AS TO THE ADMISSIBILITY OF

Application No. 28934/95
by Karlheinz BEER and Philip REGAN
against Germany

The European Commission of Human Rights sitting in private on 24 February 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 13 September 1995 by Karlheinz BEER and Philip REGAN against Germany and registered on 17 October 1995 under file No. 28934/95;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 15 February 1996 and the observations in reply submitted by the applicant on 3 April 1996;

Having deliberated;

Decides as follows:

THE FACTS

The first applicant, born in 1952, is a German national and resident in Darmstadt. He is an engineer by profession. The second applicant, born in 1960, is a British national and resident in Strathclyde in the United Kingdom. He is a systems programmer by profession.

A. Particular circumstances of the cases

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

In 1982 the first applicant, employed by the company S., was placed at the disposal of the European Space Agency to render services at the European Space Operations Centre in Darmstadt. The first applicant's contract was later taken over by the company T., which has its seat in France. The second applicant, employed by the Italian company T.I., was placed at the disposal of the European Space Agency to render services at the European Space Operations Centre in Darmstadt in 1991.

The European Space Agency with headquarters in Paris, formed out of the European Space Research Organisation and the European Organisation for the Development and Construction of Space Vehicle Launchers, was established under the Convention for the Establishment of a European Space Agency of 30 May 1975. The European Space Agency operates the European Space Operations Centre in Darmstadt.

In October and November 1993 the applicants instituted proceedings before the Darmstadt Labour Court (Arbeitsgericht) against the European Space Agency, claiming that, pursuant to the German Provision of Labour Act (Arbeitnehmerüberlassungsgesetz), they had acquired the status of employees of the defendant organisation. In his submissions, the second applicant indicated that, by letter of 27 September 1993, his employer T.I. had dismissed him.

In the respective labour court proceedings, the defendant organisation relied on their immunity from jurisdiction under Article XV para. 2 of the Convention for the Establishment of a European Space Agency and its Annex I.

On 21 March 1995 the Darmstadt Labour Court, following hearings, declared the applicants' respective actions inadmissible. In both decisions, the Labour Court considered that the defendant organisation had validly relied on its immunity from jurisdiction. The Labour Court, in this respect, relied on S. 20 para. 2 of the Court Organisation Act (Gerichtsverfassungsgesetz), according to which immunity from jurisdiction could be provided for, inter alia, in international agreements. The defendant organisation enjoyed such immunity under Article XV para. 2 of the Convention on the Establishment of the European Space Agency and its Annex I. The Labour Court further recalled that the Federal Labour Court (Bundesarbeits-gericht), in a decision of 10 November 1993 in a similar case, had found that the rules in question could not be objected to from a constitutional point of view.

B. Relevant law

a. Provision of Labour Act

According to S. 1 para. 1 of the Provision of Labour Act (Arbeitnehmerüberlassungsgesetz), an employer, who, on a professional basis (gewerbsmäßig), intends to hire out his employees, i.e. temporary workers (Leiharbeitnehmer) to third persons, i.e. borrowing employers (Entleiher), is subject to permission. S. 9 (1) provides that contracts between the hirer out (Verleiher) and the borrowing employer

as well as between the hirer out and the temporary worker are void in the absence of a permission within the meaning of S. 1. If the contract between a hirer out and a temporary worker is void, pursuant to S. 9 (1), a contract between the borrowing employer and the temporary worker is implied in law (gilt als zustande gekommen) as from the envisaged start of employment (S. 10 para. 1).

b. Immunity from jurisdiction

SS. 18 to 20 of the German Court Organisation Act (Gerichtsverfassungsgesetz) regulate the immunity from jurisdiction (Extraterritorialität) in German court proceedings. SS. 18 and 19 concern the members of diplomatic and consular missions, and S. 20 para. 1 other representatives of States staying in Germany upon the invitation of the German Government. S. 20 para. 2 provides that other persons have immunity from jurisdiction according to the general rules of international law, e.g. foreign States in the exercise of public authority, or according to international agreements or other legal rules.

c. The Convention for the Establishment of a European Space Agency

The European Space Agency with headquarters in Paris, formed out of the European Space Research Organisation and the European Organisation for the Development and Construction of Space Vehicle Launchers, was established under the Convention for the Establishment of a European Space Agency ("ESA Convention") of 30 May 1975, which entered into force in 1980.

The purpose of the European Space Agency is to provide for and to promote, for exclusively peaceful purposes, co-operation among European States in space research and technology and their space applications, with a view to their being used for scientific purposes and for operational space applications systems (Article II). For the execution of the programmes entrusted to it, the Agency shall maintain the internal capability required for the preparation and supervision of its tasks and, to this end, shall establish and operate such establishments and facilities as are required for its activities (Article VI para. 1 (a)).

Article XV regulates the legal status, privileges and immunities of the Agency. According to paragraph 1, the Agency shall have legal personality. Paragraph 2 provides that the Agency, its staff members and experts, and the representatives of its Member States, shall enjoy the legal capacity, privileges and immunities provided for in Annex I. Agreements concerning the headquarters of the Agency and the establishments set up in accordance with Article VI shall be concluded between the Agency and the Member States on whose territory the headquarters and the establishments are situated (paragraph 3).

Article XVII concerns the arbitration procedure in case of any dispute between two or more Member States, or between any of them and the Agency, concerning the interpretation or application of the ESA Convention or its Annexes, and likewise any dispute referred to in Article XXVI of Annex I, which is not settled by or through the Council.

Annex I relates to the privileges and immunities of the Agency.

According to Article I of Annex I, the Agency shall have legal personality, in particular the capacity to contract, to acquire and to dispose of movable and immovable property, and to be a party to legal proceedings.

Pursuant to Article IV para. 1 (a) of Annex I, the Agency shall have immunity from jurisdiction and execution, except to the extent that it shall, by decision of the Council, have expressly waived such

immunity in a particular case; the Council has the duty to waive this immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency.

Article XXV of Annex I provides for arbitration with regard to written contracts other than those concluded in accordance with the Staff Regulations. Moreover, any Member State may submit to the international Arbitration Tribunal referred to in Article XVII of the ESA Convention any dispute, inter alia, arising out of damage caused by the Agency, or involving any other non-contractual responsibility of the Agency. According to Article XXVII of Annex I, the Agency shall make suitable provision for the satisfactory settlement of disputes arising between the Agency and the Director General, staff members or experts in respect of their conditions of service.

COMPLAINTS

The applicants complain under Article 6 para. 1 of the Convention that they did not have a hearing by a court on the question of whether a contractual relationship had existed between them and the European Space Agency.

As regards the question of exhaustion of domestic remedies, as required by Article 26 of the Convention, they submit that, having regard to the established case-law of the German courts on the matter, any further appeals could not prove to be effective.

The applicants submit that they could not have lodged an appeal with the Appeals Board of the European Space Agency as such a possibility was limited to the staff of this organisation. Moreover, they could not have relied on an arbitration procedure, which presupposed a contractual relationship and not a merely fictitious contract.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 13 September and registered on 17 October 1995.

On 27 November 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 15 February 1996. The applicants replied on 3 April 1996.

THE LAW

The applicants complain that they did not have a hearing by a court on the question of whether a contractual relationship had existed between them and the European Space Agency. They invoke Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1). , as far as relevant, provides as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law."

1. The respondent Government raise doubts as to whether the applicants exhausted the domestic remedies available to them under German law, as required by Article 26 (Art. 26) of the Convention. As regards the fact that the applicants did not lodge any further appeal against the Darmstadt Labour Court decision of 21 March 1995, the Government accept that, following negative decisions rendered by the Federal Labour Court and the Federal Constitutional Court

(Bundesverfassungs-gericht) in a similar case, such remedies would not have offered any prospect of success. However, in their view, the applicants could have brought proceedings before the German administrative courts requesting that, in order to comply with Article 6 para. 1 (Art. 6-1) of the Convention, Germany should bring international arbitration proceedings, on behalf of the applicants, pursuant to Article XVII of the ESA Convention.

The applicants disagree with the Government's objection.

Under Article 26 (Art. 26) of the Convention, the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

Under Article 26 (Art. 26) 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. The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (cf. Eur. Court HR, Akdivar v. Turkey judgment of 16 September 1996, para. 66, to be published in the Reports of Judgments and Decisions for 1996). In this context, it has been recognised that Article 26 (Art. 26) must be applied with some degree of flexibility and without excessive formalism; it is essential to have regard to the particular circumstances of each individual case (cf. Akdivar judgment, op. cit., para. 69).

The Commission notes that the Darmstadt Labour Court, in its decision of 21 March 1995, referred to the existing case-law of the Federal Labour Court on the legal issue in question. The Government pointed out that the position of the German labour courts had been confirmed by the Federal Constitutional Court; and they have in essence accepted that, in this situation, any further appeal would have had no prospect of success. The Commission accordingly considers that, in the circumstances of the present case, the applicants did not have any effective remedy, within the meaning of Article 26 (Art. 26), before the German labour courts.

Furthermore, the Commission notes that the Government did not cite a single instance in which a plaintiff had instituted administrative court proceedings, invoking Article 6 para. 1 (Art. 6-1) of the Convention, with a view to obliging the German Government to institute an international arbitration procedure on their behalf. Moreover, the Government failed to show that in the context of the arbitration procedure under the ESA agreement, any rights under the German Provision of Labour Act could have been invoked. In any event, the Commission considers that Article 26 (Art. 26) requires an applicant to have recourse to those remedies available at the domestic level which in themselves are sufficient to redress the situation complained about. Any court action with a view to having another international procedure instituted for the purpose of deciding an issue arising under the Convention, as suggested by the respondent Government, cannot be regarded as an available and sufficient remedy that the applicants ought to have exhausted.

It follows that the applicants' complaint under Article 6 para. 1 (Art. 6-1) cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

2. The respondent Government further observe that the Labour Court granted the European Space Agency immunity from the applicants' action in accordance with the relevant provisions of the German Courts Organisation Act. Referring to the case-law of the Convention organs, they maintain that the right of access to court is subject to inherent limitations which include the traditional and generally recognised

principle of parliamentary and diplomatic immunity and also the immunity of international organisations. In this respect, they explain that, like the state immunity, the immunity granted to international organisations corresponds to the principle of the sovereign equality of all states. An international organisation can only function satisfactorily if its independence is ensured. The activities of international organisations are so closely linked with their sovereign purposes that even private acts cannot be entirely excluded from immunity.

Moreover, the Government consider that sufficient legal protection is provided for the applicants. Following his dismissal, the second applicant could have brought an action against the Italian company T.I., the other party to his employment contract, claiming compensation under S. 10 para. 2 of the German Provision of Labour Act. The question of whether he acted in good faith would have had to be clarified in the said court proceedings. The first applicant, still employed by the company T. and working for the ESA, could also bring proceedings under the Provision of Labour Act against the French company T., though, as the Government admit, any such procedure would have no prospect of success. However, the Government submit that the Convention only guarantees the right of access to a court and not a favourable outcome of any envisaged action. In this context, the Government state that, in any event, the applicants' action against the ESA would have probably remained unsuccessful. In their view, national legislation such as the Provision of Labour Act cannot result in a temporary worker obtaining the status of a member of an international organisation's permanent staff.

The applicants consider that it is not acceptable under Article 6 (Art. 6) that, in a dispute against an international organisation, the access to an independent tribunal is entirely excluded by the principle of immunity.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission