AS TO THE ADMISSIBILITY OF

Application No. 24184/94
by Gisela KNAUF
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 5 April 1995, 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. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

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 6 May 1994 by Gisela KNAUF against Germany and registered on 25 May 1994 under file No. 24184/94;

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 1933 and living in Eschenburg. She is represented by Mr. R. Battenstein, a lawyer practising in Düsseldorf.

It follows from her statements and the documents submitted that on 13 April 1989, the Gießen Social Court (Sozialgericht) rejected an action brought by the applicant against a professional association for precision mechanics and electricians (Berufsgenossenschaft).

The action concerned a dispute between the parties as to whether the applicant's late husband had died as a consequence of an occupational disease caused by asbestos. The applicant claimed a widow's pension for reasons of this alleged "occupational disease".

According to the findings of the court, the applicant's late husband, born in 1929, had been working from 1945 until 1950 as an electrician's apprentice. According to the statements of former colleagues, asbestos was used for the production of goods manufactured by the firm which had been their employer. Furthermore, the late husband had been working from 1950 until 1955 with another firm where he had to install electric motors. It was possible that during that period he was also exposed to asbestos.

In September 1983 he started to suffer from lung complaints and died on 22 April 1984 as a consequence of lung cancer with metastases.

The medical superintendent of the specialised clinic in which the applicant's late husband had been treated, Prof. M., attested, in a letter of 25 April 1984, that the cancer had been caused by asbestos to which the applicant had been exposed during his professional life.

Post-mortem examinations carried out by further medical experts namely, Prof. Kr., Prof. Sch. and Prof. W. did, however, not confirm Prof. M.'s opinion.

Prof. W. had made an analysis of the concentration of asbestos fibres in the deceased patient's lungs and had come to the conclusion that the figures obtained were to be situated in the lowest possible range of measurable concentration and therefore considered that from a medical point of view, there was no indication that the patient had, in his professional career, been over-exposed to asbestos dust.

In a further comprehensive expert opinion of 13 December 1984 Prof. Kr. and Prof. Sch. stated that, as a result of an examination under microscope of the lung remains a diagnosis of asbestosis had to be ruled out. Consequently there was no causal link between the lung cancer and the patient's alleged exposure to asbestos.

On 28 January 1985 a public health officer Dr. F. likewise attested, in conformity with the expert opinion submitted by Prof. Kr., that the death had not been caused by an occupational disease.

In view of all these expert opinions, on 13 March 1985 the defendant refused to grant social insurance cover for contraction of an occupational disease. Objections against this decision had been rejected by the authority on 30 September 1985 after having obtained a further medical expert opinion which was submitted by Prof. L on 31 July 1985 and which confirmed that it was not probable that the cancer of the applicant's husband had been caused by asbestos.

The Social Court ordered ex-officio that another expert opinion should be prepared by Prof. W. taking into account a new decree on occupational diseases. In his expert opinion of 20 October 1988 Prof. W. stated that the existence of a causal link could not be proven with the necessary probability while, on the other hand, it could not be excluded either.

The Social Court stated that it was convinced by the expert opinion of Prof. W., dated 20 October 1988, which confirmed the expert opinions submitted by Prof. L. on 31 July 1985 and Prof. Kr. on 13 December 1984 obtained in the pre-trial administrative proceedings.

Contrary to the plaintiff's opinion it had to be concluded from these expert opinions that the deceased did not suffer from a mesothelioma but of a bronchialcarcinoma. It was true that Prof. M. had, in the course of the treatment, diagnosed a mesothelioma but this diagnosis had been disproved by an autopsy carried out by Prof. Kr. The autopsy permitted an extensive examination under microscope.

On the basis of the result of the autopsy the experts, Prof. L. and Prof. W., had come to the conclusion, so the court pointed out, that a causal link between the alleged exposure to asbestos and the deadly disease could not be established with sufficient probability although it could likewise not be completely excluded. The court also considered that the available expert evidence was sufficient and there was no necessity to grant the plaintiff's motion to obtain another expert opinion from a medical doctor in New York.

The plaintiff's appeal (Berufung) was rejected by the Hessian Social Court of Appeal (Landessozialgericht) on 16 December 1992. Following a request of the plaintiff, this court also obtained an additional expert opinion from Prof. N. and Dr. P. who likewise came to the conclusion that the existence of a causal link could not be

proved with sufficient probability.

The appellate court also relied on the expert opinions of Prof. Kr. and Prof. W. It pointed out that according to the findings of Prof. W. the examination under microscope of the deceased's lung remains had shown that the lung contained a concentration of asbestos fibres which was insignificant i.e. compared to three groups namely, normal lungs, lungs which had received low exposure to asbestos and those which had received high exposure. The results found in the present case were slightly above normal. The court pointed out that consequently all medical experts, namely, Profs. Kr., L., and N. as well as Dr. F., had unanimously denied the existence of a causal link between the disease and the patient's prior exposure to asbestos. The appellate court considered that these expert opinions were conclusive and convincing.

The appellate court also took into consideration that according to a recent recommendation of a medical expert council a lung cancer should be considered to have been caused by asbestos dust if the cancer patient had been exposed to asbestos for at least 25 years at his work place. The court found however that there was no proof that the plaintiff's deceased husband had been exposed to asbestos for such a long period. There was only proof that during his apprenticeship from July 1945 until May 1950 the deceased had been exposed to asbestos but its density could no longer be assessed as the firm had gone bankrupt in the 1950s and information about the concrete working conditions could no longer be obtained.

The appellate court therefore likewise relied on the findings of the experts, Prof. W. and N., who unanimously had excluded the probability of a causal link in view of the small amount of asbestos fibre concentration found by way of examination under microscope of the diseased lung.

The court also rejected the plaintiff's motion to obtain a further expert's report (Obergutachten) stating that such an expert opinion was not necessary as the expert opinion of Prof. Kr. was exhaustive and had been confirmed by several other medical experts. The court also pointed out that the questions which had been put to the medical expert had been determined in collaboration with the plaintiff and this also excluded the need to obtain a further expert opinion.

On 5 August 1993 the Federal Social Court (Bundessozialgericht) denied the plaintiff leave to appeal on points of law (Revision). It is stated in the decision that the judgment appealed from did not disclose any violation of procedural rights as:

- in view of the extensive evidence available, the appellate court was justified in refusing to obtain a counter-expert opinion;

- the appellate court had taken into consideration recent recommendations of a medical expert council and had stated grounds why these were irrelevant in the given case. The plaintiff, on the other hand, had not shown that in view of an alleged precedent there had been reason to decide otherwise;

- insofar as further offers of evidence had been disregarded by the appellate court it had stated sufficient reasons why it considered the evidence in question to be irrelevant.

Furthermore the Federal Social Court denied that the matter raised any issue of a general nature.

The applicant then lodged a constitutional complaint which was rejected by a group of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) on 3 November 1993 on the ground that the requirements as stated in Section 93 (a) para. 2 of the Act on the

Federal Constitutional Court (BVerfGG) were not given.

COMPLAINTS

The applicant considers that contrary to the opinion of the medical experts heard in her case and the opinion of the social courts, the asbestos dust concentration found in her deceased husband's lung was not only of consequence but extremely high and therefore corresponded to that of the group of persons who have been heavily exposed to asbestos. In these circumstances the applicant considers it to be a violation to a right to a fair trial as guaranteed by Article 6 of the Convention that the Social Court of Appeal rejected her request for a further expert opinion. The applicant considers that the social court's opinion that even in normal lungs traces of asbestos dust may be found, is not based on any proof but mere speculation and therefore an expert opinion should have been obtained on this question.

THE LAW

The applicant complains of the decisions given against her in the social court proceedings and considers that her right to a fair trial has been violated because her request to seek a further expert opinion had been rejected by the domestic courts.

With regard to the judicial decisions of which the applicant complains, the Commission first points out that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77 ; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

It is true that in the present case the applicant alleges a violation of her right to a fair trial. She considers that further expert evidence should have been obtained by the domestic courts.

However, the Commission notes that the Social Court and also the Social Court of Appeal had sufficient expert evidence before them. The Social Court of Appeal even obtained, at the plaintiff's request, a further additional expert opinion from Professor N. and Dr. P who, as the preceding experts, likewise came to the conclusion that the existence of a causal link between the applicant's late husband's death and his prior alleged professional exposure to asbestos could not be proved with sufficient probability.

The Commission points out that it is a matter for the domestic judge to appreciate the relevance of proposed evidence. Neither para. 1 nor para. 3 (d) of Article 6 (Art. 6-1, 6-3-d) give to the party in a trial an absolute right to obtain the examination of witnesses or experts on its behalf (see Barbèra, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31 para. 68). The Commission notes that the appellate court based its judgment on several expert opinions which had unanimously found no established causal link between the applicant's late husband's disease and his prior exposure to asbestos. The Commission concludes that in these circumstances it cannot be found that the refusal of the application to obtain a further expert opinion amounted to a possible violation of the applicant's right to a fair trial.

It follows that the application has to be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

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)