AS TO THE ADMISSIBILITY OF

Application No. 29754/96
by Ingrid and Hans SCHMITT
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 12 December 1995 by Ingrid and Hans SCHMITT against Germany and registered on 8 January 1996 under file No. 29754/96;

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 applicants are German nationals and a married couple. They are resident at Petersdorf. In the proceedings before the Commission, they are represented by Mr. C. Freiherr von Stackelberg, a lawyer practising in Karlsruhe.

In 1988 Mr. W. instituted proceedings before the Augsburg Regional Court (Landgericht), claiming payment of about DM 730,000 and interest, namely amounts of money which the applicants had allegedly fraudulently obtained between 1980 and 1988 while the first applicant had been living together with the plaintiff. The plaintiff alleged that the first applicant had falsely told him that she had separated from her husband and had introduced the second applicant as her cousin; she had claimed to be wealthy and to be in receipt of a high capital income. He had made the payments to the first applicant upon her offer to invest it under advantageous conditions. The defendants denied having defrauded the plaintiff and also claimed various single items of expenditure. In these and the following proceedings the applicants were represented by counsel.

On 19 September 1991 the Augsburg Regional Court convicted the first applicant of fraud, and the second applicant of having acted as

accomplice to fraud.

On 8 March 1993 the Augsburg Regional Court ordered the applicants to pay to the plaintiff a sum of money amounting to about DM 585,562.10 and interest. The Regional Court awarded this sum under the head of tort, finding that the first applicant had obtained from the plaintiff repayable sums of money amounting to altogether DM 682,648.13 without having ever intended to pay these amounts back. Repayments of DM 72,086,03 and a DM 25,000 loan given by the first applicant to the plaintiff were deducted. In its evaluation of evidence, the Regional Court had regard to various documents relating to the payments made by the plaintiff to the first applicant. The Regional Court considered that the applicants had failed to prove their allegation that the loan document had been a fictitious contract. While it was not in dispute that the plaintiff, in his own earlier divorce proceedings, had concealed his assets by, inter alia, concluding fictitious contracts with the first applicant, the applicants had not expressly alleged and had not offered any proof that the loan document formed part of these fictitious transactions. In this respect the Regional Court observed that a loan contract was not a suitable means of concealing assets. Moreover, by merely denying the receipt of the amounts in question, the applicants had not been able to refute the presumption of payment based on the loan document. Some further payments made by the plaintiff to the first applicant had been proved on the basis of bank statements or on the basis of the applicants' statements in the criminal proceedings against them. Moreover, to the extent that the applicants admitted the receipt of further payments, but claimed that the plaintiff had been bound by contract or that the moneys were used for common expenditure, they had failed to furnish proof of their allegations. In this respect, the Regional Court observed that in view of the amount of some of the payments, namely more than DM 100,000 or DM 55,000, respectively, the assumption that they had been made to cover household expenditure was not very likely. The Regional Court, having regard to the applicants' further submissions on payments made to the plaintiff, found that they had failed to prove the payment of sums exceeding the above-mentioned amounts.

On 16 February 1994 the Munich Court of Appeal (Oberlandesgericht) dismissed the applicants' appeal (Berufung). The Court of Appeal, having considered the applicants' appeal submissions, confirmed the first instance court's findings.

The Court of Appeal considered in particular that the first applicant had defrauded the plaintiff; the question of whether the plaintiff had been aware of the second applicant's true relationship with the first applicant had been only one of the elements showing her intention to deceive the plaintiff. However, there was further corroborating evidence. The Court of Appeal noted in particular the applicants' firm denial, following the parties' separation in 1988, of any obligation to pay back the amounts of moneys obtained from the plaintiff. The applicants had also failed to comment on various other circumstances, i.e. the undisputed payment of some of the sums involved, as confirmed by the applicants' conviction, as well as the fact that the first applicant had immediately used some of the sums to cover her own debts.

Furthermore, the Court of Appeal, in assessing the evidence before it, found that the deception as to the second applicant's status confirmed the applicants' fraudulent intentions. In particular, in the first instance proceedings, the applicants had admitted having introduced the second applicant as the first applicant's cousin. This statement had not been validly withdrawn. The applicants had failed to show any factual circumstances to prove that the plaintiff had any doubts in this regard. Their supposition that the plaintiff had been in a position to realise the second applicant's identity at the very beginning of their relationship was a mere speculation and as such not

susceptible of proof. In any event, the applicants had stated in the course of the first instance proceedings that, when the second applicant was introduced to the plaintiff some four to five years later, the plaintiff had still not been aware of his identity. The requests for the taking of evidence as to whether the plaintiff, in the context of his divorce proceedings, had been in a position to discover that the first applicant was still married and had no own financial means, was refused on the ground that the applicants' submissions on this point were inconclusive. Moreover, the Court of Appeal noted that, in the course of the criminal proceedings, all witnesses had confirmed that the second applicant's identity was to be concealed from the plaintiff. The applicants had failed to comment on these findings in the civil proceedings. The Court of Appeal refused the applicants' request to hear a witness on the question of the plaintiff's general knowledge about the first applicant's family situation as the request to summon the witness had not in any way referred to the crucial question whether the plaintiff had been aware, in 1985 or earlier, that the second applicant was the husband of the first applicant and that he had the power to dispose of the moneys in the relevant account.

As regards the applicants' defence that substantial amounts had been used as expenditure for the plaintiff's and her living, in particular for expensive travelling, the Court of Appeal found that the applicants had failed to show that the amounts claimed by the plaintiff had been transferred to her to cover the said expenditure.

As regards the second applicant's joint and several liability (Gesamtschuldnerschaft), the Court of Appeal found that he had supported the first applicant in defrauding the plaintiff.

On 7 February 1995 the Federal Court of Justice (Bundesgerichtshof) refused to accept the applicants' appeal on points of law (Revision). The Federal Court of Justice stated that the case did not raise any question of fundamental importance and offered no prospect of success.

According to S. 554b of the German Civil Code (Zivilprozeß-ordnung), in disputes concerning pecuniary claims exceeding DM 60,000, the court of cassation, with a two-third majority, may refuse acceptance of an appeal on points of law if the case does not raise any question of fundamental importance.

On 13 March 1995 the applicants lodged a constitutional complaint (Verfassungsbeschwerde) with the Federal Constitutional Court (Bundesverfassungsgericht), alleging that the civil court decisions infringed their constitutional rights.

Sitting as a panel of three members, on 16 June 1995 the Third Section of the Second Division (dritte Kammer des Zweiten Senats) of the Federal Constitutional Court declined to accept the case for adjudication. In its summary decision the Federal Constitutional Court referred to S. 93b, taken in conjunction with S. 93a, of the Federal Constitutional Court Act (Gesetz über das Bundesverfassungsgericht), in the version of 11 August 1993. The decision was notified to the second applicant on 28 June 1994.

According to Article 93 para. 1 (4a) of the Basic Law (Grundgesetz) the Federal Constitutional Court rules on constitutional complaints which may be lodged by any person who considers that the public authorities have infringed one of his or her fundamental rights or one of his or her rights as guaranteed under Articles 20 (4), 33, 38, 101, 103 and 104 of the Basic Law.

The composition and functioning of the Federal Constitutional Court are governed by the Federal Constitutional Court Act.

SS. 90 to 96 concern constitutional complaints. S. 90 para. 1

determines the right to bring such proceedings in line with Article 93 para. 1 (4a) of the Basic Law. In its paragraph 2, it lays down a rule on the exhaustion on ordinary remedies. Any complaint has to be reasoned in accordance with S. 92.

S. 93a para. 1 provides that a constitutional complaint requires acceptance prior to a decision (Annahme zur Entscheidung). According to paragraph 2 of S. 93a, a constitutional complaint shall be accepted if (a) it raises questions of fundamental importance from a constitutional point of view, or (b) if such acceptance is necessary for the protection of the rights enumerated in S. 90 para. 1; this may also be the case if the refusal of acceptance would cause the complainant a particularly serious prejudice. S. 93d contains further procedural rules, including the rule that the decision to decline acceptance does not require any particular reasoning.

S. 95 provides that if a constitutional complaint is upheld, the decision shall state which provision of the Basic Law has been infringed and by which act or omission. If a decision is concerned, the Federal Constitutional Court shall quash the decision.

COMPLAINTS

1. The applicants complain under Article 6 paras. 1 and 3 (d) of the Convention about the German court decisions. They also submit that the proceedings before the Munich Court of Appeal were unfair. In particular the Court of Appeal unduly disregarded their requests to take further evidence as to the plaintiff's awareness of the second applicant's status. Moreover, in their view, the Court of Appeal should have taken evidence on the question whether some of the amounts involved had been used, in agreement with the plaintiff, for their common living. Finally, the Court of Appeal erroneously considered that the second applicant's general support of the first applicant justified his joint and several liability.

2. The applicants further complain under Article 6 para. 1 about the lack of reasoning in both the decisions of the Federal Court of Justice of 7 February 1995 and of the Federal Constitutional Court of 16 June 1995.

THE LAW

1. The applicants complain under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention about the German court decisions and also of the proceedings concerned.

2. With regard to the judicial decisions of which the applicants complain, 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 to 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-A, pp. 81, 88; and Eur. Court HR, Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, para. 61; Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17, para. 29).

3. As regards their complaint about the alleged unfairness of the proceedings before the Munich Court of Appeal, the applicants rely on Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

The Commission has examined the applicants' arguments regarding the civil compensation case brought against them under Article 6 para. 1 (Art. 6-1) which, so far as relevant, provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

As regards the applicant's complaints about the taking and evaluation of evidence, the Commission recalls that it is not for the Convention organs to substitute their own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. The task under the Convention is to ascertain whether the proceedings in their entirety were fair (cf., mutatis mutandis, Eur. Court HR., Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

The applicants submit in particular that the Court of Appeal unduly disregarded their requests to take further evidence as to the plaintiff's awareness of the second applicant's status. Moreover, in their view, the Court of Appeal should have taken evidence on the question whether some of the amounts involved had been used, in agreement with the plaintiff, for their common expenditure.

The Commission notes that the Augsburg Regional Court, in its judgment of 8 March 1993 upheld the plaintiff's claims in tort against the applicants for repayment of sums of money previously transferred to the first applicant. This judgment was confirmed by the Munich Court of Appeal upon the applicants' appeal.

The Commission finds that the respective courts carefully examined the applicants' submissions to disprove the plaintiff's allegations of tort and to establish counter-claims or other reasons warranting a reduction of the sums claimed. The applicants, represented by counsel, had adequate opportunity to put forward their arguments and request the taking of any relevant evidence. To the extent that the Munich Court of Appeal did not take evidence as requested by the applicants, the Court of Appeal gave reasons why it had considered the applicants' submissions inconclusive or irrelevant.

Having regard to all circumstances, the Commission finds no sufficient grounds to conclude that the Court of Appeal's taking of evidence in the applicants' case was incompatible with Article 6 (Art. 6).

4. The application further relates to the alleged lack of a sufficient reasoning in both the decision of the Federal Court of Justice refusing acceptance of the applicants' appeal on points of law as well as in the decision of the Federal Constitutional Court, according to which it declined to accept their constitutional complaint. The applicants invoke Article 6 para. 1 (Art. 6-1).

a. The Commission recalls that Article 6 para. 1 (Art. 6-1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument (cf. Eur. Court HR, Ruiz Torija and Hiro Balani v. Spain judgments of 9 December 1994, Series A nos. 303 A/B, p. 12, para. 29 and pp. 29-30, para. 27, respectively). However, the Commission has already found that, if the relevant domestic law authorises a superior court to reject an appeal on the ground that it raises no legal issue of fundamental importance and offers no prospect of success, it may be sufficient for that court simply to refer to the provision authorising this procedure (cf. No. 8769/79, Dec. 16.7.81, D.R. 25 p. 240; see also No. 20335/92, Dec. 6.9.95; No. 28631/95, Dec. 15.5.96; not published and No. 29753/96, Dec. 26.11.96, not published).

In the instant case, the Commission observes that the Federal Court of Justice, as authorised under S. 554b of the German Civil Code,

refused to accept the applicants' appeal on points of law, stating that the case did not raise any question of fundamental importance and offered no prospect of success.

In these circumstances the Commission, having regard to the particularities of the proceedings regarding an appeal on points of law, considers that there is no appearance that the Federal Court of Justice did not comply with Article 6 para. 1 (Art. 6-1).

b. As regards the proceedings before the Federal Constitutional Court, the Commission recalls that such proceedings come within the scope of Article 6 para. 1 (Art. 6-1) of the Convention, where their outcome is decisive for civil rights and obligations (cf. Eur. Court HR, Süßmann v. Germany judgment of 16 September 1996, para. 41, to be published in Reports 1996). In the present case the dispute before the civil courts concerned the applicants' pecuniary liabilities towards a third person, i.e. civil obligations within the meaning of Article 6 (Art. 6) (cf. Süßmann judgment, loc cit., para. 42). The complaint proceedings before the Federal Constitutional Court could have been directly decisive for the dispute over the applicants' civil obligations, had the constitutional complaint been accepted for adjudication and further been successful. However, the third Section of the Second Division, sitting as a panel of three judges, had declined to accept the applicants' constitutional complaint without giving reasons as to the merits of the submissions made by them. The question therefore arises whether these proceedings involved a "determination" of the applicants' obligations (cf., a contrario, Süßmann judgment, loc. cit., paras. 43-45). However, this matter need not be resolved, as this aspect of the application is anyway inadmissible.

The Commission notes that the Federal Constitutional Court decided to decline acceptance of the applicants' case on the basis of S. 93b, in conjunction with S. 93a of the Federal Constitutional Court Act. In its decision, reference was made to these legal provisions.

The Commission also considers that, taking into account the particular features of the constitutional complaint proceedings, there is no appearance that the Federal Constitutional Court did not comply with Article 6 para. 1 (Art. 6-1).

In sum, the Commission finds that the various matters raised by the applicants, taken individually or cumulatively, did not result in rendering unfair, for the purposes of Article 6 para. 1 (Art. 6-1), the civil proceedings against the applicants.

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

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber