

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 23959/94

Margit, Roswitha and Melanie JANSSEN

against

Germany

REPORT OF THE COMMISSION

(adopted on 31 May 1999)

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I. INTRODUCTION

1. The present Report concerns Application No. 23959/94 introduced on 2 March 1994 against Germany and registered on 25 April 1994.
2. The applicants are German citizens. The first applicant, born in 1957, lives in Oberhausen, the second and third applicants live in Mülheim. The first applicant is the daughter, the second applicant the stepdaughter and the third applicant the grandchild of Mrs Gretel Janssen, who died on 27 July 1986. The applicants were represented before the Commission by Mr R. Battenstein, a lawyer practising in Düsseldorf.
3. The respondent Government were represented by their Agent, Ms H. Voelskow-Thies, Ministerialdirigentin, of the Federal Ministry of Justice.
4. The application was communicated to the Government on 12 April 1996. Following an exchange of written observations, the complaint relating to the length of proceedings (Article 6 § 1 of the Convention) was declared admissible on 9 September 1998. The decision on admissibility is appended to this Report. After the entry into force of Protocol No. 11 to the Convention on 1 November 1998, the application was transferred to the Commission sitting in plenary.
5. Having noted that there is no basis upon which a friendly settlement within the meaning of former Article 28 para. 1 (b) of the Convention, can be secured, the Commission, after deliberating, adopted this Report on 31 May 1999 in pursuance of former Article 31 of the Convention, the following members being present:

MM S. TRECHSEL, President
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
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A. PERENIČ
C. BÎRSAN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

6. In this Report the Commission states its opinion as to whether the facts found disclose a violation of the Convention by Germany.

7. The text of the Report is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with former Article 31 § 2 of the Convention.

II. ESTABLISHMENT OF THE FACTS

8. Before her death from mesothelioma, Mrs Gretel Janssen had lodged on 23 December 1985 a compensation claim with her husband's social security insurance association (Maschinenbau- und Metall-Berufsgenossenschaft) in Düsseldorf. She had submitted that her husband had worked from October 1950 to December 1959 as an asbestos fabric cutter in a work area where asbestos mattresses were manufactured. Workers had to clean their clothes themselves. She had washed her husband's clothes every day. She alleged that this activity had caused her to contract an asbestosis related disease.

9. Her claim was rejected by the competent insurance association on 28 February 1986. An appeal (Widerspruch) was rejected on 23 April 1986 by the competent appeals board of the insurance association.

10. On 26 May 1986 Mrs Gretel Janssen appealed to the Duisburg Social Court (Sozialgericht).

11. On 27 May 1986 the Social Court asked the defendant to comment on the claim and to communicate the file. On 9 July 1986 Mrs Janssen's lawyer asked the court by telephone to fix a date for the hearing as quickly as possible since he feared that the plaintiff would not live to attend a hearing in July or August 1986. The defendant submitted written pleadings and the administrative file to the Social Court on 18 July 1986. The plaintiff's representative replied on 18 August 1986.

12. On 9 November 1987 the parties were summoned to appear at a hearing on 26 November 1987. This hearing was cancelled on 23 November 1987. On 24 November 1987 the plaintiff's counsel informed the court that Mrs Janssen had died on 27 July

1986. Thereafter the social court proceedings were continued by Mrs Gretel Janssen's family.

13. On 17 March 1988 the court requested the plaintiff's counsel to indicate the successors in title. It sent a reminder on 8 July 1988. The court received the requested information on 25 July 1988. On 22 November 1988 the parties were summoned to appear at a hearing on 8 December 1988. On 28 November 1988 the plaintiff's counsel requested a hearing to be held at an earlier hour of the day fixed for the hearing. On 5 December 1988 the Social Court cancelled the hearing. On 14 February 1989 the court set the case down for hearing on 2 March 1989.

14. On 2 March 1989 the Duisburg Social Court dismissed the claim on the ground that under Section 539 para. 1 of the Social Security Act (Reichsversicherungsordnung - RVO) the plaintiff was neither an employee nor had she carried out any work that served the purposes of her late husband's employer. The cleaning of his clothes was part of her tasks as a housewife. The court pointed out that under para. 2 of this provision also persons who acted like persons insured under para. 1 were insured against industrial accidents. However, according to the court, the plaintiff had cleaned her deceased husband's clothes because she felt under an obligation to do so on ground of their living together as wife and husband, but not under an obligation to do so for her husband's employer.

15. On 10 May 1989 the family appealed against the judgment to the Social Court of Appeal (Landessozialgericht) of North Rhine-Westphalia. The appeal was received by the court on 12 May 1989.

16. At the hearing on 30 October 1989 the court summoned the employer to take part in the proceedings on the ground that his rights could be affected by the proceedings and requested information as to the work performed by his former employee from 1950 to 1959 and as to the requirements for the protection of the health of workers. The court also instructed a medical expert, Prof. W., to submit a report on the question of whether between 1950 to 1959 medical science was already aware of the danger asbestos constituted for health and whether it was already known that measures of protection had to be taken and, if so, what measures.

17. The employer supplied information on 7 December 1989. The defendant filed written pleadings on 22 December 1989.

18. On 24 August 1990 the Social Court of Appeal asked doctors to supply reports on the former employee and completed the questions put to the expert. The court obtained medical reports from a general practitioner, Dr. P., on 2 September 1990 and from a hospital doctor, Dr. H., on 10 September 1990.

19. On 21 September 1990 the court asked the defendant to supply certain information which was submitted on 4 October 1990.

20. Prof. W.'s report was received by the court on 6 December 1990.

21. On 12 February 1991 the court summoned the Rhineland Communal Accident Insurance Association (Rheinischer Gemeindeunfallversicherungsverband) as a third party and requested Prof. W. to submit an expert opinion on the question of a causal link between the alleged exposure to asbestos and the lethal cancer. In November 1991 the court asked the German Meteorological Service and a witness for information. In December 1991 the court sought supplementary advice from the expert.

22. On 30 January 1992 the court reminded the expert that he should submit his report. The expert opinion was received on 13 July 1992. The applicant's lawyer submitted his observations on 7 September 1992.

23. By a judgment of 14 October 1992 the Social Court of Appeal modified the judgment pronounced on 2 March 1989 by the Duisburg Social Court. The Social Court of Appeal considered that the deceased Mrs Gretel Janssen's cancer had to be considered as a professional disease (Berufskrankheit) and that consequently the defendant had to grant insurance cover. The court considered that Mrs Gretel Janssen's claim was justified in accordance with Section 539 para. 2 of the Social Security Act because by cleaning her husband's workclothes she had acted like a person insured under para. 1 of that provision. In view of the medical expert opinion obtained, the court also considered that there was a causal link between the cleaning activity and the cancer. The court granted leave of appeal on points of law holding that the case raised issues of general interest (grundsätzliche Bedeutung).

24. The defendant insurance organisation thereupon lodged an appeal on points of law (Revision).

25. On 13 October 1993 the Federal Social Court (Bundessozialgericht) set the appellate court's judgment aside and dismissed the action. The Federal Social Court considered that, contrary to the applicants' submissions, the defendant insurance association had been properly represented by its managing director. Like the first instance court the Federal Social Court found that Mrs Gretel Janssen's sickness was not a professional disease as the cleaning of her husband's workclothes mainly served the interests of the couple's household and not the interests of the employer.

26. The applicants then lodged a constitutional complaint (Verfassungsbeschwerde) alleging that the interpretation of Section 539 of the Social Security Act by the social security courts of first and last instance violated the principle of equality before the law and the right to a fair hearing. Invoking Article 6 of the Convention, the applicants further submitted that proceedings relating to professional diseases allegedly caused by asbestos lasted in general too long.

27. Sitting as a panel of three members, on 12 January 1994 the Federal Constitutional Court (Bundesverfassungsgericht) declined to accept the case for adjudication on the ground that the constitutional appeal was inadmissible for lack of substantiation. The

court further pointed out that a constitutional complaint could not be based on an alleged violation of the European Convention on Human Rights.

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

28. The Commission has declared admissible the applicants' complaint that their case was not heard within a reasonable time by the social courts.

B. Point at issue

29. The only point at issue is whether the length of the proceedings complained of exceeded the "reasonable time" referred to in Article 6 § 1 of the Convention.

C. As regards Article 6 § 1 of the Convention

30. The relevant part of in Article 6 § 1 of the Convention provides as follows:

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

1. Applicability of Article 6 § 1

31. The Commission observes that the proceedings at issue concerned the applicants' claim to compensation under the Social Security Insurance Scheme. The purpose of the proceedings was to obtain a decision in a dispute over "civil rights and obligations", and they accordingly fall within the scope of Article 6 § 1 of the Convention (cf. Eur. Court HR, *Duclos v. France* judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, pp. 2179, 2180, § 53; see also No. 20223/92, Comm. Report 18.10.95, endorsed by the Committee of Ministers in its Interim Resolution CM/Del/Dec(96)567 of 25 June 1996). The Government do not dispute the applicability of Article 6.

2. Compliance with Article 6 § 1

a) Period to be taken into consideration

32. As regards the period to be taken into account in the application of Article 6, the Commission finds that it started to run on 23 December 1985 when Mrs Gretel Janssen lodged a compensation claim with her deceased husband's social security insurance association. In this respect, the Commission recalls that obligatory administrative proceedings which precede the court proceedings have to be considered when calculating the relevant period (cf., *mutatis mutandis*, Eur. Court HR, *König v. Germany* judgment of 28 June 1978, Series A no. 27, p. 33, § 98; *Schouten and Meldrum v. the Netherlands* judgment of 9 December 1994, Series A no. 304, p. 25, § 62; *Duclos v. France* judgment

of 17 December 1996, op. cit., p. 2180, § 54; No. 20223/92, Comm. Report, op. cit.). The proceedings ended on 12 January 1994 with the decision of the Federal Constitutional Court. The proceedings in issue therefore lasted approximately eight years and one month.

b) Reasonableness of the length of the proceedings

33. The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and the importance of what is at stake for the applicant in the litigation (see, e.g., Eur. Court HR, Süßmann v. Germany judgment of 16 September 1996, Reports 1996-IV, pp. 1172-1173, § 48 and, as the most recent authority, Papachelas v. Greece judgment of 25 March 1999, Reports 1999- ..., p. ..., § 37).

Complexity of the case

34. The applicants submit that the social security insurance association could have decided on Mrs Gretel Janssen's compensation claim, which she had brought on 23 December 1985, within a month. In fact, the case could have been decided rapidly as there was clearly a causal link between the exposure to asbestos and Mrs Gretel Janssen's disease. Moreover, the amount of the compensation to be awarded was determined by law.

35. In the Government's submission, the case was complex because of the legal nature of both the substantive and procedural issues involved. Detailed investigations had to be made and difficult and controversial legal questions be decided. This is shown by the fact that the Social Court of Appeal granted leave to appeal on points of law against its judgment holding that the case raised issues of general interest.

36. The Commission considers that the case was of some complexity in law and fact. The Social Court of Appeal had to make extensive investigations and examine several expert medical reports. However, as the length of the proceedings cannot be explained in terms of the complexity of the issues involved, the Commission will examine it in the light of the conduct of the applicants and the national authorities.

Conduct of the applicants

37. The Government submit that the applicants contributed to the length of the proceedings. Although Mrs Gretel Janssen's counsel requested an early hearing in view of the disease from which his client was suffering, the court could not fix a hearing without the defendant's written pleadings and without having the administrative file at its disposal which was received by the court on 18 July 1986. They point out that on 18 August 1986 Mrs Gretel Janssen's counsel filed supplementary written pleadings without, however, requesting that a date be fixed for a hearing or that the case be dealt with more rapidly. Thereafter, on 13 October 1987 the court received a power of attorney on behalf

of the applicants as heirs of Mrs Gretel Janssen without any further explanation. Moreover, it took the applicants sixteen months to inform the court that Mrs Gretel Janssen had died on 27 July 1986. On 17 March 1988 the court requested the applicants to submit evidence concerning Mrs Gretel Janssen's succession. After having renewed its demand on 8 July 1988, the court received the requested information on 25 July 1988. Furthermore, a hearing due to be held on 8 December 1988 was postponed at the request of the applicants' counsel who thus contributed to the length of the proceedings.

38. The Commission observes that the applicants did not take the opportunity to accelerate the proceedings, but rather contributed by prolonging them to a certain extent. However, it cannot be said that their conduct in itself justified the length of the proceedings complained of.

Conduct of the national authorities

39. The applicants submit that the proceedings before the Duisburg Social Court lasted for almost three years although that court did not take any evidence.

40. While admitting that what was at stake in the proceedings in issue was of considerable importance for Mrs Gretel Janssen, the Government contend that the first instance court could not reasonably be expected to hold a hearing before Mrs Janssen's death on 27 July 1986, i.e. within two months. The Government also refer to the bad health of the judge dealing with the case as a factor which delayed the proceedings.

41. The Commission recalls that Article 6 § 1 imposes on the Contracting States the duty to organise their judicial system in such a way that their courts can meet each of requirements (see, e.g., Eur. Court HR, Süßmann, loc. cit., p. 1190, § 57). It notes that the proceedings before the Duisburg Social Court lasted from 26 May 1986 until 2 March 1989, that is about two years and nine months, and that the first instance court rejected the claim without having taken any evidence.

42. The proceedings before the Social Court of Appeal began on 12 May 1989 and ended on 14 October 1992, i.e. about three years and five months later.

43. The Government submit that in the applicants' interest the court had to carefully assess the relevant facts and to take extensive evidence. It is true that the submission of the expert opinion took a certain time due to the difficulty of the matter. However, the Court of Appeal had ordered the necessary investigations as early as at the hearing of 30 October 1989. Moreover, the Social Court of Appeal asked for reports and for information from the German Meteorological Service and from a witness. The parties had to be given the opportunity to comment on these points, third parties' interests were involved and they were invited to take part in the proceedings, namely the former employer of Mrs Gretel Janssen's husband and an accident insurance association. In the Government's view these circumstances should be taken into consideration when assessing the reasonableness of the length of the proceedings.

44. The Commission points out that the preparation of expert opinions was the primary cause of the delay in the progress of the proceedings before the Court of Appeal. The submission of these opinions resulted in delays lasting from 30 October 1989 to 6 December 1990, that is thirteen months and six days, and from 12 February 1991 or December 1991, when the court sought supplementary advice from the expert, to 13 July 1992, that is at least seven months. These delays covered therefore a total period of over twenty months. Although the court reminded the expert on 30 January 1992 that he should submit his report, the Commission points out that an expert works in the context of judicial proceedings supervised by a judge, who remains responsible for the preparation and the speedy conduct of the trial (see Eur. Court H.R., Scopelliti v. Italy judgment of 23 November 1993, Series A no. 278, p. 9, § 23).

45. The procedure before the Federal Social Court and the Federal Constitutional Court was not subject to any delay.

What was at stake for the applicants

46. The Commission agrees with the Government's submission that Mrs Gretel Janssen was very ill and a great deal was at stake for her in the proceedings against the social insurance organisation, the main purpose of which was to secure payment of her subsistence. The Commission finds, however, that the same could not be said about her successors.

Overall assessment

47. The Commission, basing itself on the delays in the proceedings before the Court of Appeal and having regard to the circumstances of the instant case and the overall length of the proceedings lasting approximately eight years and one month, concludes that they exceeded a reasonable time within the meaning of Article 6 § 1 of the Convention.

CONCLUSION

48. The Commission concludes, unanimously, that in the present case there has been a violation of Article 6 § 1 of the Convention.

M.-T. SCHOEPFER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission