AS TO THE ADMISSIBILITY OF

Application No. 28156/95
by Christine SEARLE
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 April 1997, the following members being present:

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

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 23 February 1995 by Christine SEARLE against the United Kingdom and registered on 8 August 1995 under file No. 28156/95;

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 British national born in 1948. She is a housewife and a student and resides in Hampshire. She claims to be suffering from a form of arachnoiditis, a disease causing severe pain in the back and legs, as a result of a myelogram she underwent in April 1971 in which Myodil, a spinal dye, was used.

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

A. The Myodil litigation in general

When the potential link between Myodil and arachnoiditis was realised, civil proceedings for negligence were instituted against Glaxo Laboratories Ltd (hereinafter Glaxo), the manufacturers of Myodil, and the Health Authorities of England and Wales.

On 19 December 1991 the High Court of Justice gave permission to the plaintiffs in the action against the Health Authorities to discontinue the proceedings before 15 January 1992. The court decided that it would not make any order as to costs for plaintiffs who

discontinued before that date. It also ordered the Health Authorities to continue to supply copies of their medical records to the plaintiffs or potential plaintiffs in the proceedings against Glaxo.

The proceedings against Glaxo were organised as follows. There was the generic claim concerning the liability of Glaxo for damages caused through arachnoiditis being brought about by Myodil myelography. All plaintiffs were parties to this claim, which was conducted as a group action by a Steering Committee designated by the Group of Solicitors involved in Myodil litigation. In addition to the generic claim, there was a series of individual claims as to whether each plaintiff was suffering from Myodil induced arachnoiditis. These were handled by each plaintiff's solicitors.

The statement of claim in the generic action and Glaxo's defence thereto were served before the end of June 1992. By the same time, the consultants of the Steering Committee of the Myodil Solicitors Group had met with the consultants of Glaxo and had agreed on "the essential diagnostic criteria for Myodil-induced symptomatic arachnoiditis" (hereinafter "the essential criteria").

It appears that the High Court judge appointed to hear the litigation issued an order approving the essential criteria. Only the persons who satisfied the essential criteria were admitted to the litigation and were allowed to lodge individual claims. As agreed between the Steering Committee and Glaxo, each potential plaintiff would be examined by a neurologist who would provide a clinician's report. Where appropriate the neurologist would refer the potential plaintiff to a radiologist or neuro-radiologist to undergo a Magnetic Resonance Imaging (hereinafter MRI) scan.

The essential criteria were clinical and radiological criteria. The patient should have been injected with Myodil. There should be radiological evidence of arachnoiditis not just at the site of the initial pathology or surgery, but also at other levels. There should have been no other exclusive cause for arachnoiditis. Finally, the symptoms and clinical findings should match the anatomical distribution of the arachnoiditis which had been demonstrated radiologically.

A number of potential litigants who had been granted legal aid limited to all steps up to but excluding the issue of proceedings and who were found not to satisfy the essential criteria agreed to have their legal aid certificates "discharged". According to the rules governing the granting of legal aid by the Legal Aid Board, persons who have their legal aid certificate "discharged", are covered by legal aid up to the date of the notice of "discharge". A "discharge" of a legal aid certificate is to be distinguished from its "revocation". If a legal aid certificate is "revoked", it is as if the person concerned never had legal aid. As a result, the person concerned has to bear the full cost of the work done under the "revoked" certificate.

On 23 November 1992 a directions hearing took place at the High Court. The judge instructed that all individual claims had to be notified to Glaxo by 1 February 1993 and that the court proceedings had to be served by 1 March 1994. The general claim was to be heard in October 1994.

The deadline for serving the individual claims was subsequently extended to 1 September 1994 and the hearing of the generic action was adjourned until 26 April 1995. On 21 December 1994 the court ordered a further adjournment until October 1995 in the generic action. In January 1995 the court authorised the belated serving of additional individual claims. The Steering Committee promised that it would seek no further extension in respect of individual cases.

In March 1995 Glaxo and the Steering Committee exchanged expert evidence. On 5 July 1995 Glaxo made an offer to settle the action which

the Steering Committee advised the plaintiffs to accept. On 31 July 1995 the judge approved the settlement terms.

It is not clear whether a second action was ever brought by persons who were found not to fulfil the essential criteria.

B. Particular circumstances of the applicant's case

On a date which has not been specified, the applicant was issued with a limited legal aid certificate.

On 14 February 1994 she was examined by a neurologist and on 1 March 1994 she had an MRI. On 15 March 1994 the neurologist informed the applicant's solicitors that the MRI showed evidence of a degree of arachnoiditis which appeared to be confined to the level of surgery.

On 23 March 1994 the applicant's solicitors informed her that, in view of the MRI findings, it would be difficult to proceed within the present Myodil group as she was unable to satisfy the essential criteria. However, the solicitors had decided to seek counsel's advice on whether the opinion of a second neurologist was necessary and on whether the applicant could proceed within the second group of claimants who did not satisfy the "strict" essential criteria but who nevertheless exhibited some signs of Myodil induced arachnoiditis. On 24 May 1994 counsel advised that the applicant should be referred for a second medical opinion. On 16 July 1994 a second neurologist advised that the case was probably not worth taking forward.

On 17 August 1994 the first neurologist advised the applicant's solicitors that, in the light of a recent study, certain assumptions about Myodil induced arachnoiditis (in particular, that the Myodil induced arachnoiditis must be at sites other than the operation site) might be no longer valid.

On 18 August 1994 the applicant's solicitors advised the applicant that the matter could not be pursued further and that they would inform the Legal Aid Board of the difficulties in her case.

On 8 September 1994 the applicant was informed of the conclusions of a recent study to the effect that, although arachnoiditis occurred following surgery, the chance of it happening was well under 10% if the patient had not had Myodil. In contrast, if the applicant had had Myodil, the chance of post-operative arachnoiditis was over 50% in a "highly selected group of patients" investigated.

On 20 September 1994 the applicant's legal aid certificate was discharged with her consent.

COMPLAINTS

1. The applicant complains that she was not allowed to take part in the Myodil litigation. She argues that the essential criteria were unduly restrictive. She invokes Article 13 of the Convention.

2. The applicant also complains under Article 10 of the Convention that for a number of years she did not have access to information concerning the potential effects of Myodil.

THE LAW

1. The applicant complains that she was not allowed to take part in the Myodil litigation.

The Commission considers that the applicant's complaint should be examined under Article 6 para. 1 (Art. 6-1) of the Convention which provides that "in the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by a tribunal

established by law." In accordance with the Court's case-law, this provision guarantees the right of access to a court, i.e. the right to have a claim relating to civil rights and obligations brought before a court or tribunal (Eur. Court HR, Golder v. United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, para. 36). Moreover, there can be no doubt that the applicant had a claim for compensation against Glaxo which was of a civil nature.

The Commission notes that the main thrust of the applicant's complaints is that the essential criteria were unduly restrictive and it recalls that these criteria were agreed by the Steering Committee of the Myodil Solicitors Group, which was conducting the group action, and the defendants, Glaxo. However, it appears that the essential criteria were also approved by a court order. Moreover, it is clear that they were used by the domestic legal aid authorities to determine the applicant's prospects of success if she were to join in the group action. As a result, the responsibility of the United Kingdom under the Convention could be engaged.

However, the Commission considers that Article 6 para. 1 (Art. 6-1) does not preclude the authorities from deciding various issues affecting participation in a group action on the basis of criteria established with the agreement of the defendant, provided that the criteria are reasonable and that potential litigants who do not fall within the criteria preserve the right to sue independently. The applicant has not established that the criteria agreed between the Steering Committee and Glaxo were unreasonable. Moreover, it clearly emerges from the applicant's submissions that persons who were excluded from the group action did not automatically lose the possibility of suing Glaxo independently.

The Commission accepts that the applicant's financial situation was such that, on the basis of all available indications, she could not contemplate instituting proceedings Glaxo without legal aid. However, the applicant was issued with a legal aid certificate. This was limited to all steps up to but excluding the issue of proceedings including obtaining counsel's opinion. Thus, its aim was to enable the applicant to assess her prospects of joining in the group action always with reference to the essential criteria. The Commission notes that this certificate was discharged with the applicant's consent and, as a result, an issue could arise as to whether the applicant can still claim to be a victim of a violation of her right of access to a court, within the meaning of Article 25 (Art. 25) of the Convention. However, the Commission does not consider it necessary to determine the issue because, in any event, the complaint is manifestly ill-founded

The Commission recalls in this connection that Article 6 (Art. 6) does not always guarantee legal aid in civil cases. The means by which a State ensures effective access to civil courts is within its margin of appreciation (Eur. Court HR, Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 15, para. 26). Moreover, even where legal aid may be available for certain types of civil action, it is reasonable to impose conditions on its availability involving, inter alia, the financial situation of the litigant or the prospects of success of the proceedings (No. 8158/78, Dec. 10.7.80, D.R. 21, p. 95; No. 10871/84, Dec. 10.7.86, D.R. 48, p. 154; No. 10594/83, Dec. 14.7.87, D.R. 52, p. 158).

The Commission considers that the discharge of the applicant's legal aid certificate was obviously related to a finding that she did not fulfil the essential criteria for participation in the group action. This finding was reached after obtaining expert medical and legal opinion on the matter and both the medical and legal opinions were covered by the applicant's legal aid certificate. In these circumstances, it cannot be argued that the applicant's prospects of success in the group proceedings were not properly weighed and that the conditions imposed on availability of legal aid in this connection were

unreasonable.

A final issue which remains to be examined is whether the applicant, once excluded form the group action, retained a realistic possibility of instituting proceedings against Glaxo. The Commission is, of course, not unaware of the financial implications of suing Glaxo. However, the Commission notes that the applicant never applied for legal aid in order to institute independent proceedings against Glaxo. Moreover, there is no indication that the domestic legal aid authorities would not consider the possibility of financing such litigation, if it had prospects of success. As a result, the Commission considers that the applicant cannot claim that the inevitable consequence of exclusion from the group proceedings was inability to sue.

It follows that no appearance of a violation of the applicant's right of access to a court under Article 6 para. 1 (Art. 6-1) of the Convention is disclosed. As a result, this part of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains under Article 10 (Art. 10) of the Convention that for a number of years she did not have access to information concerning the potential effects of Myodil.

The Commission considers that, insofar as this complaint may concern the failure of the manufactures of Myodil to disclose to the public information which may have been available to them, it is incompatible ratione personae with the provisions of the Convention, since the actions of the manufactures cannot engage the responsibility of the United Kingdom under the Convention.

It follows that this part of the application must be rejected as incompatible with the Convention in accordance with Article 27 para. 2 (Art. 27-2) thereof.

3. Insofar as the complaint may concern the failure of the competent Health Authority to communicate such information and assuming that an issue under Article 10 (Art. 10) of the Convention could arise, the Commission considers that the applicant has not exhausted domestic remedies in accordance with Article 26 (Art. 26) of the Convention. The Commission recalls, in this connection, that the proceedings against the Health Authorities in all Myodil cases were discontinued before 15 January 1992.

It follows that this part of the application must be rejected in accordance with Article 27 para. 3 (Art. 27-3) 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