AS TO THE ADMISSIBILITY OF

Application No. 27723/95
by James A. DOUGLAS
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 February 1995 by James A. DOUGLAS against the United Kingdom and registered on 26 June 1995 under file No. 27723/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British national born in 1921. He is retired and resides in North Yorkshire. He claims to be suffering from a form of arachnoiditis, a disease causing severe pain in the back and legs, as a result of a myelogram he underwent in June 1967 in which Myodil, a spinal dye, was used.

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

A. The Myodil litigation in general

When the potential link between Myodil and arachnoiditis was realised, civil proceedings for negligence were instituted against Glaxo Laboratories Ltd (hereinafter Glaxo), the manufacturers of Myodil, and the Health Authorities of England and Wales.

On 19 December 1991 the High Court of Justice gave permission to the plaintiffs in the action against the Health Authorities to discontinue the proceedings before 15 January 1992. The court decided that it would not make any order as to costs for plaintiffs who discontinued before that date. It also ordered the Health Authorities

to continue to supply copies of their medical records to the plaintiffs or potential plaintiffs in the proceedings against Glaxo.

The proceedings against Glaxo were organised as follows. There was the generic claim concerning the liability of Glaxo for damages caused through arachnoiditis being brought about by Myodil myelography. All plaintiffs were parties to this claim, which was conducted as a group action by a Steering Committee designated by the Group of Solicitors involved in Myodil litigation. In addition to the generic claim, there was a series of individual claims as to whether each plaintiff was suffering from Myodil induced arachnoiditis. These were handled by each plaintiff's solicitors.

The statement of claim in the generic action and Glaxo's defence thereto were served before the end of June 1992. By the same time, the consultants of the Steering Committee of the Myodil Solicitors Group had met with the consultants of Glaxo and had agreed on "the essential diagnostic criteria for Myodil-induced symptomatic arachnoiditis" (hereinafter "the essential criteria").

It appears that the High Court judge appointed to hear the litigation issued an order approving the essential criteria. Only the persons who satisfied the essential criteria were admitted to the litigation and were allowed to lodge individual claims. As agreed between the Steering Committee and Glaxo, each potential plaintiff would be examined by a neurologist who would provide a clinician's report. Where appropriate the neurologist would refer the potential plaintiff to a radiologist or neuro-radiologist to undergo a Magnetic Resonance Imaging (hereinafter MRI) scan.

The essential criteria were clinical and radiological criteria. The patient should have been injected with Myodil. There should be radiological evidence of arachnoiditis not just at the site of the initial pathology or surgery, but also at other levels. There should have been no other exclusive cause for arachnoiditis. Finally, the symptoms and clinical findings should match the anatomical distribution of the arachnoiditis which had been demonstrated radiologically.

A number of potential litigants who had been granted legal aid limited to all steps up to but excluding the issue of proceedings and who were found not to satisfy the essential criteria agreed to have their legal aid certificates "discharged". According to the rules governing the granting of legal aid by the Legal Aid Board, persons who have their legal aid certificate "discharged", are covered by legal aid up to the date of the notice of "discharge". A "discharge" of a legal aid certificate is to be distinguished from its "revocation". If a legal aid certificate is "revoked", it is as if the person concerned never had legal aid. As a result, the person concerned has to bear the full cost of the work done under the "revoked" certificate.

On 23 November 1992 a directions hearing took place at the High Court. The judge instructed that all individual claims had to be notified to Glaxo by 1 February 1993 and that the court proceedings had to be served by 1 March 1994. The general claim was to be heard in October 1994.

The deadline for serving the individual claims was subsequently extended to 1 September 1994 and the hearing of the generic action was adjourned until 26 April 1995. On 21 December 1994 the court ordered a further adjournment until October 1995 in the generic action. In January 1995 the court authorised the belated serving of additional individual claims. The Steering Committee promised that it would seek no further extension in respect of individual cases.

In March 1995 Glaxo and the Steering Committee exchanged expert evidence. On 5 July 1995 Glaxo made an offer to settle the action which the Steering Committee advised the plaintiffs to accept. On

31 July 1995 the judge approved the settlement terms.

It is not clear whether a second action was ever brought by persons who were found not to fulfil the essential criteria.

B. Particular circumstances of the applicant's case

On 8 November 1991 the applicant obtained legal aid to take proceedings against Glaxo and/or the Greenwich Medical Authority for damages for negligence. The legal aid certificate was limited to all steps up to but excluding the issue of proceedings including obtaining counsel's opinion. As explained in a letter dated 13 November 1991 the applicant received from his solicitors, the Legal Aid Board was prepared to cover the cost of obtaining the applicant's medical records and advice from appropriate medical experts.

On 23 June 1993 the applicant was examined by a neurologist and had an MRI. A clinician's report was prepared on 20 June 1994.

On 13 July 1994 he was advised by his solicitors that, although he had radiological signs of arachnoiditis, he had no clinical signs of the disease and, as a result, he did not satisfy the essential criteria.

His solicitors forwarded the medical report to the Legal Aid Board which informed him on 18 November 1994 that they were considering discharging or revoking his legal aid certificate on the ground that the medical evidence obtained on his behalf confirmed that Myodil was not responsible for the symptoms of which he was suffering. The Board, therefore, considered that he did not have any reasonable prospects of success in the proceedings.

On 29 November 1994 the applicant's legal aid certificate was discharged with his consent.

In December 1995 the applicant had contacts with another solicitors' firm who were planning to institute further proceedings against Glaxo, after the group litigation had been settled. This firm of solicitors was assisted by Dr B from the United States and was hoping to obtain legal aid. However, as the solicitors themselves accepted, until then no potential plaintiff had been able to obtain such aid.

COMPLAINTS

The applicant complains that he was not allowed to take part in the Myodil litigation. He argues that the essential criteria were unduly restrictive. He invokes Article 8 of the Convention.

THE LAW

The applicant complains that he was not allowed to take part in the Myodil litigation.

The Commission considers that the applicant's complaint should be examined under Article 6 para. 1 (Art. 6-1) of the Convention which provides that "in the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by a tribunal established by law." In accordance with the Court's case-law, this provision guarantees the right of access to a court, i.e. the right to have a claim relating to civil rights and obligations brought before a court or tribunal (Eur. Court HR, Golder v. United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, para. 36). Moreover, there can be no doubt that the applicant had a claim for compensation against Glaxo which was of a civil nature.

The Commission notes that the main thrust of the applicant's

complaints is that the essential criteria were unduly restrictive and recalls that these criteria were agreed by the Steering Committee of the Myodil Solicitors Group, which was conducting the group action, and the defendants, Glaxo. However, it appears that the essential criteria were also approved by a court order. Moreover, it is clear that they were used by the domestic legal aid authorities to determine the applicant's prospects of success if he were to join in the group action. As a result, the responsibility of the United Kingdom under the Convention could be engaged.

However, the Commission considers that Article 6 para. 1 (Art. 6-1) does not preclude the authorities from deciding various issues affecting participation in a group action on the basis of criteria established with the agreement of the defendant, provided that the criteria are reasonable and that potential litigants who do not fall within the criteria preserve the right to sue independently. The applicant has not established that the criteria agreed between the Steering Committee and Glaxo were unreasonable. Moreover, it clearly emerges from the applicant's submissions that persons who were excluded from the group action did not automatically lose the possibility of suing Glaxo independently.

The Commission accepts that the applicant's financial situation was such that, on the basis of all available indications, he could not contemplate instituting proceedings Glaxo without legal aid.

However, the applicant was issued with a legal aid certificate. This was limited to all steps up to but excluding the issue of proceedings including obtaining counsel's opinion. Thus, its aim was to enable the applicant to assess his prospects of joining in the group action always with reference to the essential criteria. The Commission notes that this certificate was discharged with the applicant's consent and, as a result, an issue could arise as to whether the applicant can still claim to be a victim of a violation of his right of access to a court, within the meaning of Article 25 (Art. 25) of the Convention. However, the Commission does not consider it necessary to determine the issue because, in any event, the application is manifestly ill-founded.

The Commission recalls in this connection that Article 6 (Art. 6) does not always guarantee legal aid in civil cases. The means by which a State ensures effective access to civil courts is within its margin of appreciation (Eur. Court HR, Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 15, para. 26). Moreover, even where legal aid may be available for certain types of civil action, it is reasonable to impose conditions on its availability involving, inter alia, the financial situation of the litigant or the prospects of success of the proceedings (No. 8158/78, Dec. 10.7.80, D.R. 21, p. 95; No. 10871/84, Dec. 10.7.86, D.R. 48, p. 154; No. 10594/83, Dec. 14.7.87, D.R. 52, p. 158).

The Commission considers that the discharge of the applicant's legal aid certificate must have been related to a finding that he did not fulfil the essential criteria for participation in the group action. This finding was reached after obtaining expert medical and legal opinion on the matter and both the medical and legal opinions were covered by the applicant's legal aid certificate. In these circumstances, it cannot be argued that the applicant's prospects of success in the group proceedings were not properly weighed and that the conditions imposed on availability of legal aid in this connection were unreasonable.

A final issue which remains to be examined is whether the applicant, once excluded form the group action, retained a realistic possibility of instituting proceedings against Glaxo. The Commission is, of course, not unaware of the financial implications of suing Glaxo. However, the Commission notes that the applicant never applied

for legal aid in order to institute independent proceedings against Glaxo. Moreover, there is no indication that the domestic legal aid authorities would not consider the possibility of financing such litigation, if it had prospects of success. As a result, the Commission considers that the applicant cannot claim that the inevitable consequence of exclusion from the group proceedings was inability to sue.

It follows that no appearance of a violation of the applicant's right of access to a court under Article 6 para. 1 (Art. 6-1) of the Convention is disclosed. As a result, the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber