CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 40291/98
by Margaret McTEAR
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 7 September 1999 as a Chamber composed of

Mr J.-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mr K. Traja, *Judges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 19 May 1997 by Margaret Mctear against the United Kingdom and registered on 17 March 1998 under file no. 40291/98;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are British national, born in 1945 and living in Beith, Ayrshire, Scotland.

She is represented before the Court by Cameron S. Fyfe, a lawyer practising at Ross Harper, Solicitors, in Glasgow, Scotland.

A. Particular circumstances of the case

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

The applicant is unemployed and in receipt of income support. The applicant raised an action for damages for negligence against Imperial Tobacco Limited in the Court of Session, Edinburgh, in respect of the illness and subsequent death of her late husband. The applicant alleged that her late husband (M), who smoked cigarettes from 1966 to 1992 manufactured by Imperial Tobacco Limited ("the defenders"), was not initially warned by the defenders that the consumption of these cigarettes would be injurious to his health. It was alleged that the defenders had a duty to warn smokers that smoking was addictive and could cause lung cancer. The defenders had failed to do so and, but for that failure, M would not have started to smoke. In 1971 the defenders arranged for warnings about injury to health to be put on their cigarette packets. By that time, however, M was addicted to nicotine and, despite advice from his doctor, could not give up his smoking habit until 1992. In 1992 he was diagnosed as suffering from inoperable lung cancer. The defenders denied the applicant's claims and denied that causation had been proved, alleging *inter alia* contributory negligence.

Since January 1993 M, and following his death, the applicant, attempted to obtain the facility of legal aid from the Scottish Legal Aid Board ("the Board") in order to allow them to be represented by solicitors and counsel in their court action. Every attempt to secure legal aid to sue the defenders for negligence has been unsuccessful, but legal aid was granted to pursue a judicial review of the Board's decision to refuse legal aid.

It was in July 1992 that M began his claim. On 8 January 1993 a legal aid application was lodged on behalf of M, along with a supportive opinion from senior counsel. On 16 and 17 March 1993 M gave evidence on commission which was subject to cross-examination. On 23 March 1993 M died, aged 48, before the cross-examination stage of the commission had been completed.

On 10 May 1993, M's counsel prepared a note, following the commission, giving his opinion as to the likely success of M's case which was to be pursued, following his death, by the applicant. In this opinion he referred to and quoted from a letter sent to the legal aid board in England by a respected academic on the subject of a causal link between tobacco and cancer. In this opinion counsel stated that there would be medical evidence from the applicant's General Practitioner, his consultant and a professor. The anti-smoking campaign had also collected good statistics on the matter.

On 25 May 1993 the Board wrote to M's solicitors ("the solicitors") to confirm that they believed there were difficulties with the subjects of *volenti*, the value of the claim, the likely cost of the case and liability.

On 8 July 1993 the Board wrote to the solicitors refusing the application. In summary the reasons were as follows:

1. It was not reasonable to grant legal aid.
2. M continued to smoke for more than 20 years after warnings were put on cigarette packets.
3. His daily consumption of cigarettes actually increased in his later years.
4. M was able to stop in the later years of his life (once he contracted lung cancer).
5. There was wide publicity of the dangers of smoking in the 1960s and the evidence given by M on commission before his death was at times 'rather vague'.
6. There were difficult questions of *volenti*, causation and substantial contributory negligence. The case would be difficult, complex, lengthy and expensive.
7. It would not be reasonable to hazard such a large sum of money on such a limited prospect of successfully gaining any worthwhile return.

On 4 October 1993, the applicant, M's widow, lodged an appeal against the decision to refuse legal aid. The Board arranged a hearing to deal with the appeal which was attended by the applicant's solicitor and her senior counsel. On 19 October 1993 the Board wrote to the applicant's solicitors confirming that her appeal was unsuccessful.

In December 1993, the applicant was granted legal aid to proceed in the Court of Session with a judicial review of the Board's decision to refuse her appeal. Counsel submitted an opinion in support of the applicant's case in spite of some unhelpful comments made by M on commission prior to his death. On 15 February 1995, Lord Kirkwood in the Court of Session refused the petition for judicial review but indicated that he may have come to a different decision if the case could have been regarded as a test case.

On 9 April 1996, Lord Gill ruled against a motion for caution requested by the defenders. He noted that the decision of the Board to refuse legal aid was based on the criterion of reasonableness and not lack of probable cause. He noted that the Board was entitled, having considered the general assessment of the applicant's prospects, to consider whether the apparent prospects justified the potential costs to public funds. The defenders claimed they wished to obtain security because of the size of their probable expenses (£2 million on preliminary preparations alone) and the applicant's lack of means. Lord Gill noted that whatever the intention behind the motion the inevitable effect of its being granted would be that the action would come to an end. The fact that the Board considered the grant of legal aid to be unreasonable from its point of view did not mean it was unreasonable from the court's point of view that the action should be pursued. Therefore the motion was denied.

On 10 June 1996, the applicant lodged a fresh legal aid application which detailed five new reasons why she considered legal aid should be granted namely:

1. The defenders had lodged a motion for caution which in effect asked the applicant to produce £2 million to cover their expenses. Their motion was refused by Lord Gill whose judgement was sympathetic to the applicant's case.
2. The case could now be regarded as a test case or a class action as the applicant's solicitors had lodged twelve other writs in court and received instructions from twenty other clients with similar claims.
3. Legal aid had been granted to a limited extent in England.

4. For the first time a major tobacco company, Liggett, had conceded a case in the United States of America.
5. A refusal to grant legal aid would amount to a breach of Article 6 § 1 of the Convention.

On 29 August 1996, the applicant's solicitors wrote to the Board with 3 further reasons why they considered that legal aid should be granted. Firstly, there had been a recent and very similar case in Florida called McGrady Carter which was successful. Secondly, the arguments used by the applicant were very similar to those used by the plaintiff in the McGrady case. Finally, there was a proposal in the United States of America for legislation banning any further law suits against tobacco companies if these companies settled all existing actions and made payment towards the medical costs of the smoking related diseases and the costs of anti-smoking campaigns.

On 1 November 1996, the Board wrote to the applicant's solicitors, confirming that legal aid had been refused. On 24 February 1997, following the applicant's application for an appeal against this decision, the Board arranged a hearing at which the applicant was represented by her solicitor and her senior counsel. On 18 March 1997 the Board wrote to the applicant's solicitors confirming the refusal of the appeal. On 15 May 1997 the applicant applied for legal aid to cover judicial review of the Board's decision to refuse her legal aid. This application was refused by the sheriff at Edinburgh on 22 December 1997.

The applicant's court action is still proceeding as the applicant's solicitors and counsel are prepared to act for her at present for no fee.

B. Relevant domestic law and practice

The relevant domestic legislation is section 14 (1)(b) of the Legal Aid Act (Scotland) Act 1986.

COMPLAINT

The applicant complains that the Government have violated her rights under Article 6 § 1 of the Convention because the Government, through the Board, have refused her the right of access to court in not granting her legal aid to cover representation in her action for damages against Imperial Tobacco Limited. The applicant refers to the case of Airey v. Ireland (see Airey v. Ireland judgment of 9 October 1979, Series A no. 32, pp. 15-16, § 26) and complains that legal aid should have been granted to her because she was financially eligible, the action was important to her, it was a complex case, there were reasonable prospects of success in view of recent medical research and the costs of the action would have been exacerbated not by the applicant but by the defenders if they chose to challenge established medical fact.

THE LAW

The applicant complains that she has been refused her right of access to court because the Board have refused to grant her legal aid in the action against Imperial Tobacco Limited for damages which was originally commenced by M, her late husband.

The applicant invokes Article 6 § 1 of the Convention, which provides so far as is relevant:

> " 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 Court recalls that Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations (see Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p.18 § 36). There is no automatic right under the Convention to legal aid to pursue a civil action (see Airey v. UK judgment, op. cit., p. 15 § 26). The latter case indicated, however, that if an applicant was refused legal aid in a case where there exists reasonable prospects of success and therefore had no legal representation this could, in certain circumstances, indeed deny an applicant effective access to court.

The Court is not called upon to examine whether these circumstances exist in the present case. The Court notes that the applicant's counsel, in his opinion, quoted from an expert's letter which had been presented to English courts and which was available to the applicant's representatives without the assistance of legal aid. Further, the opinion indicates that members of the medical profession were already prepared to give evidence and that statistics had been prepared by an anti-smoking pressure group which were available to the applicant and her advisers. The applicant's legal representatives have agreed to represent the applicant without taking a fee and, therefore, it cannot be said that the applicant has been deprived of her right of access to the courts. Her legal representatives have attended interlocutory hearings to date on her behalf. In these circumstances, the Court finds that the applicant's case is at this stage speculative and there is no indication that the representatives will not continue to act on a *pro bono* basis or would be unable to obtain supporting evidence for her claims (c.f. Andronicou and Constantinou v Cyprus judgment of 9 October 1997, Reports 1997-VI, p. 2109, §§ 199-200). The facts presented, therefore, do not disclose any interference with the applicant's rights.

It follows that this application must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J. P. Costa
President