AS TO THE ADMISSIBILITY OF

Application No. 25274/94
by Alban and Hildegard SCHARPF
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 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. MARXER
G.B. REFFI
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 13 July 1994 by Alban and Hildegard SCHARPF against Germany and registered on 22 September 1994 under file No. 25274/94;

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 facts of the case, as they have been submitted by the applicants, may be summarised as follows.

The applicants, born in 1958 and 1962, respectively, are German nationals and resident at Markt-Rettenbach. In the proceedings before the Commission, they are assisted by Ms. H. Kustermann, president of an Oberstdorf association.

In 1991 the applicants' daughter, born in wedlock in 1988, fell ill with leukaemia. Following a first term of chemotherapy, the applicants decided not to continue the subsequent terms of their daughter's treatment. In September 1991 the Memmingen District Court (Amtsgericht), upon the request of the physicians having treated the applicants' daughter, withdrew the applicants' right to custody to the extent that the question of their daughter's medical treatment was concerned, and appointed the Unterallgäu Youth Office (Jugendamt) as supplementary guardian (Ergänzungspfleger). The applicants' appeal was to no avail. In October 1991 the District Court ordered the applicants immediately to hand over their daughter to the supplementary guardian or to bring her themselves to the hospital in Ulm. In this respect the District Court had regard to the guardian's submission that the

applicants had disappeared with their daughter. Upon the applicants' objection, this decision was modified to the effect that they were ordered to bring their daughter to any appropriate hospital. The applicants subsequently brought their daughter first to a hospital in Tübingen and then to a special hospital abroad, and the decisions of September and October 1991 were set aside in November 1991. Having returned from abroad, their daughter remained at the applicants' home under medical surveillance by a paediatrician. The applicants' daughter died suddenly on 21 July 1993.

On 22 July 1993 the Memmingen District Court ordered that the body of the applicants' daughter be seized and subjected to a post-mortem examination. The Court, referring to SS. 94 and 87 of the German Code of Criminal Procedure (Strafprozeßordnung), noted that the applicants had objected to a post-mortem examination which was considered to be necessary in order to determine the cause of their daughter's death and thereby to determine whether a third person could be held responsible for her death. The applicants' right to take care of their deceased daughter (Totensorgerecht) was outweighed by the public interest in establishing the truth regarding the child's death.

On 23 July 1993 the Memmingen Regional Court dismissed the applicants' appeal. The Regional Court considered that, in accordance with the relevant provisions of the Code of Criminal Procedure, the seizure and post-mortem examination could be ordered in case of doubt as to whether the death had been caused by negligence. In the present case, the measures ordered by the District Court were necessary in order to clarify the precise cause of the child's death as well as to examine whether criminal negligence was involved. The Regional Court noted the background of the case and the reporting in the media which inter alia suggested that the applicants' refusal of medical treatment had caused the child's death.

The applicants, represented by counsel, thereupon filed a constitutional complaint (Verfassungsbeschwerde) with the Federal Constitutional Court (Bundesverfassungsgericht) regarding the court decisions ordering the seizure and post-mortem examination of their deceased daughter, and also requested an interim injunction (einstweilige Anordnung). As the post-mortem examination had already been carried out before their submissions were received by the Constitutional Court, the applicants amended their remedies. They then requested that the Constitutional Court should declare the examination in question unlawful and, in interim proceedings, order that the report on the examination be taken in safe-keeping until a decision on the merits of their constitutional complaint, that the report be destroyed and the organs of their deceased daughter, which had been removed in the course of the examination, be transferred immediately to the applicants' place of residence and not be destroyed or thrown away.

On 27 July 1993 the Federal Constitutional Court dismissed the applicants' request for the interim injunction on the ground that at that stage of the proceedings the applicants' constitutional complaint appeared to be manifestly ill-founded. The Constitutional Court found that the decisions ordering the seizure and post-mortem examination could not be objected to under constitutional law. In particular, the measures in question served the purpose of establishing the cause or time of death or whether a third person could be held criminally responsible, and would not, therefore, disregard the deceased person's dignity. Furthermore, the applicants' right to take care of their deceased daughter had not been infringed. Such right was limited by the provisions of the Code of Criminal Procedure on post-mortem examinations, serving the public interest in detecting and prosecuting criminal offences having caused the death of a person. The principle of proportionality was respected as long the authorities acted on the basis of a suspicion that a criminal offence could have been committed. The necessity to order such examinations, and carry them out, as soon as possible in order not to impair the results had to be taken into

account. In the present case, the criminal courts when ordering the seizure and post-mortem examination of the applicants' deceased daughter had balanced the applicants' private interests against the public interest in the prosecution of crime. Their findings that medical negligence or negligence on the part of the applicants could not be excluded in the circumstances and that therefore the examination was necessary to establish the cause of the child's death could not be objected to.

According to a press communique issued by the Memmingen Public Prosecutor's Office (Staatsanwaltschaft) in September 1993, the applicants' daughter had died of leukaemia.

On 4 January 1994 the Federal Constitutional Court refused to admit the applicants' constitutional complaint. The Constitutional Court referred to its earlier decision of 27 July 1993. It further found that having regard to the circumstances of their deceased daughter's disease and of her medical treatment the order of a post-mortem examination could not be objected to on the ground that criminal responsibility regarding the child's death had appeared possible. To the extent that the applicants complained about the circumstances of the post-mortem examination, the Constitutional Court observed that these issues were not covered by the court order but fell within the responsibility of the surgeons concerned. The applicants' complaint as to the failure to return all organs of their deceased daughter, the Court considered that they had failed to show that such organs had been in fact held back, and that they had anyway failed to exhaust the ordinary remedies. The decision was served on 19 January 1994.

It appears that the preliminary investigations against the paediatrician who had been in charge of the deceased child's medical surveillance were recently discontinued.

COMPLAINTS

The applicants complain that the seizure and post-mortem examination of their deceased daughter, the circumstances of the examination and the fact that organs were retained and could not be buried subjected them to inhuman treatment contrary to Article 3 of the Convention. In this context, they also refer to the circumstances of the medical treatment in 1991.

THE LAW

1. The applicants complain about the decision of the Memmingen District Court of 22 July 1993 ordering the seizure and post-mortem examination of their deceased daughter, as confirmed by the Memmingen Regional Court and the Federal Constitutional Court. They also submit that organs were retained and could not be buried.

The Commission recalls 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 (cf. No. 21283/93, Dec. 5.4.94, D.R. 77, pp. 81, 88 and Eur. Court H.R., Van de Hurk judgment of 19 April 1994, Series A no. 288, p. 20, para. 61; Klaas judgment of 22 September 1993, Series A no. 269, p. 17, para. 29).

The applicants consider that the seizure and post-mortem examination of their deceased daughter amount to inhuman and degrading treatment within the meaning of Article 3 (Art. 3) of the Convention.

Article 3 (Art. 3) of the Convention provides that "no one shall

be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission finds that it is primarily for the domestic prosecution authorities and courts to decide whether or not, in given circumstances, there are reasons calling for investigations in the case of a person's death. In the present case, the impugned court decisions ordering the seizure and post-mortem examination of the applicants' deceased daughter were taken against the background of the child's past suffering from leukaemia, and the events at the time and following her chemotherapy in 1991. The Federal Constitutional Court, in its detailed decisions of 27 July 1993 and 4 January 1994, considered that these decisions could not be objected to under constitutional law. The Commission observes that the seizure and post-mortem examination of the applicants' daughter was ordered, in accordance with the relevant provisions of the German Code of Criminal Procedure, for the purpose of establishing the cause of her death because there were doubts as to a possible criminal responsibility on the ground of negligence. Considering all circumstances, the Commission finds that the court decisions ordering the measures concerned cannot be regarded as inhuman or degrading.

Moreover, the applicants' submissions regarding the circumstances of the post-mortem examination of their deceased daughter, in substance concern the conduct of the doctors involved in the post-mortem examination and do not disclose any disregard for their rights by State authorities.

Accordingly, there is no appearance of a violation of Article 3 (Art. 3) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. To the extent that the applicants appear to complain about the events in 1991, the Commission finds that these submissions were not brought within the time-limit of six months, as required by Article 26 of the Convention. This part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) 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)