(TRANSLATION)

THE FACTS

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

The applicant is a German national born in 1924. He lives at Wilhelmsfeld (Baden-Württemberg), where he works as a management consultant.

In 1977 he lodged an application (No. 7900/77) concerning a fine imposed by the administrative authorities for unlawful professional assistance in tax matters. The application was declared inadmissible on 6 March 1978. A further application (No. 9163/80), likewise concerning a fine imposed by the administrative authorities, was declared inadmissible on 3 March 1982.

First set of proceedings

On 8 August 1975 the applicant applied for unemployment assistance (Arbeitslosenhilfe) on the ground that he had given up his self-employed activities.

On 25 September 1975 the Federal Employment Agency (Bundesanstalt für Arbeit) refused the application. The applicant's appeal against the decision (Widerspruch) was unsuccessful.

On 3 November 1975 he brought proceedings in Mannheim Social Security Court (Sozialgericht) claiming unemployment assistance.

On 20 January 1976 he also applied to the court under Article 43 of the Social Security Code (Sozialgesetzbuch) for a declaration of entitlement to provisional benefit during the proceedings. This was initially registered as an action for a declaration (Feststellungsklage) of entitlement to provisional benefit but on 26 June 1976, the president of the chamber dealing with the case having ruled that it was not a separate action and Article 43 of the Social Security Code did not apply and that the object of the application was the same as that of the proceedings instituted on 3 November 1975, the application was joined to the file in those proceedings.

In its judgment of 16 August 1977 the court ruled that before his declaration of unemployment the applicant had been engaged in self-employed work which entitled him to assistance and set aside the decision of 25 September 1975. It ordered the Federal Employment Agency to pay unemployment assistance, the amount to be determined by the Agency. (The Agency eventually paid the assistance by decision of 5 December 1979.)

The Agency appealed to Baden-Württemberg Regional Social Security Court (Landessozialgericht) against the Mannheim Social Security Court's judgment of 16 August 1977, on the ground that the applicant did not qualify for unemployment assistance.

On 9 February 1978 the applicant filed a cross-appeal (Anschlussberufung).

On 9 May 1978, after a quick examination of the file, the reporting judge decided that the case was ready to be dealt with and, taking account of the court's workload, that the hearing would be held in the following six months. After a subsequent more detailed examination, however, it was realised that the case was not ready and that there were a number of questions still to be resolved.

On 11 January 1979 the court asked the applicant for further information. The applicant replied on 8 February 1979. The Federal Employment Agency did not submit its comments on the information until 3 July 1979, after two reminders from the court.

Between 12 July and 14 September 1979 the applicant and the Federal Employment Agency several times lodged further submissions and observations.

On 15 November 1979 the applicant wrote to the Agency requesting provisional benefit and his administrative file was sent to them. This meant the proceedings had to be discontinued until the file was returned, on 8 July 1980. The file

was only returned after the court had repeatedly asked for it back (on 18 January, 6 February, 28 March, 16 May and 1 July 1980).

On 8 and 31 January, 11, 17, 21 and 30 April, 7 May, 12 and 30 June, and 2 September 1980 the applicant lodged further submissions. The court asked him for further evidence on 12 May, 19 June, 28 July, 26 August, 17 September and 2 October 1980.

On 29 October 1980 the court decided to hold a hearing to consider how the investigation should proceed. At the hearing, on 25 November 1980, it decided to request further administrative files concerning the applicant. These reached it during February 1981. On 30 April 1981 the case was declared ready and a hearing was set for 26 May 1981. The applicant, however, asked the court to rule without oral proceedings and the court gave its decision on 16 June 1981.

It set aside the challenged judgment and dismissed the applicant's cross-appeal. It ruled that he was not eligible for unemployment assistance as he had not shown that he had been engaged in self-employed work for at least ten weeks during the year preceding his declaration of unemployment. In addition, he had not definitively given up his self-employed work and was not prepared to accept offers of work made to him by the Employment Office (Arbeitsamt). he was refused leave appeal on points of law (Revision).

He appealed against the refusal of leave to appeal on points of law, claiming that the Baden-Württemberg Regional Social Security Court had not asked him for evidence of his qualifications or availability for work and had not taken evidence from one of his witnesses. In addition, he complained that the judgment had not dealt with the action for a declaration of entitlement to provisional benefit which he had instituted on 20 January 1976 and which, as far as he was aware, had been joined to the main action.

On 25 March 1982 the Federal Social Security Court (Bundessozialgericht) declared the appeal inadmissible as not meeting the requirements laid down in the Code of Social Security Procedure (Sozialgerichtsgesetz). In so far as the applicant had complained of procedural defects, it noted that in finding him ineligible for unemployment assistance the Regional Court had based its decision on his failure to meet the requirement of having engaged in self-employed work for at least ten weeks in the year preceding the declaration of unemployment and that the Regional Court's findings concerning his availability for employment and his qualifications had only been supporting reasons. Insofar as he had complained that the Regional Court had refused to take evidence from one of his witnesses, the Federal Court held that he had not shown what bearing the testimony had on the case or why the refusal to hear it was unjustified. Lastly, it found that no action for a declaration was joined to the action referred to it and stated that if any such action existed it must still be pending before Mannheim Social Security Court.

The applicant filed a constitutional appeal. In particular, he relied on Articles 12 (freedom of choice of occupation) and 103 (the right to a hearing in accordance with the statutory procedure) of the Basic Law (Grundgesetz). He also relied on Article 6 para. 1 of the Convention, alleging that the proceedings had been unfair and had taken too long. He lodged further submissions with the Constitutional Court on 11 June 1982, 17 July 1982, 26 October 1982, 22 February 1983, 21 June 1983 and 18 July 1983.

On 23 September 1983 the Constitutional Court disallowed the appeal on the grounds that it was partly inadmissible and that the remainder did not offer sufficient prospects of success. It ruled that insofar as the appeal challenged the judgment of the Federal Social Security Court it did not meet the legal requirements because it did not contain a proper statement of reasons. Insofar as the applicant alleged that the proceedings before the Regional Social Security Court had been unfair, the appeal was likewise inadmissible whether in that it did not contain a proper statement of reasons or in that it did not offer sufficient prospects of success.

Second set of proceedings

On 23 March 1984 the applicant wrote to Mannheim Social Security Court complaining that no decision had been taken in his action for a declaration of entitlement to provisional benefit and that the action was still pending. His letter was registered as a new action.

Mannheim Social Security Court delivered judgment on 2 December 1985. Noting that no other action was pending and that the new application was late, it dismissed it.

On 27 February 1986 the applicant appealed.

On 3 September 1987 Baden-Württemberg Regional Social Security Court rejected the appeal on the ground that the applicant did not have a legitimate interest.

Third set of proceedings

On 13 August 1981, i.e. after the Baden-Württemberg Social Security Court decision of 16 June 1981, the Federal Employment Agency demanded repayment of 30,652 DM in benefit wrongly paid to the applicant. This was reduced to approximately 18,000 DM after an objection (Widerspruch) from the applicant.

The applicant brought proceedings in Mannheim Social Security Court alleging that the Employment Agency demand was contrary to the Employment Promotion Act.

On 10 March 1983 Mannheim Social Security Court partly allowed the applicant's action and reduced the amount of the demand to approximately 9,000 DM.

The applicant appealed to Baden-Württemberg Regional Social Security Court.

On 2 July 1984, by interlocutory decision of the Regional Social Security Court, the proceedings were suspended at the request of both parties.

On 7 December 1987 the Federal Employment Agency asked the Regional Social Security Court to resume consideration of the case.

Relevant legislation

Germany's Employment Promotion Act (Arbeitsförderungsgesetz) provides for two types of unemployment allowances:

i. *Unemployment benefit (Arbeitslosengeld)*, which is governed by Sections 100 *et seq.* of the Act, is payable to persons who lose paid employment and have contributed to the unemployment insurance scheme for a specified time. The period for which unemployment benefit is paid depends on the length of time for which contributions were paid (Section 106 of the Act).

ii. *Unemployment assistance (Arbeitslosenhilfe)*, governed by Sections 134 *et seq.* of the Act:

"*Section 134*

Eligibility

(1) Unemployment assistance shall be payable to persons who:

1. are unemployed, are available to take up employment, have registered as unemployed with the Employment Office and have applied for unemployment assistance;
2. are not entitled to unemployment benefit because they have not paid contributions for the required length of time (Section 104);
3. are in need, and
4. during the year preceding the date on which the other conditions of entitlement to unemployment assistance must be met,
   a. drew unemployment benefit, to which their entitlement did not cease by virtue of Section 119 (3);
   b. were in paid employment for at least 150 days, or at least 240 days if the last period of entitlement to unemployment benefit or to unemployment assistance ended by virtue of Section 119 (3), or who qualify by virtue of a period of time which is reckonable for purposes of granting those benefits (Anwartschaftszeit);

.....

Section 136

Amount of unemployment assistance

(1) The amount of unemployment assistance payable is

1. in the case of unemployed persons with one or more children within the meaning of Section 32 (1), (4) and (5) of the Income Tax Act, or unemployed persons whose spouses have one or more children within the meaning of Section 32 (1), (4) and (5) of the Income Tax Act, where the two spouses are unrestrictedly liable to income tax and are not permanently separated, 58% of the salary (Arbeitsentgelt) less any statutory deductions to which employees' pay is customarily subject;
2. in the case of other unemployed persons 56% of the salary.

.....

Section 188

The cost, other than administrative costs, of unemployment assistance ... shall be paid by the Federation."

The decree of 7 August 1974 under which the applicant submitted his application for unemployment assistance provides as follows:

"*Article 1*

Basis of entitlement to unemployment assistance

where the claimant was not in paid employment or was only in part-time paid employment within the meaning of Section 134 (1) (4) (b) of the Employment Promotion Act the paid employment requirement shall be met:

.....

3. where the claimant's main work fell within the scope of the Employment Promotion Act and he performed that work either in a self-employed capacity or for a self-employed person as a member of that person's family and provided the cessation of the work was not temporary only."

COMPLAINTS

The applicant complains that he was not given a fair hearing. He alleges that the Regional Social Security Court ruled him to be ineligible for unemployment assistance without having sufficient evidence and without holding an adversarial hearing on all the legal and factual issues.

He also complains about the length of the proceedings.

He maintains that neither his application for unemployment assistance nor his action for a declaration of entitlement to provisional benefit were determined within a reasonable time.

He relies on Article 6 para. 1 of the Convention.

.....

THE LAW

The applicant complains that he was not given a fair hearing and that the proceedings concerning his application for unemployment assistance were of unreasonable length. He relies on Article 6 para. 1 of the Convention.

Article 6 para. 1, first sentence, of the Convention reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The first question the Commission has to decide is whether the above provision is applicable in the present case. As there can be no doubt that the proceedings did not concern a criminal charge against the applicant, the Commission will firstly consider whether there was a dispute concerning a right and, if so, whether the right was a civil right (Eur. Court H.R., Benthem judgment of 23 October 1985, Series A no. 97, pp.14 *et seq.*, paras. 30 *et seq.*).

The Commission firstly notes that the German social security courts were dealing with a genuine and serious dispute (Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 30, para. 81) and had to decide whether a right (entitlement to unemployment assistance) actually existed (Eur. Court H.R., Lecompte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 22, para. 49). It accordingly finds that the case involved the determination of a right within the meaning of Article 6 para. 1 of the Convention, as indeed is common ground.

To determine whether the right was a civil right, the Commission firstly refers to the established case-law of the European Court and Commission of Human Rights, according to which the concept of civil rights and obligations cannot be interpreted solely by reference to the domestic law of the respondent State. Article 6 does not cover only private law disputes in the conventional sense — that is, disputes between individuals or between an individual and the State to the extent that the latter acted as a private person, subject to private law, and not in its sovereign capacity. Accordingly, the nature of the legislation which governs how the matter is to be determined and that of the authority which has jurisdiction in the matter is immaterial. All that matters is the nature of the right at issue (Eur. Court H.R., König

judgment of 28 June 1978, Series A no. 27, pp. 29-30, paras. 88-90; Eur. Court H.R., Benthem judgment, *loc. cit.*, p. 16, para. 34).

The right at issue here was entitlement to unemployment assistance and therefore came within the social security field.

In the cases of Feldbrugge (judgment of 29 May 1986, Series A no. 99) and Deumeland (judgment of 29 May 1986, Series A no. 100) the European Court of Human Rights considered whether Article 6 para. 1 of the Convention was applicable to disputes concerning entitlement to social security benefit. In these two judgments it laid down a number of principles for deciding whether a given dispute about entitlement to social security benefit could be regarded as a dispute about civil rights or obligations as protected by Article 6, and set out criteria for deciding whether a right was a public law right or a private law right. The Court's criteria for a public law right are the public law character of the relevant domestic law, the compulsory nature of the insurance, and State assumption of responsibility for social protection, while its criteria for a private law right are the personal and economic nature of the right, connection with the contract of employment, and affinities of the insurance scheme with insurance governed by ordinary law (Feldbrugge judgment, *loc. cit.*, pp. 12-16, paras. 28-40 and Deumeland judgment, *loc. cit.*, pp. 22-26, paras. 62-74).

As regards the right involved in the present case, the Commission observes that the grant of unemployment assistance is governed by Sections 134 *et seq.* of the Federal Employment Promotion Act, which forms part of German welfare law and which domestic law treats as falling within the sphere of public law.

Furthermore, in addition to having to meet the prime requirement of being unemployed, a claimant must, to receive unemployment assistance, be in need and ineligible for unemployment benefit (Section 134 of the Employment Promotion Act), unemployment benefit being the allowance payable to unemployed people who are insured and have contributed to the statutory unemployment insurance scheme.

Lastly, the unemployment assistance scheme is not only administered by State bodies but also wholly financed by the State (Section 188 of the Employment Promotion Act). The Commission notes that there is an important difference here between unemployment assistance and unemployment benefit, the unemployment benefit scheme being funded by the direct contributions which employees in the scheme pay to the Federal Employment Agency.

Unemployment assistance, which in national law is supplementary to unemployment benefit, consequently appears in principle to be a State welfare benefit which does not involve any insurance relationship between the beneficiary and the body paying the benefit or any direct contribution by the beneficiary to the unemployment insurance scheme.

The Commission infers from this that the right at issue has a number of public law features in that it is governed by legislation falling within the sphere of public

law, the State runs and finances the scheme, and there is no insurance relationship or prior contribution to the scheme by the beneficiary.

The applicant, who does not deny these features, nonetheless points to private law aspects of the entitlement to unemployment assistance. He argues that the personal and economic nature of the right and its connection with the employment contract are sufficient to make it a civil right within the meaning of Article 6 para. 1 of the Convention.

The Commission firstly observes that the applicant claimed "a right flowing from specific rules laid down by the legislation in force" and accordingly takes the view that the right was of a personal and economic nature (Eur. Court H.R., Deumeland judgment, *loc. cit.*, p. 24, para. 71). It notes that there was less connection with an employment contract than in the Deumeland and Feldbrugge cases : the only connection with an employment contract in the present case is that the amount of the benefit is based on the salary the beneficiary was earning before he became unemployed. Any connection between the right at issue and the employment contract is all the weaker in that the applicant, who was self-employed, applied for unemployment assistance under the decree of 7 August 1974, which assimilates the self-employed to salaried employees.

Having examined the case in the light of the Court's case-law, the Commission finds that the right at issue in the proceedings in question showed a clear predominance of public law features. It considers that the public law nature of the right is called in question neither by Article 9 of the International Covenant on Economic, Social and Cultural Rights, nor by the mere fact that granting of the benefit would have increased the monthly amount of the applicant's future old-age pension, nor by the fact that the Federal Employment Agency demanded repayment of benefit wrongly paid to the applicant. Such considerations have nothing to do with the actual nature of the right, which is the only relevant factor.

The Commission accordingly holds that the right was not a civil right within the meaning of Article 6 para. 1 of the Convention.

The application is therefore incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 27 para. 2.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.