of the Convention (in respect of both stays of the applicant in the clinic of Dr Heines in Bremen)

The Government was of the opinion that the applicant had not put forth any precise complaints about the fairness of her trial in the Bremen courts.

The applicant, referring to her submissions with respect to Article 5 § 1 of the Convention, pointed out that the way in which the Bremen Court of Appeal applied and interpreted the provisions of German law amounted to a breach of her right to a fair trial as guaranteed by Article 6 § 1 of the Convention. In particular, that court's assumption that she consented to her stay and treatment in the clinic, without taking into consideration the applicant's submissions and the evidence to show that she physically opposed to her stay and treatment there, must be regarded as unfair. Furthermore, in her application to this Court, she had also complained about the incompetent way in which the expert heard by the Court of Appeal had drafted his report and the way the Court of Appeal had assessed the contradictory opinion given by him.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law, which are closely linked to the issues raised under Article 5 of the Convention, and the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

6. Complaint concerning Article 8 and 3 of the Convention (in respect of both stays of the applicant in the clinic of Dr Heines in Bremen)

The Government stressed that the applicant had not explicitly invoked Article 8 of the Convention. In any event, there had been no violation of the applicant's right to respect for her private life by a wrongful medical diagnosis or therapy. As was found by the Bremen Court of Appeal after its taking of evidence, no erroneous medical treatment had been proved. There had also been no violation of Article 8 by the alleged deprivation of liberty, as the latter, in any event, was not imputable to the State. Likewise, the applicant's private life had not been violated by her medical treatment while allegedly detained. The State was not involved in her treatment in the private clinic. It had also complied with its positive obligation to afford an effective protection of the applicant's right under Article 8, as it was open to the applicant to lodge a criminal information (*Strafanzeige*) against the doctors treating her or to bring compensation proceedings in the civil courts. In dismissing the applicant's compensation claim, the Bremen Court of Appeal did not disregard her right to respect for private life.

The applicant claimed that in substance, she complained about a violation of Article 8 of the Convention with respect to the restrictions on her liberty, her immobilisation and the medical treatment against her will. She considered that these facts should also be examined under the aspect of a violation of Article 3 of the Convention. Referring to her submissions with respect to Article 5 § 1 of the Convention, she argued that both the detention and the infringement of her physical integrity are imputable to the State. Germany also violated its positive obligation to protect her from these interferences with her right to respect for private life.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law, which are closely linked to the issues raised under Article 5 of the Convention, and the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

7. Complaint concerning Article 6 § 1 of the Convention (in respect of the applicant's medical treatment in Mainz)

The Government maintained that the expert opinion given at the hearing was not contradictory. As was shown by the facts that the expert had been summoned to explain his report at the hearing, could be questioned and was invited to prepare two supplementary reports, the applicant had sufficient opportunities to question and control the expert. It was irrelevant that the expert report had been prepared with the aid of assistant doctors, as the

expert controlled and took the responsibility for the report. Moreover, the proceedings had also not been unfair only because the applicant's medical file concerning her treatment in the Mainz university clinic had temporarily disappeared. The applicant's lawyer had been granted access to a substitute file (*Notakte*) of more than 100 pages compiled by the clinic, and had later been granted access to the original file, which was found during the proceedings before the Koblenz Court of Appeal. As was rightly found by the Koblenz Court of Appeal, it had also not been necessary to allow the applicant facilitations when complying with the burden of proof (*Beweiserleichterungen*), in particular as the original medical file was taken into consideration by the Court of Appeal.

The applicant maintained that her trial had been unfair in that the expert did not properly address the questions put to him, and assessed issues of which he could not have had any knowledge. The competent court did not thoroughly assess the expert report, which had been prepared with the aid of assistant doctors. As the medical file, to which the applicant claimed access already in 1993, had been withheld for seven years, this procedural defect could not be remedied in the proceedings before the Court of Appeal. The principle of equality of arms would have necessitated to grant the applicant facilitations in proving her case with respect to the causal link between her wrong medical treatment and the damage done to her physical integrity.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law, the determination of which requires an examination of the merits. The Court concludes, therefore, that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

8. Complaint concerning Article 8 and 3 of the Convention (in respect of the applicant's medical treatment in Mainz)

The Government did not comment on this issue.

The applicant maintained that the restrictions on her liberty, the interference with her physical integrity and the refusal of an adequate treatment infringed the right to respect for her private life as guaranteed by Article 8 of the Convention as well as Article 3 of the Convention. In this respect, she repeats her submissions made with respect to her treatment in the clinic of Dr Heines in Bremen.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law, the determination of which requires an examination of the merits. The Court concludes, therefore, that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning her stays in the clinics in Bremen and Mainz;

Declares the remainder of the application inadmissible.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President