

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

FIFTH SECTION

DECISION

Application no. 49372/10
Christian STÜRMER against Germany
and 10 other applications
(see list appended)

The European Court of Human Rights (Fifth Section), sitting on 6 November 2012 as a Chamber composed of:

Mark Villiger, *President,*
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki,
Paul Lemmens,
Helena Jäderblom, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 25 August 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Christian Stürmer and ten others, are German nationals. Their names and personal details are listed in the annex at the end of this decision.

A. The circumstances of the case

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

1. Background to the case

3. The applicants were born between 1959 and 1962 with deformities of their upper and/or lower extremities and other malfunctions of inner organs, resulting from the fact that their mothers had taken the tranquilliser "thalidomide", sold in Germany under the name "Contergan", during a certain, sensitive period of pregnancy. About 3,000 persons suffering from likewise impacts of the drug are living in Germany alone.

4. "Contergan" was produced by the pharmaceutical manufacturer G. GmbH, a company with limited liability, from 1957 until November 1961. It was available on the German market without a medical prescription and was sold as an analgesic suitable to soothe discomforts caused by pregnancy.

5. In 1970 the criminal proceedings for injuries caused by negligence against the management and the owners of the manufacturer company G. were stayed. Civil proceedings on compensation for damages lodged by some affected children or their parents were pending.

6. On 10 April 1970 the pharmaceutical manufacturer G. covenanted to pay a lump sum of 100 million Deutschmarks (DEM - 51 million euros (EUR)) to the victims in order to settle all compensation claims.

7. On 17 December 1971 a public law foundation "*Hilfswerk für behinderte Kinder*" was established by federal law in order to facilitate a settlement with all persons affected and in order to provide a solid financial basis for benefit payments. The foundation received DEM 100 million from the manufacturer and the same amount from the German State. Each person affected by "Contergan" was eligible for a single payment of at least DEM 1,000 and at maximum DEM 25,000 and additionally monthly pensions between DEM 100 and DEM 450. All payments from this fund were exempt from taxes and were not credited against other social benefits. All legal claims against the manufacturer expired by law. The law entered into force on 31 October 1972.

8. On 8 July 1976 the Federal Constitutional Court found the Law on Establishment of a Foundation of 17 December 1971 – henceforth: the 1971 Act – to be compatible with the provisions of the Basic Law, in particular compatible with the property protection of Article 14 of the Basic Law. It held that the legislator voluntarily incurred a position as a creditor and was therefore constitutionally obliged to guarantee the liquidity of the foundation in future and to safeguard that the pensions to the victims were adequate.

9. In 1976 and in 1980 the financial funds of the foundation were supplemented by DEM 50 and DEM 170 million by the German State. Since 1997 the monthly pensions have been financed entirely from the federal budget. From 1976 until 2002 the height of the pensions had been raised nine times.

10. In October 2005 the foundation was renamed to Contergan Foundation (*Conterganstiftung für behinderte Menschen*). The persons affected by "Contergan" received a non-recurring capital sum and again a monthly life-long pension depending on the established degree of health impairment. Payments from the foundation could not be credited against any other social benefit payment in order to ensure that the aggrieved persons received the pension as an extra monetary benefit.

11. On 1 July 2008 the monthly pensions were doubled by the First Law on Amending the Contergan Foundation Law. According to the legislator the higher pension should contribute to compensate for the increasing secondary health deterioration of the now middle-aged persons affected by "Contergan".

12. On 30 June 2009 the Second Law on Amending the Contergan Foundation Law entered into force. The Foundation was endowed with a further EUR 100 million of which EUR 50 million were provided by the manufacturing company G. GmbH and the rest by the Federal Republic of Germany. The amendment slightly increased the monthly pensions (now between EUR 248 and EUR 1,116) which are still funded entirely from the federal budget and the non-recurring payment (*Kapitalentschädigung*) between EUR 1,278 and EUR 12,782 depending on the extent of the bodily damage caused by "Contergan". The law further introduced an annual additional payment (*jährliche Sonderzahlung*) from the capital interests gained by the foundation. The amount of this payment varies between EUR 460 and EUR 3,680 depending on the degree of disability. Furthermore, the increase of the monthly pension was tied to the adaptations of the general retirement pension scheme. By the amendment a further 100 persons who had been previously time-barred to claim benefits became eligible for the benefits.

2. Proceedings at issue

13. On 30 June 2009 the applicants directly lodged a constitutional complaint in which they attacked the constitutionality of the 1971 Act and all subsequent legislation in that respect. They invoked a violation of their property rights and felt discriminated against in comparison to other vulnerable groups. They further complained about a legislative failure to act insofar as they did not receive benefits to the extent they would receive if the present laws on pharmaceutical liability were applied.

14. On 26 February 2010 the Federal Constitutional Court, in a composition of a panel of three judges, declined to review the constitutional complaint of the applicants. The Constitutional Court held that the complaint was inadmissible for being time-barred insofar as the 1971 Act and the First Law on Amending the Contergan Foundation Law were challenged. Regarding the complaint on the Second Law on Amending the Contergan Foundation Law the Court found it inadmissible for reasons of

subsidiarity of the constitutional complaint, as the applicants had not priorly objected against their pension with the competent administrative courts. The Court underlined that the applicants had failed to challenge the regulatory framework. The Court further reasoned that the complaint as a whole was not sufficiently substantiated. Insofar as the applicants complained about a violation of their property rights the Court held that the sum of all benefits the applicants had received since 1971 was significantly higher than the amount of damages the applicants could have reasonably claimed against the manufacturing company of limited liability. The applicants had further failed to clarify why the present statutory provisions on liability for pharmaceutical products which had been enacted well after the "Contergan scandal" had taken place should become applicable in this case. Furthermore, the current provisions on liability for pharmaceutical products provided for compensation only in cases which involved less than 200 severely damaged persons, whereas the "Contergan" case still affected around 3,000 persons. In regard to their complaint about arbitrary discrimination the Court held it insufficient to compare just the amount of the payments and disregard the different legal and factual circumstances. All other groups in question like victims of warfare, war crimes as well as of criminal deeds and of contaminated blood preserves were compensated under significantly different factual and legal circumstances. The benefit payments from the "Contergan" foundation were tax-free and not considered to be income or assets in order to guarantee that the benefits actually improved the financial situation of those affected by "Contergan".

B. Relevant domestic law and practice

1. Law on Establishment of a Foundation

15. Section 23 § 1 of the Law on Establishment of a Foundation of 17 December 1971 – henceforth 1971 Act – (*Gesetz über die Errichtung einer Stiftung „Hilfswerk für behinderte Kinder"*) provided that claims against the manufacturing company of limited liability, G. GmbH, or against its associates, managers or clerks of that company be extinct insofar as the claims relate to a damage which falls under the scope of the 1971 Act.

2. Second Law on Amending the Contergan Foundation Law

16. Section 17 of the Second Law on Amending the Contergan Foundation Law stipulates that the benefits based on this law are exempt from income tax and are not considered to become part of the assets of the beneficiary. According to section 18 § 2 of the same law the obligation of other state authorities to provide for benefits is not affected. Authorities may

not decline benefits provided for by law because the person receives benefits according to this law.

3. Federal Constitutional Court Act

17. Section 93 § 1 of the Rules of Procedure of the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz) stipulates that a constitutional complaint shall be lodged and substantiated within one month after the final decision of the competent court. Section 93 § 3 stipulates that a constitutional complaint on the constitutionality of a statutory law against which there is no other way of recourse must be lodged within one year after the enactment of that law.

COMPLAINTS

18. The applicants complained under Article 13 of the Convention and under Article 1 of Protocol No. 1 read alone and in conjunction with Article 14 that Germany had taken from them any possibility to bring action against the manufacturing company by federal law. They further complained that the First and the Second Amendment Law on the Contergan Foundation Law provided an inadequate compensation for the injuries the applicants had suffered in particular if compared to the amounts paid to likewise impaired victims of the drug "Contergan" in Italy, the United Kingdom and if compared to war invalids or victims of HIV contaminated blood products in Germany.

19. Lastly, they pointed out that the German State was liable for failure to act immediately after first rumours of the teratogenic effects of the drug "Contergan" came up in Austria and in the United States around 1959.

THE LAW

A. The complaint concerning the 1971 Act and subsequent legislation until 2009

20. The applicants complained that the extinction of their civil law claims by the 1971 Act and the following respective legislation including the Second Law on Amending the Contergan Foundation Law violated their right of property under Article 1 of Protocol No. 1 taken in conjunction with Article 13 of the Convention. In addition, they pointed out that the German State was liable for failure to act immediately after first rumours of the

teratogenic effects of the drug "Contergan" came up in Austria and in the United States around 1959.

Article 1 Protocol No. 1 provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 13 of the Convention provides that:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

21. The Court recalls at the outset that a prior application lodged against the 1971 Act claiming likewise a violation of Article 1 Protocol No. 1 was declared inadmissible for being manifestly ill-founded by the Commission (see *X, Y and Z v. Germany*, no. 8387/78, Commission decision of 4 March 1980, Decisions and Reports 19, p. 233). As the present applicants are not identical with the applicants of the former case this complaint cannot be regarded as having been already examined by the Court in the sense of Article 35 § 2 (b) of the Convention.

22. The Court notes that the Federal Constitutional Court held that the applicants' constitutional complaint was time-barred insofar as the applicants had failed to take legal action against the 1971 Act and all subsequent legislation including an alleged failure to act, with the exception of the Second Law on Amending the Contergan Foundation Law, within the statutory time-period prescribed in section 93 §1 or § 3 of the Federal Constitutional Court Act.

23. The applicants did not give any explanation why they were impeded to lodge a constitutional complaint in time nor are any such impediments obvious. Hence, it follows that this part of the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

24. The applicants do not have an arguable claim and Article 13 is therefore not applicable to the case. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3, 3 (a) and 4 of the Convention.

B. The Second Law on Amending the Contergan Foundation Law of 2009

1. Complaint under Article 1 Protocol No. 1

25. The applicants' complaint under Article 1 Protocol No. 1 concerned allegedly insufficient benefits under the Second Law on Amending the Contergan Foundation.

26. The Court recalls that "possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see mutatis mutandis, *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004 IX).

27. The Court reiterates that the right to a pension is not, as such, guaranteed by the Convention. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme (see *Kopecký* [GC], cited above, § 35 (d) and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005-X).

28. Even assuming that the obligation of the German State to guarantee the liquidity of the foundation and to safeguard adequate pensions amounted to such a "legitimate expectation" in the aforementioned sense the Court cannot find that the Second Law on Amending the Contergan Foundation Law interfered with that right.

29. The Court notes that the law significantly increased the capital of the "Contergan Foundation" by EUR 100 million. It further raised the monthly pensions which had been doubled only a year ago and meticulously ensured that the increased benefits remained with the applicants' assets and were not charged against other benefits. It therefore cannot be found that the German State neglected its obligation to observe the financial liquidity of the foundation or that it had lost sight of the adequacy of the monthly pensions.

30. The Court cannot accept the applicants' argument that it results from the comparison of their present situation with the hypothetical financial situation had they been allowed to sue the manufacturing company that there has been an interference. Firstly, this argumentation is purely notional. The applicants did not submit any convincing details why their financial situation today would be better had they been allowed to pursue individual civil proceedings. Secondly, this way of argumentation is in essence again directed against the 1971 Act. However, this part of the applicants' complaint has already been found to be inadmissible.

31. Hence, the applicants' complaints are manifestly ill-founded within the meaning of Article 35 §§ 1 and 3 (a) of the Convention and must be declared inadmissible in accordance with Article 35 § 4 of the Convention.

2. Complaint under Article 1 Protocol No. 1 read in conjunction with Article 14 of the Convention

32. The applicants further complained under Article 14, read in conjunction with Article 1 of Protocol No. 1, that they had been discriminated against in comparison to injured persons claiming compensation under the present pharmaceutical liability provisions, victims of warfare, criminal acts, vaccination, victims of HIV-contaminated blood preserves and in comparison to person affected by "Contergan" who had been born outside Germany.

33. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

34. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, 29 April 2008).

35. Even if the obligation of the German State to safeguard the liquidity of the foundation and to guarantee the adequacy of the pensions can be considered to fall within the ambit of Article 1 Protocol No. 1, the distinction the German legislator drew between the aforementioned groups is not without justification.

36. The Court has established that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Stummer v. Austria* [GC], no. 37452/02, § 88, ECHR 2011).

37. As the Federal Constitutional Court convincingly pointed out the applicants had failed to substantiate that the compensation for about 3,000 injured persons under the present pharmaceutical liability law would be significantly higher than the actual benefits the applicants receive. The persons infected with the HIV via contaminated blood preserves receive comparable benefits to the applicants, but only for five years whereas the pensions of the applicants will be paid for life. The Federal Constitutional Court further pointed out that pensions paid to victims of warfare, criminal

acts and vaccination were not tax-exempt and counted as assets if further social benefits were applied for. Moreover, the pensions paid to persons affected by "Contergan" outside Germany cannot simply be compared by their amount. Again, the questions whether the benefits are tax-exempt, whether the costs of living are comparable and what other social benefits are available to the persons in question has to be taken into account. The applicants did not refute these arguments of the Federal Constitutional Court. Furthermore, the applicants' present pension is not of an insufficient level such as to deprive them of basic means of existence. In light of this, the Court cannot come to the conclusion that the distinctions between the different groups are arbitrary.

38. Hence the applicants' complaints are manifestly ill-founded within the meaning of Article 35 §§ 1 and 3 (a) of the Convention and must be declared inadmissible in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President

APPENDIX

Nº	Firstname LASTNAME	Birth date	Place of residence	Representative
1.	Christian STÜRMER	30/07/1961	Ostfildern	-
2.	Bernhard QUIEL	20/05/1961	Wapelfeld	Christian STÜRMER
3.	Martina GEBURZI	11/03/1961	Berlin	Christian STÜRMER
4.	Manuela BEINLICH	29/04/1961	Hamburg	Christian STÜRMER
5.	Petra BADER	10/05/1962	Wendlingen	Christian STÜRMER
6.	Dieter MACHAUER	18/01/1960	Herxheim	Christian STÜRMER
7.	Brigitte SPEER	16/09/1959	Bassum	Christian STÜRMER
8.	Horst LUCK	07/06/1960	Breckerfeld	Christian STÜRMER
9.	Werner WITTPOTH	27/05/1960	Eschweiler	Christian STÜRMER
10.	Angelika Lili EBEN	06/06/1961	München	Christian STÜRMER
11.	Claudia KLEIN	12/12/1961	Oftersheim	Christian STÜRMER