SUR LA RECEVABILITÉ

Application No. 25040/94
by Hans-Joachim ENDERS
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 30 March 1994 by Hans-Joachim ENDERS against Germany and registered on 31 August 1994 under file No. 25040/94;

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 German citizen born in 1946, living in Paderborn where he is practising as a medical doctor in Altenbeken.

The applicant is a member of the medical association (Ärztekammer) and he is admitted to practice as a social security doctor (Kassenarzt). Both positions oblige him to participate in the medical emergency service (Notfalldienst).

Between 2 January 1979 until 31 July 1991 the applicant was on emergency duty for two thousand one hundred and fifteen days.

Medical emergency services are provided for by law and serve the purpose of ensuring medical care in emergency cases on days on which medical practices are closed.

In 1991 the applicant brought a civil action against his regional medical association (Kassenärztliche Vereinigung) of Westfalen-Lippe with a view to obtaining a finding that insofar as the defendant had appointed him emergency duty doctor for more than 14 days per year it was responsible for a violation of his rights. Furthermore the applicant requested the court to find that the defendant had to pay him damages resulting from the fact that since January 1979 he had to be

on emergency duty for more than 14 days per year. In the event he claimed damages from January 1988 onwards and also claimed damages that might arise in the future.

On 23 October 1991 the Paderborn Regional Court (Landgericht) dismissed the action.

The court found that insofar as the applicant requested a finding that the emergency duty regulation was unlawful the action was inadmissible, because the court had no competence for such declarations.

Insofar as the applicant claimed a finding that he was entitled to damages the court considered that he had neither shown that his rights had been violated by the defendant nor that he had incurred any material damage. He had not submitted any figures showing that his costs were not covered by his income as a medical doctor. The court furthermore noted that the applicant had failed to bring a social court action complaining that he was too often chosen for the emergency medical service. Finally the court denied the applicant's claim that the appointments in question constituted a de facto expropriation.

The applicant lodged an appeal (Berufung) which was rejected by the Hamm Court of Appeal (Oberlandesgericht) on 3 July 1992. This court pointed out that the defendant also had to take into account the interests of the medical doctors. Nevertheless it left the question open as to whether the defendant had disregarded the applicant's interest and therefore violated its duties in respect of the applicant, as in any event the applicant had not shown that he had suffered material damages. The applicant had only alleged that his damage consisted in the loss of leisure time but under tort law non-material damages were irrelevant.

The applicant then lodged an appeal on points of law (Revision) which was rejected by the Federal Court (Bundesgerichtshof) on 13 July 1993. The court refused to admit the case for a decision on the merits considering that the case raised no issues of a general character and furthermore it offered no chances of success. The court confirmed the appellate court's finding that under tort law non-material damage was irrelevant. The emergency service had neither deprived the applicant of the possibility to earn money elsewhere or to save costs.

The applicant then lodged a constitutional complaint which was rejected by a group of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) on 12 October 1993.

Subsequently the applicant brought social court proceedings. His request for an interim measure was unsuccessful.

On 25 May 1993 the Dortmund Social Court (Sozialgericht) dismissed the action which he had lodged against his appointment as emergency service doctor for 1992. The court considered that the applicant had no legal interest in finding that his appointment as emergency service doctor was illegal as in any event the civil courts had denied a claim for damages.

The applicant lodged an appeal and on 15 December 1993 the Social Court of Appeal of North Rhine Westfalia (Landessozialgericht) gave judgment in the applicant's favour finding that the defendant orders of 1991 and 1992 appointing him as emergency service doctor were illegal.

Contrary to the social court the appellate social court considered that the applicant had a legal interest in pursuing the matter although the measures complained of related to the past. The court found that the applicant was discriminated against in comparison with his 68 colleagues in the district of Paderborn as in the district

of Altenbeken there were next to him only two further medical doctors who shared with him the burden of providing emergency services. While in the Paderborn District a medical practitioner only had to serve about 7 days per year as emergency doctor the three doctors in the Altenbeken District had to serve 57 days per year. This was an unjustified and excessive burden taking into account that the distance between Altenbeken and Paderborn city was only about 12 km.

COMPLAINTS

The applicant considers that in the light of the social court of appeal's judgment his duty to perform as emergency service doctor amounts to a violation of Article 4 of the Convention and Article 1 of Protocol No. 1. He also invokes these provisions in conjunction with Article 14 of the Convention. The applicant also alleges a violation of Article 6 of the Convention.

THE LAW

The applicant had complained of being a victim of an excessive and discriminatory requisition as an emergency service doctor. The Commission notes however that the applicant has successfully raised this complaint before the social court of appeal and the question therefore arises whether he can still be considered to be a victim of the alleged violation. According to the jurisprudence of the European Court of Human Rights a person is in general no longer a victim within the meaning of Article 25 (Art. 25) when the national authorities have acknowledged either expressly or in substance and afforded redress for, the breach of the Convention (see Eur. Court H.R., Eckle judgment of 15 July 1982, Series A No. 51, p. 30, para. 66).

In the present case the appellate social court recognised that the applicant's emergency service obligation imposed on him an unjustified and excessive burden. It thus acknowledged in substance a breach of the Convention rights invoked by the applicant.

The social court as well as the civil courts refused however to grant the applicant compensation. The question therefore arises whether the appellate social court's judgment constitutes in itself sufficient redress.

The Commission notes in this respect that according to the findings of the German civil courts the applicant has not shown that he has suffered any material damage. The applicant's claim before the civil courts was that he had a loss in leisure time which did however not mean that he was deprived of the possibility to earn money elsewhere or that he incurred any costs in connection with his emergency service. In these particular circumstances the Commission cannot find that the denial of compensation was arbitrary and amounted to a violation of Convention rights in particular of Article 1 of Protocol No. 1 (P1-1) or of Article 4 (Art. 4) of the Convention.

The Commission also notes that the applicant had the possibility to argue his case fully before the civil courts and there is nothing to show that he was in any way denied a fair hearing (Article 6 (Art. 6) of the Convention).

It follows that there is no appearance of a violation of the Articles invoked by the applicant and the application therefore has to be rejected as being manifestly ill-founded.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (C.L. ROZAKIS)