AS TO THE ADMISSIBILITY OF

Application No. 28639/95
by Joyce G. WOODLEY
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 27 February 1995 by Joyce G. WOODLEY against the United Kingdom and registered on 21 September 1995 under file No. 28639/95;

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 1927. She is retired and resides in Hertfordshire. 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 1976 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 an unspecified date, the applicant obtained a limited legal aid certificate with a view to participating in the Myodil litigation.

On 11 January 1994 the applicant had an MRI. On 20 May 1994 a neuro-radiologist opined that, although there was clear evidence of arachnoiditis, this was limited to the surgery site and, as a result, it was not possible to conclude that Myodil was the most likely cause.

On 26 July 1994 the applicant's solicitors suggested that she should apply for the discharge of her legal aid certificate.

On 21 November 1994 the neuro-radiologist confirmed that, although the applicant had severe arachnoiditis and its appearance suggested that it was probably due to Myodil, the distribution was only at levels of previous surgery. Therefore, the case lay just outside the essential criteria by which it had been agreed that the most likely cause could be attributed to Myodil.

On 31 December 1994 a further medical report was prepared by another neurologist who identified another possible cause for the applicant's symptoms, epidural fibrosis.

On 4 January 1995 the applicant's legal aid certificate was discharged on the ground that it was unreasonable in the circumstances that she should continue to receive legal aid.

On 17 September 1996 the applicant was advised by a different firm of solicitors that her case could not be included in a new group action against Glaxo for which legal aid would be sought. The solicitors considered that the statutory limitation period would be difficult to overcome in the applicant's case, since the courts would probably consider that more than three years had passed since the applicant had first known that she had been injured as a result of an act or omission of Glaxo. Although it was within the courts' discretionary power not to apply the three-year rule, the solicitors considered that there was not likely that this would occur in the applicant's case, particularly since there had been Myodil litigation previously.

COMPLAINTS

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 does not invoke any provisions of the Convention.

THE LAW

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 certificate was discharged on the ground that it was unreasonable in the particular circumstances that she should continue to receive legal aid.

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 must have been 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 from 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 domestic legal aid authorities appeared to have always seriously considered the possibility of financing such litigation, if it had prospects of success. It also notes that the applicant considered the possibility of joining in a second group action for which legal aid would be sought.

Although on 17 September 1996 the applicant's solicitors advised her that there would be problems in overcoming the three-year statutory limitation period, the courts were never given the opportunity of examining the issue of whether the applicant's claim had become statute-barred. As a result, the Commission cannot exclude the possibility that the applicant herself might bear part of the responsibility, especially since her previous legal aid certificate had been discharged on 4 January 1995, i.e. more than twenty months before she was first advised that a problem of statutory limitation arose. In these circumstances, the Commission considers that the applicant cannot claim that the inevitable consequence of exclusion from the original 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, the application must be rejected as 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
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber