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

THIRD SECTION[1]

**CASE OF STORCK v. GERMANY**

*(Application no. 61603/00)*

JUDGMENT

STRASBOURG

16 June 2005

**FINAL**

*16/09/2005*

[1] In its composition before 1 November 2004.

**In the case of Storck v. Germany,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr I. CABRAL BARRETO, *President*,
Mr G. RESS,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs A. GYULUMYAN, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 26 October 2004 and 24 May 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in an application (no. 61603/00) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Ms Waltraud Storck ("the applicant"), on 15 May 2000.

2. The applicant, who had been granted legal aid, was represented by Mr G. Rixe, a lawyer practising in Bielefeld. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, and, subsequently, Mrs A. Wittling-Vogel, *Ministerialrätin*, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that her confinement in different psychiatric hospitals and the medical treatment she had received had violated Articles 5 and 8 of the Convention. She also complained that the proceedings to review the legality of these measures had not satisfied the requirements of Article 6 of the Convention.

4. On 15 October 2002 a committee of three judges of the Court, pursuant to Article 28 of the Convention, declared the application inadmissible and rejected it in accordance with Article 35 § 4.

5. On 28 January 2003 the same committee decided to reopen the proceedings.

6. The application was then allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. By a decision of 26 October 2004, the Chamber declared the application partly admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

9. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Third Section.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born on 30 August 1958 and lives in Niederselters (Germany).

### A. Background to the case

11. The case concerns the applicant's repeated placement in a psychiatric institution, her stay in a hospital, her medical treatment and her various compensation claims.

12. The applicant is currently 100% disabled and receives an invalidity pension. She claims to be constantly suffering from significant pain, especially in her arms and legs and her vertebral column. She has spent almost twenty years of her life in different psychiatric institutions and other hospitals.

#### *1. The applicant's placement in different psychiatric institutions*

13. From January 1974 to May 1974 (at which time the applicant was 15 years old), and from October 1974 to January 1975 (when she was 16 years old), the applicant was placed in the children and young people's psychiatric department at Frankfurt am Main University Clinic for seven months at her father's request.

14. From 29 July 1977 (when she was 18 years old) to 5 April 1979, she was placed in a locked ward (*geschlossene Station*) at a private psychiatric institution, the clinic of Dr Heines in Bremen, at her father's request. There had been serious conflicts between the applicant and her parents, following which her father believed her to be suffering from a psychosis. The applicant's mother had suffered from a paranoid-hallucinatory psychosis.

15. The applicant – who by that time had attained the age of majority – had not been placed under guardianship, had never signed a declaration that

she had consented to her placement in the institution, and there had been no judicial decision authorising her detention in a psychiatric hospital. The private clinic of Dr Heines was not entitled to detain patients who were to be kept in accordance with the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts (see paragraphs 51-58 below). On 4 March 1979 the police brought the applicant back to the clinic by force after she had attempted to escape.

16. During her forced stay at that clinic, the applicant was unable to maintain regular social contact with persons outside the clinic. When she was three years old, she had fallen ill with poliomyelitis, and following her medical treatment at the clinic she developed post-poliomyelitis syndrome.

17. From 5 April 1979 to 21 May 1980, the applicant was placed in a psychiatric hospital in Gießen. She claimed that she had by chance been saved from having to stay there any longer by a patient in the hospital who had given her accommodation.

18. From 21 January to 20 April 1981, she again received medical treatment at Dr Heines's clinic, having at that time lost her ability to speak and, according to the doctors, showing signs of autism.

### 2. *The applicant's stays in different hospitals and clinics*

19. On 7 May 1991 the applicant received medical treatment at Dr Horst Schmidt's clinic for neurology and psychiatry.

20. From 3 September 1991 to 28 July 1992, the applicant received medical treatment (*stationäre Behandlung*) at Mainz University Clinic for Psychosomatic Medicine and Psychotherapy, a public-law institution, where she regained her ability to speak.

21. From 22 October to 21 December 1992, the applicant was treated in the orthopaedic department of a clinic in Frankfurt am Main and, from 4 February to 18 March 1993, she was treated in the orthopaedic department of a clinic in Isny.

22. On 18 April 1994 Dr Lempp, a professor of paedopsychiatry at Tübingen University and a member of the federal government's investigating committee, prepared an expert report at the applicant's request. He indicated that the applicant had "at no point in time suffered from a schizophrenia-type psychosis" ("*zu keinem Zeitpunkt lag eine Psychose aus dem schizophrenen Formenkreis vor*") and that her intemperate behaviour had resulted from conflicts with her family.

23. On 6 October 1999 Dr Köttgen, a psychiatrist, submitted a second expert opinion, again at the applicant's request. Confirming the findings of Dr Lempp, she considered that the applicant had never suffered from an early onset of schizophrenia, but that she had been in the midst of a puberty-related identity crisis (*Pubertätskrise*) at the relevant time. Because of the wrong diagnosis given at that time, she had for many years received medication already known to have adverse side effects. As the applicant had

had poliomyelitis, she would have had to be treated with the utmost caution. In that connection, the situation at Dr Heines's clinic seemed to have been particularly serious: deprivation of liberty without a judicial decision, absence of a legal basis for the detention, excessive dosage of medication in order to question the applicant, and methods belonging to "black pedagogy" (*schwarze Pädagogik*).

## B. Proceedings brought by the applicant in the national courts

### *1. Proceedings in the Bremen courts*

24. On 12 February 1997 the applicant, on the basis of the expert report by Dr Lempp, lodged an application for legal aid and an action for damages against Dr Heines's clinic in the Bremen Regional Court. She claimed, firstly, that her detention from 29 July 1977 to 5 April 1979 and from 21 January 1981 to 20 April 1981 had been illegal under German law. Furthermore, the medical treatment she had received had been contraindicated because of her poliomyelitis. She argued that her forcible detention and the medical treatment she had received had ruined both her physical and mental health.

25. It was only at that time, on 24 February 1997, that the applicant was given access to her medical file from Dr Heines's clinic, despite her previous and repeated requests.

#### (a) The judgment of the Bremen Regional Court of 9 July 1998

26. On 9 July 1998 the Bremen Regional Court, after a hearing, allowed the applicant's action for damages, as her detention had been illegal under German law.

27. The Regional Court found that the applicant, who had attained the age of majority, had not been placed under guardianship, and her detention had not been ordered by a district court as provided by the Act of 16 October 1962 of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts (see paragraphs 51-58 below).

28. According to the Regional Court, such a detention would only have been legal if the applicant had given her consent, which had not been the case. Firstly, she had not signed the admission form filled in on the day of her initial admission to the clinic. Secondly, she had not given her implicit consent (*konkludente Einwilligung*) to her placement and treatment at the clinic. The mere fact that on the day of her initial admission she had come to the clinic, accompanied by her father, did not suffice to establish valid consent (*wirksame Einwilligung*). According to the private clinic's submissions, it could not be ruled out that, at that time, the applicant had not

been in a position to realise the importance and the consequences of her detention ("*es ist ... vielmehr nicht auszuschließen, daß die Klägerin zum damaligen Zeitpunkt die Bedeutung und Tragweite der Unterbringung nicht erkennen konnte*"). This was due, in particular, to the fact that the applicant had been given very strong medication from the time of her arrival.

29. On that point, the Regional Court concluded as follows:

> "Even assuming the claimant's initial consent, it would have lapsed as a result of her undisputed attempts to escape and the need to shackle her. From these times at the latest, which have not been specified any further by the defendant, it would have been necessary to obtain a court order."
>
> ("*selbst wenn man doch von einer anfänglichen Einwilligung der Klägerin ausgehen wollte, wäre diese durch die unstreitig erfolgten Ausbruchsversuche der Klägerin und die erforderlich gewordenen Fesselungen hinfällig geworden. Spätestens zu diesen, von der Beklagten nicht näher vorgetragenen Zeitpunkten, wäre die Einholung einer gerichtlichen Anordnung erforderlich gewesen.*")

30. The Regional Court found that, for the second period in which the applicant was placed in the psychiatric hospital (from 21 January to 20 April 1981), she had likewise not consented to her confinement, as she had shown signs of autism and had suffered from temporary loss of speech. Therefore, a court order would also have been necessary for this period.

31. As the applicant was therefore entitled to damages in any event, the Regional Court did not examine the question whether her medical treatment had been adequate or not.

32. The Regional Court also found that the applicant's compensation claim was not time-barred. Under Article 852 § 1 of the Civil Code (see paragraph 63 below), the limitation period of three years for tort claims (*unerlaubte Handlung*) started running only when the victim had knowledge of the damage and of the person responsible for it. The court observed that a victim could only be perceived to have that knowledge when he was in a position to bring an action for damages that had sufficient prospects of success. Only from then on could he reasonably be expected to bring that action ("*daß ihm die Klage zuzumuten ist*"), regard being had in addition to his state of health. The court referred to the case-law of the Federal Court of Justice (*Bundesgerichtshof*) on the subject.

33. Even if the applicant might already have been conscious of the fact that she had been placed in the clinic against her will, it was established that during her long stays in the psychiatric hospital she had been forced to take very strong medication. When she had been released from the clinic, she had still received medical treatment, and she had always been regarded as mentally ill. The applicant had also suffered from serious physical disorders (*schwere körperliche Ausfallerscheinungen*) and had, in particular, subsequently lost the ability to speak for more than eleven years (from 1980 to 1991/92). It was not until the end of this medical treatment and after the submission of Dr Lempp's expert report on 18 April 1994 – in which it had

been concluded for the first time that she had never suffered from schizophrenia – that she had become sufficiently aware of her situation, of her possible right to damages, and of the possibility of bringing an action in court. Her application for legal aid, lodged on 12 February 1997, had interrupted the three-year limitation period. Her claim was therefore not time-barred.

**(b) The judgment of the Bremen Court of Appeal of 22 December 2000**

34. On 22 December 2000 the Bremen Court of Appeal, following an appeal by the clinic, quashed the judgment of the Bremen Regional Court and dismissed the applicant's action.

35. The Court of Appeal disagreed with the Bremen Regional Court's finding that the applicant had illegally been deprived of her liberty during her stay and treatment at the clinic. It noted that the Regional Court had not taken evidence on the issue in dispute. It found that the applicant had conceded in the appeal proceedings that she had to a certain extent voluntarily ("*bedingt freiwillig*") consented to her stay in the clinic in 1981.

36. The Court of Appeal left open the question whether the applicant had a compensation claim in tort (*Schadensersatzanspruch aus unerlaubter Handlung*) on account of her unlawful deprivation of liberty or the damage caused to her body by her medical treatment. In any event, such a claim would be time-barred under Article 852 § 1 of the Civil Code, which provided for a three-year time-limit. The Court of Appeal considered that the applicant had always been conscious of the fact that she had purportedly been detained against her will, independently of the expert opinion submitted by Dr Lempp. She had also been aware that she had allegedly been forced to take antipsychotic medication. Therefore, she had also been in a position to bring an action in court, despite her physical problems. According to the case-law of the Federal Court of Justice, it sufficed to be aware of having suffered damage, without knowledge of the entirety of the damage being necessary.

37. Furthermore, the Court of Appeal found that the applicant was likewise not entitled to bring a compensation claim on a contractual basis (*Schadensersatzansprüche aus Vertrag*) following her medical treatment. According to the Court of Appeal, the applicant had not sufficiently proved that she had expressly objected to her stay in the psychiatric hospital. Moreover, a contract between the applicant and the clinic concerning the applicant's medical treatment could also have been concluded implicitly (*konkludenter Vertrag*). It could not be assumed that this contract had been terminated by each of the applicant's attempts to escape, which were attributable to her illness ("*Es kann nicht angenommen werden, daß dieser konkludent geschlossene Vertrag durch jeden krankheitsbedingten Fluchtversuch beendet worden ist*"). In fact, when the clinic prevented the applicant from escaping, it had complied with its duty of care

(*Fürsorgepflicht*). According to the expert opinion of Dr Rudolf, a psychiatrist appointed by the Court of Appeal, the applicant had been seriously ill at that time and in need of medical treatment.

38. Irrespective of this, the Court of Appeal pointed out that the clinic had disputed the applicant's assertion that she had been detained against her will, so that it remained uncertain whether this assertion was true ("*so daß offenbleibt, ob dieser Vortrag überhaupt zutrifft*").

39. Even if a contract concluded between the clinic and the applicant, who had at that time attained the age of majority, could not be presumed, there was in any event a contract between the clinic and the applicant's father, concluded implicitly for the applicant's benefit. This contract had run at least from 29 July 1977 to January 1978, when attempts had been made to place her in a different psychiatric institution.

40. Furthermore, the Court of Appeal did not consider that the applicant's treatment had been erroneous, or that the dosage of her medication had been too high. It relied in this connection on the conclusive expert report by Dr Rudolf. In assessing the opinion expressed by the expert, who had submitted his report both in writing and orally during the hearing, the court thoroughly considered the partly different conclusions reached in the expert reports by Dr Lempp and Dr Köttgen, which had been prepared at the applicant's request.

*2. Proceedings in the Mainz and Koblenz courts*

41. The applicant also brought an action for damages in the Mainz Regional Court against the doctors who had treated her at Mainz University Clinic and against the clinic itself. She claimed that she had been treated for psychosomatic symptoms, although she had in fact been suffering from post-poliomyelitis syndrome. As the applicant's medical file concerning her treatment at the clinic had temporarily disappeared, the clinic compiled a substitute file (*Notakte*) of some 100 pages, to which the applicant's lawyer was subsequently granted access.

42. In a judgment delivered on 5 May 2000, the Mainz Regional Court dismissed the applicant's claim. It found that, according to the expert report by Dr Ludolph, chief physician of the neurology clinic at Ulm University, there had not been sufficient evidence that her post-poliomyelitis syndrome and her contemporaneous mental ailments had not been treated correctly.

43. During the appeal proceedings subsequently brought by the applicant in the Koblenz Court of Appeal, the original of the applicant's medical file was found, and the applicant's lawyer was granted access to it.

44. In a judgment delivered on 30 October 2001, the Koblenz Court of Appeal confirmed its own judgment by default of 15 May 2001, given on account of the applicant's failure to attend the hearing (*Versäumnisurteil*). It upheld the judgment of the Mainz Regional Court. Relying on the expert report by Dr Ludolph and another two reports submitted by orthopaedic

experts, the court found in particular that the applicant had neither intentionally nor negligently been given the wrong medical treatment. It stated that the fact that one of the expert reports had been drawn up with the aid of doctors assisting the court-appointed expert did not preclude its use in court. The court-appointed expert had taken full responsibility for the report and had been examined in person in court. Moreover, even assuming that there had been an error in treatment, the applicant, on whom the burden of proof fell in the matter, had not shown that there was a causal link between the error in treatment and the damage to her health. In particular, as there had not in any event been a serious error in treatment, it was not necessary, in accordance with the settled case-law of the Federal Court of Justice, to apply a less strict rule on the burden of proof (*Beweiserleichterungen*).

*3. Proceedings before the Federal Court of Justice*

45. The applicant lodged an appeal on points of law with the Federal Court of Justice against the Bremen Court of Appeal's judgment of 22 December 2000 and against the judgments delivered by the Mainz Regional Court on 5 May 2000 and the Koblenz Court of Appeal on 30 October 2001.

46. On 15 January 2002 the Federal Court of Justice refused to admit the applicant's appeal against the judgment of the Bremen Court of Appeal.

47. On 5 February 2002 the five judges of the Federal Court of Justice with jurisdiction to adjudicate on the applicant's case refused to grant her legal aid for her appeal on points of law against the judgments of the Mainz and Koblenz courts. They argued that her appeal did not have sufficient prospects of success. On 25 March 2002 the same five judges of the Federal Court of Justice dismissed the applicant's appeal against the judgments of the Mainz and Koblenz courts as inadmissible, the applicant not having submitted grounds for her appeal within the statutory time-limit.

*4. Proceedings before the Federal Constitutional Court*

48. On 2 February 2002 the applicant lodged a constitutional complaint against the judgments delivered by the Bremen Court of Appeal on 22 December 2000 and the Federal Court of Justice on 15 January 2002. Quoting the relevant provisions of the Basic Law, she claimed that her rights to liberty and human dignity and to a fair trial had been violated. She argued that her physical integrity had been infringed. She set out in detail the conditions of her stay in the various psychiatric institutions, the hearings in and the judgments delivered by the Bremen courts and explained why she considered that her rights had not been respected.

49. On 19 February 2002 the applicant lodged a constitutional complaint against the judgments delivered by the Mainz Regional Court on 5 May 2000 and the Koblenz Court of Appeal on 30 October 2001, and against the

Federal Court of Justice's decision of 5 February 2002 not to grant her legal aid. She claimed that her right to a fair trial had been violated and argued that she had been given the wrong medical treatment. She set out in detail how she had been treated at Mainz University Clinic, how the proceedings in the Mainz and Koblenz courts had progressed and why she considered that her constitutional rights had thereby been violated.

50. On 6 March 2002 the Federal Constitutional Court refused to allow the applicant's constitutional complaints. The court argued that the complaints were not of fundamental importance ("*keine grundsätzliche Bedeutung*"), as the questions raised by them had already been resolved in its case-law. Furthermore, it was not the function of the Constitutional Court to deal with errors of law allegedly committed by the competent civil courts. The applicant's complaints did not disclose a violation of her constitutional rights.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Provisions governing the detention of individuals in a psychiatric hospital

#### *1. Provisions in force at the time of the applicant's placement in the clinic in Bremen in 1977*

51. At the time of the applicant's first placement in the clinic in Bremen, the rules governing the detention of individuals in a psychiatric hospital were notably laid down in the Act of the *Land* of Bremen of 16 October 1962 on the detention of mentally insane persons, mentally deficient persons and drug addicts (*Gesetz über die Unterbringung von Geisteskranken, Geistesschwachen und Süchtigen*).

52. Section 1(2) of the Act provided that it covered cases where confinement took place against the will or without the consent of the person concerned.

53. By section 2 of the Act, a detention was legal if the person concerned, by his conduct towards himself or others, posed a serious threat to public safety or order that could not be otherwise averted.

54. Under the terms of section 3 of the Act, the detention had to be ordered by the district court (*Amtsgericht*) on a written application by the competent administrative authority.

55. Section 7 of the Act provided that an application for the detention of an individual had to be accompanied by an expert report on the mental illness of the person concerned, submitted by the competent public health officer (*Amtsarzt*) or a specialist in mental illnesses. This report had to set

out whether and to what extent the individual, by his conduct towards himself or others, posed a serious threat to public safety or order.

56. By section 8 of the Act, the district court was obliged to assign counsel to the person concerned if this was necessary for the protection of his interests.

57. Under section 9 of the Act, the court, in principle, had to question the person concerned before reaching its decision. A hearing in person was exceptionally considered unnecessary if it was likely to have negative effects on the state of health of the person concerned or if communication with him was not possible. In such cases, the court had to assign him a guardian *ad litem* (*Verfahrenspfleger*), if he had not already been placed under guardianship.

58. An appeal (*sofortige Beschwerde*) lay against the district court's decision ordering the detention (section 10 of the Act). After a period of in principle one year, the district court had to decide whether the detention was to be continued. The continuation of the detention could only be ordered on the basis of a new medical expert report (sections 15 and 16 of the Act).

*2. Subsequent developments*

59. On 9 July 1979 a new Act of the *Land* of Bremen on measures of aid and protection in cases of mental disorders (*Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten*) came into force. It replaced the provisions of the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts of 1962 with a view to securing patients' rights.

60. Section 34 of the Act, among other things, established a Board of Visitors for Psychiatric Hospitals. Without prior notice and at least once a year, it visits psychiatric hospitals in which persons are detained following a court order in accordance with section 17 of the Act. The task of the Board of Visitors is, in particular, to check whether the rights of the persons so detained are respected, and to give patients the opportunity to raise complaints. Several years after the Act came into force, the Board of Visitors extended its visits to all psychiatric hospitals, whether or not the hospitals detained patients pursuant to a court order. These visits, which went beyond the strict wording of section 34 of the said Act, were carried out with the consent of the institutions concerned.

### B. Administrative provisions on the conduct of private clinics

61. Under the terms of section 30 of the Conduct of Trade Act (*Gewerbeordnung*), in its version in force since 16 February 1979, private hospitals and private psychiatric institutions needed a licence issued by the competent State authority. The licence could notably be refused if there

were facts raising doubts as to the reliability of the institution's management.

### C. Criminal-law provisions

62. By Article 239 § 1 of the Criminal Code, a person who deprives another person of his liberty is to be punished by up to five years' imprisonment or a fine. Paragraph 3 of the same Article provides that a person who deprives another person of his liberty for more than one week or causes serious damage to the health of the victim by the detention itself or by an act committed during that detention is to be punished with a prison sentence of between one and ten years. Under Articles 223 to 226 of the Criminal Code, assault is punishable by up to ten years' imprisonment or a fine. A person who unlawfully compels another through force to commit, acquiesce in or omit to carry out an act is punishable by up to three years' imprisonment or a fine (Article 240 § 1 of the Criminal Code).

### D. Civil-law provisions and case-law concerning compensation claims

63. Compensation claims in tort are governed by Article 823 of the Civil Code, paragraph 1 of which provides that a person who intentionally or negligently causes bodily injury to, or damage to the health of, another person or deprives that person of his liberty, is liable to compensate the victim for the damage so caused. By Article 823 § 2 of the Civil Code, the same obligation to compensate the victim rests with a person who intentionally or negligently violates a legal provision designed for the protection of others, such as Articles 223 to 226, 239 and 240 of the Criminal Code. Under Article 847 § 1 of the Civil Code (in the version in force until 31 July 2002 and applicable to damage caused before that date), damages for pain and suffering can be claimed in the event of injury to the body or damage to health, or in the event of deprivation of liberty. According to Article 852 of the Civil Code, in the version in force at the relevant time, compensation claims in tort are time-barred three years after the date on which the victim learned of the damage and of the person liable to compensate him.

64. At the relevant time, there were no explicit provisions on contractual compensation claims in the Civil Code in cases involving the defective performance of a contract (*positive Vertragsverletzung*) concluded by a doctor and his patient. However, in accordance with the well-established case-law of the civil courts, a person could claim damages if his contract with another person had deliberately or negligently been performed defectively by that other person and if this had caused damage to him.

# THE LAW

## I. THE GOVERNMENT'S PRELIMINARY OBJECTION

65. The Government repeated the objection they had raised at the admissibility stage to the reopening of the proceedings before the Court, claiming that the Court did not have the right to do so after a committee had declared an application inadmissible. Nor did the Court have such competence in cases where there had been a manifest error of fact or in the assessment of the relevant admissibility requirements. In any event, no such error was discernible in the present case.

66. The applicant did not comment on this issue.

67. The Court notes that the Government set out their preliminary objection of *res judicata* in detail at the admissibility stage. In its decision on admissibility of 26 October 2004, the Court found:

> "The Court concedes that neither the Convention nor the Rules of Court expressly provide for the reopening of proceedings before the Court (see *Des Fours Walderode v. the Czech Republic* (dec.), no. 40057/98, ECHR 2004-V, and *Harrach v. the Czech Republic* (dec.), no. 77532/01, 18 May 2004). However, in exceptional circumstances, where there has been a manifest error of fact or in the assessment of the relevant admissibility requirements, the Court does have, in the interests of justice, the inherent power to reopen a case which had been declared inadmissible and to rectify those errors (see, *inter alia*, *V.S. and T.H. v. the Czech Republic*, no. 26347/95, Commission decision of 10 September 1996; *Appietto v. France* (dec.), no. 56927/00, § 8, 26 February 2002; *Des Fours Walderode*, cited above; and *Harrach*, cited above). The Government's objection must therefore be dismissed."

The Court considers that there are no reasons for it to depart from that decision.

## II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S CONFINEMENT IN A PRIVATE CLINIC FROM JULY 1977 TO APRIL 1979

68. The applicant claimed that through her forced stay at Dr Heines's clinic in Bremen, she had been deprived of her liberty contrary to Article 5 § 1 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (e) the lawful detention ... of persons of unsound mind ..."

## A. Whether the applicant was deprived of her liberty

69. The applicant maintained that she had been detained against her will in Dr Heines's clinic. Referring to the findings of the Bremen Regional Court, she stressed that she had objected to her confinement in that clinic, where she had been placed in a locked ward and had been unable to contact others.

70. The Government contested this view. They submitted that the applicant had not been deprived of her liberty, as she had consented to her stay in Dr Heines's clinic. Otherwise, the applicant would certainly not have returned there voluntarily in 1981.

71. The Court reiterates that, in order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question (see, *inter alia*, *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 33, § 92; *Nielsen v. Denmark*, judgment of 28 November 1988, Series A no. 144, p. 24, § 67; and *H.M. v. Switzerland*, no. 39187/98, § 42, ECHR 2002-II).

72. The Court observes that, whereas the applicant's factual situation at the clinic was largely undisputed, the Bremen Regional Court found that the applicant had been deprived of her liberty because she had neither expressly nor implicitly consented to her stay there. However, the Bremen Court of Appeal took the view that either the applicant had implicitly concluded a contract concerning her medical treatment with the clinic, or, alternatively, there had been an implicit contractual agreement between her father and the clinic concluded for her benefit. The Court needs to have regard to the domestic courts' related findings of fact but is not constrained by their legal conclusions as to whether or not the applicant was deprived of her liberty within the meaning of Article 5 § 1 of the Convention (see *H.L. v. the United Kingdom*, no. 45508/99, § 90, ECHR 2004-IX).

73. Having regard to the factual situation of the applicant at the clinic in Bremen, the Court notes that it is undisputed that the applicant was placed in a locked ward there. She was under the continuous supervision and control of the clinic personnel and was not free to leave it during her entire stay there of approximately twenty months. When the applicant attempted to escape it had been necessary to shackle her in order to keep her in the clinic. On the one occasion she managed to escape, she had had to be brought back by the police. She was also unable to maintain regular social contact with the outside world. Objectively, she must therefore be considered to have been deprived of her liberty.

74. However, the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's

confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see, *mutatis mutandis*, *H.M. v. Switzerland*, cited above, § 46). The Court notes that, in the present case, it is disputed between the parties whether the applicant had consented to her stay in the clinic.

75. Having regard to the national courts' related findings of fact and to the factors that are undisputed between the parties, the Court observes that the applicant had attained the age of majority at the time of her admission to the clinic and had not been placed under guardianship. Therefore, she was considered to have the capacity to consent or object to her admission and treatment in hospital. It is undisputed that she did not sign the clinic's admission form prepared on the day of her arrival. It is true that she came to the clinic herself, accompanied by her father. However, the right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, p. 36, § 65, and *H.L. v. the United Kingdom*, cited above, § 90).

76. Having regard to the continuation of the applicant's stay in the clinic, the Court considers the key factor in the present case to be that – as is uncontested – the applicant tried on several occasions to escape. She had to be shackled in order to prevent her from absconding and brought back to the clinic by the police when she managed to escape on one occasion. Under these circumstances, the Court is unable to discern any factual basis for the assumption that the applicant – presuming that she had the capacity to consent – agreed to her continued stay in the clinic. In the alternative, assuming that the applicant was no longer capable of consenting following her treatment with strong medication, she cannot in any event be considered to have validly agreed.

77. Indeed, a comparison of the facts of this case with those in *H.L. v. the United Kingdom* (cited above) cannot but confirm this finding. That case concerned the confinement of an individual who was of the requisite age but lacked the capacity to consent in a psychiatric institution he had never attempted to leave; the Court found that there had been a deprivation of liberty. In the present case, *a fortiori*, it must be concluded that there was a deprivation of liberty. The applicant's lack of consent must also be regarded as the decisive feature distinguishing the present case from that of *H.M. v. Switzerland* (cited above, § 46), in which it was held that the placing of an elderly person in a foster home to ensure the necessary medical care had not amounted to a deprivation of liberty. However, the applicant in that case, who had been legally capable of expressing a view, had been undecided as

to whether or not she wanted to stay in the nursing home. The clinic was then able to draw the conclusion that she did not object.

78. The Court therefore concludes that the applicant was deprived of her liberty within the meaning of Article 5 § 1 of the Convention.

## B. Responsibility of the respondent State

### *1. The parties' submissions*

#### (a) The applicant

79. The applicant took the view that the deprivation of her liberty was imputable to the State, as State institutions had been involved in her detention in various respects. Even though Dr Heines's clinic was a private institution, the State had been involved in her stay and treatment there since her sickness had been covered by compulsory health insurance (*gesetzliche Krankenversicherung*). This had created a public-law relationship between the clinic and the insurance company, as well as between the clinic and the applicant herself. Furthermore, the clinic had been integrated into the public health-care system. The clinic had also been informed by a doctor who was working for a State body and had arranged for the applicant's admission to the clinic that the applicant's detention in the clinic necessitated a court order. In addition to that, on 4 March 1979 the police had brought her back to the clinic by force after she had attempted to escape.

80. The applicant further argued that the arbitrary way in which the Bremen Court of Appeal had interpreted the relevant provisions of the Civil Code amounted to a violation of Article 5 § 1 of the Convention.

81. Firstly, the Court of Appeal's interpretation of Article 852 § 1 of the Civil Code had constituted a disproportionate limitation on her right to claim damages. She could only be expected to have had knowledge of damage caused by a particular person within the meaning of that provision when she had learnt that the doctors' conduct had been unlawful and that the resulting damage was attributable to being given the wrong treatment and not to her own state of health. She had always been treated as a mentally ill person and had continued receiving medical treatment long after she had been released from Dr Heines's clinic. At the relevant time, she had even lost her ability to speak for more than ten years. She could not therefore be considered to have had sufficient knowledge and could not reasonably have been expected to bring her claim for as long as she had not had access to her medical file. Access had not been granted to her until 24 February 1997 – that is, after she had brought proceedings in the Bremen Regional Court. In support of that view, the applicant relied on a decision of the Marburg Regional Court of 19 July 1995 (no. 5 O 33/90), in which that

court had found that according to Article 852 of the Civil Code, time did not start running for the purposes of limitation until the person concerned had been granted access to his medical file. Only from then on was that person in a position to assess whether there had been a mistake in his treatment.

82. Secondly, the applicant questioned the Court of Appeal's assumption with respect to a possible claim for damages on account of the defective performance of a contract that the applicant had implicitly concluded with the clinic. She submitted that this interpretation was absolutely incomprehensible and therefore arbitrary. The same was true of the assumption that she might have agreed to her medical treatment on the basis of a contract concluded by her father with the clinic for her benefit. She stressed that, as was proved by her medical file, she had been opposed to her admission to the clinic, to the continuation of her stay there and to her medical treatment. Her various attempts to escape from the clinic would, in any event, have had to be interpreted as a termination of the alleged contract concerning her medical treatment. Even assuming the existence of such a contract, it would not have authorised her unlawful detention, the forcible administration of contraindicated medicines and her repeated immobilisation.

83. The applicant further took the view that Germany had failed to observe its positive obligation under Article 5 § 1 of the Convention to protect her from being deprived of her liberty by private persons. She pointed out that, as she had attained the age of majority, her confinement in the clinic should have required a court order. She disputed that the health authorities, by virtue of their supervisory powers, were sufficiently able to say whether this requirement had been complied with. She stressed that during her stay in the clinic, in which she had been prevented from escaping by, *inter alia*, being administered medication by force, she had not been in a position to secure help from outside. The telephone had been monitored by the clinic personnel and only her father had visited her, and he would not have taken any steps to obtain her release. She pointed out that the possible protection awarded to persons confined to mental institutions by the creation of a Board of Visitors pursuant to section 34 of the Act on measures of aid and protection in cases of mental disorders (see paragraphs 59-60 above) had not been effective in her case. That Act, the enactment of which demonstrated the State's acknowledgment of a need for protection in this respect, had only come into force on 9 July 1979 – that is, after her initial detention in Dr Heines's clinic. Further, it did not entitle the health authorities to supervise mental institutions such as that clinic, which had not been authorised to admit persons confined pursuant to a court order. She argued that only an ombudsman, whom patients could contact at any time, could have adequately safeguarded her rights. Finally, neither the provisions of German civil law nor the safeguards of criminal law had offered her adequate protection against unlawful deprivation of liberty. While providing

retroactive sanctions, they could not prevent the deprivation of liberty itself from occurring or continuing. In view of the serious nature of an infringement of the right to liberty, this could not be regarded as affording sufficient protection.

**(b) The Government**

84. The Government argued that the applicant had not been the victim of a deprivation of liberty that could be imputed to the State. The applicant had been detained in a private clinic, and there had not been a court order or other decision by a State entity authorising her confinement. Nor had any State entities been involved in the applicant's detention as supervisory authorities. Such supervision had only been provided for by law in respect of institutions competent to admit patients confined to a psychiatric hospital by a court order. Dr Heines's clinic had not been such an institution. The clinic had had no obligation and indeed, on account of a doctor's duty of confidentiality, no right to inform the State authorities about the applicant's treatment there.

85. The Government further submitted that there had been no violation of Article 5 § 1 of the Convention on account of any incorrect application of the national law. The applicant had not attempted to institute criminal proceedings against the persons responsible for her detention in Dr Heines's clinic. Her civil action for damages against the clinic had been dismissed by the Bremen Court of Appeal. However, even assuming that Article 5 of the Convention had to be taken into consideration by that court in construing the provisions of German civil law applicable to the case, its interpretation could not be regarded as arbitrary. Regard had to be had to the margin of appreciation enjoyed by the Contracting States in this sphere.

86. Firstly, the Bremen Court of Appeal's calculation of the three-year time-limit in Article 852 § 1 of the Civil Code (see paragraph 63 above) for the applicant to bring her claims in tort could not be regarded as unreasonable. The applicant had brought her action against Dr Heines's clinic in 1997, eighteen years after the end of her initial treatment there. According to Article 852 § 1 of the Code, for the purposes of limitation, time for a claim in tort started to run when the person concerned learned that damage had been caused to him by a particular person. As had been correctly found by the Bremen Court of Appeal, the applicant had already known at the time when she had been confined in the clinic that she had – allegedly – been detained there against her will. This was proved by the expert opinions to the effect that she had, in fact, not suffered from schizophrenia at the relevant time. She had also been able to train as a draughtswoman (*technische Zeichnerin*) and to obtain a driving licence. She had therefore possessed the necessary intellectual capacities to have knowledge of the relevant facts. Consequently, the Bremen Court of Appeal had been entitled to assume that on her release from the clinic in 1981, at

the latest, the applicant could have had the necessary knowledge and could also have been reasonably expected to bring her action in tort against the clinic. In any event, these were questions of fact to be resolved by the competent national courts.

87. Moreover, the Bremen Court of Appeal, with regard to the applicant's possible claim for damages on account of the defective performance of a contract, had not arbitrarily assumed that the applicant had implicitly concluded a contract with the clinic about her medical treatment. She had not objected to her admission to the hospital or to her medical treatment. It had also not been arbitrary for the court to conclude that this contract had not been terminated by her various attempts to escape from the clinic. The additional findings of that court concerning a possible contract concluded by the applicant's father with the clinic for the benefit of the applicant – which would not have entitled the clinic to treat her against her will – were therefore not decisive for its conclusion.

88. The Government further pointed out that Germany had not breached its positive obligation to protect the applicant from an alleged deprivation of liberty by private persons. It was already questionable whether Article 5 of the Convention incorporated such a positive obligation at all. In any event, German law provided multiple instruments for an individual to be protected against interferences with his liberty. Firstly, confinement in a psychiatric hospital had to be ordered by a judge. Secondly, the competent health authorities had far-reaching supervisory powers in monitoring the execution of these court orders. Thirdly, section 34 of the Act on measures of aid and protection in cases of mental disorders (see paragraphs 59-60 above), which came into force on 9 July 1979, introduced a Board of Visitors to monitor the detention of persons ordered under the Act in psychiatric hospitals. It thereby created a further innovative mechanism of protection. Fourthly, a person who deprived another person of his liberty incurred a prison sentence of up to ten years under Article 239 of the Criminal Code (see paragraph 62 above). An individual who had been illegally deprived of his liberty also had the right to claim damages, including for non-pecuniary damage, under Articles 823 and 847 of the Civil Code (see paragraph 63 above). Furthermore, in accordance with section 30 of the Conduct of Trade Act (see paragraph 61 above), the running of a private clinic required a licence issued by the State. In the course of the examination of the application lodged by Dr Heines's clinic for the issuing and extension of such a licence, the competent State authorities had verified that the clinic's management was reliable and that it provided sufficient medical treatment for its patients.

### 2. *The Court's assessment*

89. The Court reiterates that the question whether a deprivation of liberty is imputable to the State relates to the interpretation and application of Article 5 § 1 of the Convention and raises issues going to the merits of

the case, which cannot be regarded merely as preliminary issues (see, *mutatis mutandis*, *Nielsen*, cited above, p. 22, § 57). It agrees with the parties that in the present case there are three aspects that could engage Germany's responsibility under the Convention for the applicant's detention in the private clinic in Bremen. Firstly, her deprivation of liberty could be imputable to the State owing to the direct involvement of public authorities in the applicant's detention. Secondly, the State could be found to have violated Article 5 § 1 in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of Article 5. Thirdly, the State could have breached its positive obligation to protect the applicant against interferences with her liberty by private persons.

#### (a) Involvement of public authorities in the applicant's detention

90. The Court observes that it is not disputed between the parties that the applicant's confinement in the private clinic in Bremen was not authorised by a court or any other State entity. Likewise, at least at the relevant time, there was no system providing for supervision by State authorities of the lawfulness of and conditions for the confinement of persons being treated at the clinic.

91. However, the Court notes that on 4 March 1979 the police, by means of force, brought the applicant back to the clinic after she had escaped. Accordingly, the public authorities became actively involved in the applicant's placement in the clinic. The Court observes that there is no indication that the applicant's express objection to returning to the clinic gave rise to any review on the part of the police or any other public authority of the lawfulness of the applicant's confinement in a private hospital. Therefore, even though the State authorities caused the applicant's detention in the clinic only towards the end of her placement, this engaged their responsibility, as her confinement would otherwise have ended on that date.

#### (b) Failure to interpret the national law in the spirit of Article 5

92. In the present case, the applicant claimed that her rights under Article 5 § 1 of the Convention had been violated in that the Bremen Court of Appeal, in the compensation proceedings brought by her, had failed to interpret the provisions of civil law relating to her claim in the spirit of that Article. In this respect, her complaint is closely linked both to the question whether the State complied with its possible positive obligations under Article 5 § 1 (see paragraphs 100-08 below), and to the question whether the applicant had a fair trial within the meaning of Article 6 § 1 of the Convention (see paragraphs 130-36 below).

93. The Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by the national courts and that it is in the

first place for the national authorities, notably the courts, to interpret national law. However, the Court is called upon to examine whether the effects of such an interpretation are compatible with the Convention (see, *inter alia*, *Platakou v. Greece*, no. 38460/97, § 37, ECHR 2001-I). In securing the rights protected by the Convention, the Contracting States, notably their courts, are obliged to apply the provisions of national law in the spirit of those rights. Failure to do so can amount to a violation imputable to the State of the Convention Article in question. In this connection, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, *mutatis mutandis*, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33, and *Von Hannover v. Germany*, no. 59320/00, § 71, ECHR 2004-VI).

94. In the present case, the assumption adopted by the Bremen Court of Appeal in rejecting the applicant's compensation claim warrants examination of its compliance with the spirit of Article 5 in two respects. Firstly, the Court of Appeal, in considering possible claims in tort, took a restrictive view as regards the moment at which time started to run for the purposes of limitation under Article 852 § 1 of the Civil Code. This led to the applicant's claim being time-barred. In particular, the Court of Appeal, contrary to the Regional Court, found that the applicant, being conscious that she had allegedly been deprived of her liberty against her will, had had sufficient knowledge to bring a compensation claim while she was still being detained in the clinic.

95. In determining whether such an interpretation of the national law can be regarded as complying with the spirit of Article 5 § 1 of the Convention, the Court finds it helpful to compare the national courts' approach with the principles developed under the Convention with respect to the calculation of the six-month time-limit laid down in Article 35 § 1 of the Convention. It reiterates that this rule has to be applied without excessive formalism, having regard to the particular circumstances of the case (see, *inter alia*, *Toth v. Austria*, judgment of 12 December 1991, Series A no. 224, pp. 22-23, § 82). There may be, in particular, special circumstances – for example, where the applicant's mental state rendered him incapable of lodging a complaint within the prescribed period – that can interrupt or suspend the running of time for the purposes of limitation (see *K. v. Ireland*, no. 10416/83, Commission decision of 17 May 1984, Decisions and Reports (DR) 38, p. 160, and *H. v. the United Kingdom and Ireland*, no. 9833/82, Commission decision of 7 March 1985, DR 42, p. 57).

96. Having regard to this, the Court considers that the Court of Appeal, in its interpretation of the provisions on the limitation period, did not have sufficient regard to the right to liberty laid down in Article 5 § 1 of the Convention. In particular, that court did not consider the applicant's situation while being detained, in that she had in reality been incapable of

bringing an action in court. Contrary to the Regional Court, it also took no account of the difficulties she had encountered after her release from the clinic. The applicant had been treated with strong medication at the time of her release and long afterwards. It is undisputed that, at that time, she was suffering from serious physical disorders and, in particular, lost the ability to speak for more than eleven years (from 1980 to 1991/92). She was also deemed to be mentally ill until she finally obtained two expert reports to the contrary in 1994 and 1999. Furthermore, it has to be noted that the applicant was refused access to the medical file concerning her treatment at the clinic before she brought her action in the Bremen Regional Court. In this connection, the Court also takes into consideration the fact that, as a result of a decision of the Marburg Regional Court produced by the applicant, time did not start running for the purposes of limitation under Article 852 of the Civil Code before the person concerned had access to his medical file.

97. Secondly, the interpretation adopted by the Bremen Court of Appeal concerning the applicant's contractual claims for damages warrants examination of its compliance with the spirit of Article 5 of the Convention. In rejecting these claims, the Court of Appeal assumed that the applicant had implicitly concluded a contract with the clinic on her medical treatment. With respect to this, the Court refers to its above findings regarding the question whether the applicant was deprived of her liberty (see paragraphs 71-78 above). Assuming that she had the capacity to consent, there is no factual basis whatsoever for the assumption that the applicant, who had clearly objected to her stay and had tried to escape on several occasions, had consented to her stay and treatment at the clinic, thereby implicitly concluding a contract. If the applicant, in the alternative, had not been capable of consenting following her immediate treatment with strong medication, she could in any event not be considered to have validly concluded a contract. Given this finding, a contract concluded implicitly between the applicant's father and the clinic for the benefit of the applicant at the age of 18, which the Court of Appeal assumed in the alternative, could not have authorised her detention against her will. This was not disputed by the Government

98. Consequently, the Court of Appeal's finding that, under these circumstances, there was a contractual relationship by which the applicant had consented to her stay and treatment at the clinic must be considered arbitrary. The Court of Appeal cannot therefore be deemed to have applied the national provisions of civil law designed to afford protection of the right to liberty safeguarded by Article 5 § 1 in the spirit of that right. The Court, finally, cannot but discern a certain contradiction between the Court of Appeal's findings with respect to the applicant's contractual and tort claims. In examining the contractual claims, the Court of Appeal assumed that the applicant had consented to her stay in the clinic – that is, had been willing to stay there. However, it stated with respect to her claims in tort that the

applicant was already aware at the time of her confinement in the clinic that she had been detained there against her will.

99. The Court concludes that the Bremen Court of Appeal, as was confirmed by the higher courts, failed to interpret the provisions of civil law relating to the applicant's compensation claims in contract and tort in the spirit of Article 5. There has therefore been an interference imputable to the respondent State with the applicant's right to liberty as guaranteed by Article 5 § 1 of the Convention.

**(c) Compliance with the State's positive obligations**

100. The Court considers that the special circumstances of the applicant's case also warrant an examination of the question whether her detention is imputable to the respondent State in that the State breached a positive obligation to protect the applicant against interferences with her liberty by private persons.

101. The Court has consistently held that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction (see, *inter alia*, *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 57, § 26, and *Woś v. Poland* (dec.), no. 22860/02, § 60, ECHR 2005-IV). Consequently, the Court has expressly found that Article 2 (see, among other authorities, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36), Article 3 (see, *inter alia*, *Costello-Roberts*, cited above, pp. 57-58, §§ 26 and 28) and Article 8 of the Convention (see, *inter alia*, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23, and *Costello-Roberts*, ibid.) require the State not only to refrain from an active infringement by its representatives of the rights in question, but also to take appropriate steps to provide protection against an interference with those rights either by State agents or by private parties.

102. Having regard to this, the Court considers that Article 5 § 1, first sentence, of the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens. Any conclusion to the effect that this was not the case would not only be inconsistent with the Court's case-law, notably under Articles 2, 3 and 8 of the Convention, it would also leave a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see, *mutatis mutandis*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V,

and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 332-52 and 464, ECHR 2004-VII).

103. With regard to persons in need of psychiatric treatment in particular, the Court observes that the State is under an obligation to secure to its citizens their right to physical integrity under Article 8 of the Convention. For this purpose, there are hospitals run by the State which coexist with private hospitals. The State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals (see, *mutatis mutandis*, *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, pp. 14-15, §§ 28-30, and *Woś*, cited above, § 60). The Court would point out that in *Costello-Roberts* (cited above, p. 58, §§ 27-28) the State was held responsible for the act of a headmaster of an independent school on account of its obligation to secure to pupils their rights guaranteed by Articles 3 and 8 of the Convention. The Court finds that, similarly, in the present case the State remained under a duty to exercise supervision and control over private psychiatric institutions. Such institutions, in particular those where persons are held without a court order, need not only a licence, but also competent supervision on a regular basis of whether the confinement and medical treatment is justified.

104. Turning to the present case, the Court notes that, under German law, the confinement of a person in a psychiatric hospital had to be ordered by a judge if the person concerned either did not or was unable to consent. In this case, the competent health authority also had powers to supervise the execution of these court orders. However, in the applicant's case, the clinic, despite her lack of consent, had not obtained the necessary court order. Therefore, no public health officer had ever assessed whether the applicant – which was more than doubtful – posed a serious threat to public safety or order within the meaning of section 2 of the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts. Consequently, the State likewise did not exercise any supervision of the lawfulness of the applicant's detention in the clinic for approximately twenty months.

105. It is true, though, that, as deprivation of liberty is an offence punishable by up to ten years' imprisonment, German law retrospectively provided sanctions with a deterrent effect. Moreover, a victim can, under German civil law, claim compensation in tort for damage caused by an unlawful detention. However, the Court, having regard to the importance of the right to liberty, does not consider that such retrospective measures alone provide effective protection for individuals in such a vulnerable position as the applicant. It notes that, particularly in the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts, there were numerous – necessary – safeguards for persons detained in a mental institution following a court order. However, these safeguards did not apply in the more critical cases of persons confined in a

psychiatric institution without such an order. It must be borne in mind that the applicant, once detained and treated with strong antipsychotic medication, was no longer in a position to secure independent outside help.

106. The lack of any effective State control is most strikingly shown by the fact that on 4 March 1979 the police, by the use of force, brought the applicant back to the place of detention from which she had escaped. Thereby, the public authorities, as shown above, were involved in the applicant's detention in the clinic, and yet her escape and obvious unwillingness to return did not entail any review of the lawfulness of her forced stay there. This indicates the great danger of abuse in this field, notably in cases such as that of the applicant, in which family conflicts and an identity crisis were at the root of her troubles and long detention in a psychiatric hospital. The Court is therefore not convinced that the supervision exercised by the State authorities merely in connection with the issuing of a licence for the running of a private clinic pursuant to section 30 of the Conduct of Trade Act sufficed to ensure competent and regular supervisory control in respect of a deprivation of liberty in such a clinic. Moreover, section 30 of the Conduct of Trade Act was not in force as such at the start of the applicant's detention in the clinic.

107. The Court observes that, shortly after the end of the applicant's detention in the private clinic, further safeguards were introduced by section 34 of the Act on measures of aid and protection in cases of mental disorders for individuals detained in psychiatric institutions, responding to the lack of sufficient protection in this field. In particular, a Board of Visitors was created to inspect psychiatric institutions, to check whether the rights of patients were being respected and to give patients the opportunity to raise complaints. However, these mechanisms came too late for the applicant.

108. Therefore, the Court concludes that the respondent State has breached its existing positive obligation to protect the applicant against interferences with her liberty by private persons from July 1977 to April 1979. Consequently, there has been a violation of Article 5 § 1, first sentence, of the Convention.

### C. Whether the detention was "in accordance with a procedure prescribed by law" and "lawful" within the meaning of Article 5 § 1 (e)

109. It was undisputed between the parties that the detention of a person of unsound mind against his will or without his consent – where such a detention was found to have occurred – necessitated a court order under section 3 of the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts.

110. The Court reiterates that the question whether the applicant's detention was in accordance with the law and with a procedure prescribed by law only needs to be answered in so far as the public authorities, notably the courts, were directly involved in the interference with the applicant's right to liberty as such (see paragraphs 90-99 above). In so far as the interference was solely the result of acts by private persons (see paragraphs 100-08 above), it falls outside the scope of the second sentence of Article 5 § 1 of the Convention. In this case, the mere fact that the State has failed in its general duty under the first sentence of Article 5 § 1 to protect the applicant's right to liberty entails a violation of Article 5 (see, *mutatis mutandis*, *Nielsen*, cited above, opinion of the Commission, p. 38, § 102).

111. The lawfulness of the detention for the purposes of Article 5 § 1 (e) presupposes conformity both with domestic law and with the purpose of the restrictions permitted by Article 5 § 1 (e). As regards conformity with domestic law, the Court reiterates that the term "lawful" covers procedural and substantive aspects of national law, overlapping to a certain extent with the general requirement in Article 5 § 1 to observe a "procedure prescribed by law" (see, *inter alia*, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, pp. 17-18, § 39, and *H.L. v. the United Kingdom*, cited above, § 114).

112. The Court notes that, as was found above, the applicant was deprived of her liberty against her will or at least without her consent. Under these circumstances, it is not disputed that, under section 3 of the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts (see paragraph 54 above), detention was lawful only when it had been ordered by the competent district court. The Court refers to the finding of the Bremen Regional Court on this point (see paragraph 29 above):

> "Even assuming the claimant's initial consent, it would have lapsed as a result of her undisputed attempts to escape and the need to shackle her. From these times at the latest, which have not been specified any further by the defendant, it would have been necessary to obtain a court order."

As there was no court order authorising the applicant's confinement in the private clinic, her detention was not lawful within the meaning of Article 5 § 1, second sentence, of the Convention. It is therefore not necessary to decide whether the applicant had been reliably shown to have been suffering from a mental disorder of a kind or degree warranting compulsory confinement.

113. The Court concludes that the applicant's confinement in Dr Heines's clinic from July 1977 to April 1979 amounted to a breach of her right to liberty as guaranteed by Article 5 § 1 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S PLACEMENT IN A PRIVATE CLINIC FROM JULY 1977 TO APRIL 1979

114. The applicant further complained that she had not been afforded an effective remedy whereby she could secure a decision as to the lawfulness of her detention in the clinic. She relied on Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

115. The applicant, referring to her submissions in respect of Article 5 § 1 of the Convention, pointed out that there had been a lack of sufficient safeguards to ensure that individuals who considered themselves to be detained against their will had access to a court to obtain a decision on the lawfulness of their detention. This violated Article 5 § 4.

116. The Government did not comment separately on this issue.

117. The Court reiterates that it is essential for the judicial proceedings referred to in Article 5 § 4 that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Without this he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty. In the case of a detention on account of mental illness, special procedural safeguards may prove to be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see, *inter alia*, *Winterwerp*, cited above, p. 24, § 60).

118. The Court notes that, in principle, the provisions of the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts (see paragraphs 51-58 above) provided that the detention of a person on account of mental illness had to be reviewed by a court at regular intervals. In the course of such proceedings, the person concerned could be assigned counsel to protect his interests and had to be examined in court either in person or through a representative. However, in the present case, the applicant, who had apparently been unable to secure outside help during her confinement in the clinic, was not in a position to institute such judicial review proceedings. Consequently, it is indeed questionable whether there were sufficient safeguards to guarantee the applicant's effective access to a court in order to have the lawfulness of her detention reviewed. The issues raised on this subject are, however, essentially the same as those raised in respect of the State's positive obligation to protect the applicant against interferences with her liberty. Having regard to its above findings in respect of the non-compliance of the State with these positive obligations under Article 5 § 1 of the Convention

(see paragraphs 100-08 above), the Court considers that no separate issue arises under Article 5 § 4 of the Convention.

## IV. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S PLACEMENT IN A PRIVATE CLINIC FROM JULY 1977 TO APRIL 1979

119. The applicant claimed that the Bremen Court of Appeal's restrictive interpretation of the national provisions governing her compensation claim had deprived her of the right to damages for her detention. She relied on Article 5 § 5 of the Convention, which provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

120. The applicant, referring to her submissions in respect of Article 5 § 1 of the Convention, maintained that the way in which the Bremen Court of Appeal had interpreted the relevant provisions on limitation amounted to a disproportionate restriction on her compensation claim. This had denied her, in practice, the right to claim damages for her unlawful detention. The same applied to the Court of Appeal's conclusion that, by having allegedly implicitly concluded a contract with the clinic, she had agreed to her detention or her medical treatment.

121. The Government, also referring to their submissions in respect of Article 5 § 1 of the Convention, took the view that the applicant had not been detained contrary to Article 5 § 1. However, even assuming that she had, she would, under German law, be entitled to claim damages. The findings of the Bremen Court of Appeal, in particular with respect to the calculation of the relevant time-limit and to the assumption of the implicit conclusion of a contract concerning the applicant's medical treatment, could not be regarded as unreasonable. Therefore, her compensation claim had not been arbitrarily dismissed.

122. The Court reiterates that Article 5 § 5 of the Convention creates a direct right to compensation, provided that the national courts or the Convention institutions have found that an applicant has been deprived of his liberty contrary to Article 5 §§ 1-4 of the Convention (see, *inter alia*, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, p. 35, § 67). In the present case, the Court has indeed found that the applicant was detained in the clinic in breach of Article 5 § 1 of the Convention. The Court observes, however, that, in challenging the national courts' interpretation of the provisions on compensation, she is repeating, in substance, her complaint under Article 5 § 1. Having regard to its above findings concerning the failure of the Court of Appeal to interpret the applicable provisions of civil law in the spirit of Article 5 § 1 of the

Convention (see paragraphs 92-99 above), the Court finds that no separate issue arises under Article 5 § 5 of the Convention.

## V. ALLEGED VIOLATION OF ARTICLE 5 §§ 1, 4 AND 5 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S STAY IN A PRIVATE CLINIC FROM JANUARY TO APRIL 1981

123. The applicant complained that she had also been deprived of her liberty during her second stay in Dr Heines's clinic from January to April 1981. She relied on Article 5 § 1 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (e) the lawful detention ... of persons of unsound mind ..."

She further argued that she had not had sufficient access to a court to obtain a decision on the lawfulness of her detention in that clinic, contrary to Article 5 § 4 of the Convention, which reads:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Furthermore, she maintained that the Bremen Court of Appeal's interpretation of the national provisions governing her compensation claim amounted to a disproportionate restriction on her claim, which, in practice, had deprived her of the right to damages for her unlawful detention. She relied on Article 5 § 5 of the Convention, which provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

124. The applicant argued that she had also been deprived of her liberty during her stay in Dr Heines's clinic in 1981. She maintained that she had been committed to the clinic by her general practitioner owing to the onset of strong withdrawal symptoms after she had abruptly stopped taking any medication. She had therefore not consented to her detention in that clinic.

125. The Government contested this view. They submitted that the applicant, as the Bremen Court of Appeal had rightly found, had come to the clinic without being forced to do so. She had intended that her medical treatment there should be continued, as her state of health had considerably deteriorated. Therefore, she had obviously not been deprived of her liberty.

126. The Court considers that in respect of her second stay in the clinic, the applicant can only be said to have been deprived of her liberty if she did

not consent to her stay and treatment there. Having regard to the domestic courts' related findings of fact, the Court notes that the applicant came to the clinic of her own motion. This finding is not called into question by the fact that the applicant's general practitioner might have recommended her to do so on account of the strong withdrawal symptoms she suffered from after she abruptly stopped taking any medication. The mere fact that the applicant may initially have given herself up to be taken into detention, however, does not deprive her of the protection of Article 5 § 1 for the entire period of her stay in the clinic (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp*, cited above, p. 36, § 65, and *H.L. v. the United Kingdom*, cited above, § 90).

127. It is true that according to the Regional Court and Court of Appeal's consistent findings, on the very day of her admission to the clinic, the applicant was unable to speak and showed signs of autism. However, she had attained the age of majority and had not been placed under guardianship. It therefore has to be assumed that she was still capable of validly expressing consent, at least in the course of her treatment at the clinic in 1981. The Court further attaches decisive importance to the fact that the applicant, who knew the clinic's regime and methods of medical treatment following her first stay there from 1977 to 1979, herself conceded in the proceedings before the Bremen Court of Appeal that she had "to a certain extent voluntarily" ("*bedingt freiwillig*") consented to her stay there owing to her need for treatment. Moreover, contrary to the findings with respect to her first placement in the clinic, it has not been found that the applicant attempted to escape from it in 1981.

128. In these circumstances, the factual background of the applicant's second stay in the clinic, unlike that of her first stay , does not allow for the conclusion that she was confined in the clinic against her will or without her consent. She was therefore not deprived of her liberty within the meaning of Article 5 § 1 of the Convention. Consequently, there has been no violation of Article 5 § 1 of the Convention on that account.

129. Given the finding that the applicant was not detained within the meaning of Article 5 of the Convention, there has likewise been no breach of Article 5 §§ 4 and 5 of the Convention.

## VI. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF BOTH OF THE APPLICANT'S STAYS IN A PRIVATE CLINIC

130. The applicant further argued that both the Court of Appeal's restrictive interpretation of the provisions applicable to her compensation claim and its assessment of a medical expert report had violated her right to a fair trial guaranteed by Article 6 § 1 of the Convention, the relevant part of which provides:

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

131. The applicant, referring to her submissions in respect of Article 5 § 1 of the Convention, pointed out that the way in which the Bremen Court of Appeal had applied and interpreted the provisions of German law governing her compensation claim amounted to a breach of her right to a fair trial as guaranteed by Article 6 § 1 of the Convention. Furthermore, she claimed that the expert appointed by the Court of Appeal had drafted his report in an incompetent way without seeing her in person. She complained about the way in which the Court of Appeal had assessed the contradictory opinion given by the expert.

132. The Government took the view that the Bremen Court of Appeal’s assessment of the relevant facts and interpretation of the applicable provisions of national law had not been arbitrary and that the proceedings had therefore not been unfair. They referred in this connection to their submissions concerning Article 5 of the Convention. They further argued that the applicant and her counsel had had ample opportunities – which they had seized – to question the expert appointed by the court and to comment on his report both orally and in writing. The Court of Appeal, in giving reasons for its judgment, had carefully considered the positions of the parties and the three expert reports before it, two of which had been submitted by the applicant.

133. In so far as the applicant complained about the way in which the Bremen Court of Appeal had interpreted and applied the provisions of German law concerning her compensation claim, the Court, referring to its various findings under Article 5 § 1 (see paragraphs 92-99), finds that no separate issue arises under Article 6 § 1 of the Convention.

134. The applicant also claimed that she had been denied a fair trial in that the expert appointed by the Court of Appeal had proved to be incompetent and in that the Court of Appeal had wrongly assessed his opinion. With respect to this, the Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see, amongst others, *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46, and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

135. The Court notes that the expert appointed by the Court of Appeal, a psychiatrist, submitted a conclusive medical report, which he explained at a hearing during which the parties were able to put questions to him. The findings of two expert reports previously prepared at the applicant’s request

were thoroughly taken into consideration by the court in assessing the evidence. With regard to the applicant's complaint that the expert had not seen her in person, the Court observes that the expert was not called upon to assess her state of health at the time of the proceedings, but at the time of her stays in the clinic more than fifteen years earlier. Having regard to all the material before it, the Court therefore concludes that the choice of the expert and the assessment of his report do not disclose any unfairness in the court proceedings.

136. It follows that, in so far as any separate issues arise under Article 6 § 1 of the Convention that have not yet been dealt with from the perspective of Article 5 § 1, there has been no violation of Article 6 of the Convention on this account.

## VII. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION IN RESPECT OF BOTH OF THE APPLICANT'S STAYS IN A PRIVATE CLINIC

137. The applicant claimed that in substance she had also complained of a violation of Article 8 of the Convention with regard to the restrictions on her liberty, her immobilisation and the medical treatment she had received against her will during her stays in Dr Heines's clinic both from 1977 to 1979 and in 1981. She argued that these facts should also be examined under Article 3 of the Convention.

138. The Court considers that the applicant's complaints fall to be examined under Article 8 of the Convention alone, the relevant parts of which provide:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

139. Referring to her submissions in respect of Article 5 § 1 of the Convention, the applicant argued that she had been treated with medication that had been contraindicated and had caused her to develop post-poliomyelitis syndrome. Whenever she had refused to take medication, it had been administered to her by force. She had been filled with psychotropics and neuroleptics, and had been attached to beds, chairs and radiators. She had been treated as a mentally insane person for many years and the treatment had permanently ruined her health, and indeed her life. Both the detention and the infringement of her physical integrity were imputable to the State. Germany had also violated its positive obligation to protect her from these interferences with her right to respect for private life.

140. The Government stressed that the applicant had not explicitly relied on Articles 3 or 8 of the Convention in her application to the Court. Referring to their submissions with regard to Article 5, they took the view that neither the applicant's alleged deprivation of liberty nor her allegedly erroneous medical treatment while being detained were imputable to the State. For the same reasons as set out in respect of Article 5, the State had also complied with its positive obligation to afford effective protection of the applicant's rights under Articles 3 and 8. It had notably been open to the applicant to lodge a criminal complaint (*Strafanzeige*), alleging assault or coercion, against the doctors who had treated her or to bring compensation proceedings in the civil courts. In dismissing the applicant's compensation claim, the Bremen Court of Appeal had not disregarded her rights under Articles 3 or 8. In any event, there had been no violation of the applicant's rights under Articles 3 and 8 as a result of any wrongful medical diagnosis or therapy. As had been found by the Bremen Court of Appeal after its taking of evidence, there was no proof of any erroneous medical treatment.

141. Owing to the different factual circumstances surrounding the applicant's involuntary placement in Dr Heines's clinic from 1977 to 1979 on the one hand, and her stay there in 1981 on the other, the Court finds it necessary to distinguish between these periods.

## A. Placement in the clinic from 1977 to 1979

### *1. Interference with the applicant's right to respect for private life*

142. In so far as the applicant claimed that her liberty had been restricted contrary to Article 8 of the Convention during her involuntary placement in the clinic, the Court reiterates that the right to liberty is governed by Article 5, which is to be regarded as a *lex specialis vis-à-vis* Article 8 in this respect (see, by converse implication, *Winterwerp*, cited above, p. 21, § 51, and *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 21, § 44). The Court finds that the applicant, in complaining about restrictions on her freedom of movement, is in substance repeating her complaint under Article 5 § 1. It therefore considers that no separate issue arises under Article 8 in this respect.

143. In so far as the applicant argued that she had been medically treated against her will while detained, the Court reiterates that even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life under Article 8 if it is carried out against the individual's will (see, *inter alia*, *X v. Austria*, no. 8278/78, Commission decision of 13 December 1979, DR 18, p. 156; *A.B. v. Switzerland*, no. 20872/92, Commission decision of 22 February 1995, DR 80-B, p. 70; and, *mutatis mutandis*, *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, p. 26, § 86).

144. In determining whether the applicant's treatment with various medicines, which interfered with her physical integrity, was carried out against her will, the Court refers to its findings in respect of Article 5 § 1 of the Convention (see paragraphs 71-78 above). Given that the applicant not only constantly resisted her continued stay in the clinic, but equally resisted her medical treatment so that at times she had to be administered medication by force, the Court finds that she was given medical treatment against her will. It further notes that the findings of at least one expert (see paragraph 23 above) indicated that the medicines the applicant had received at the clinic had been contraindicated and had caused serious damage to her health. However, the Court does not need to determine whether the applicant's treatment was *lege artis*, as, irrespective of this, it was carried out against her will and therefore already constituted an interference with her right to respect for her private life.

### 2. *Responsibility of the State*

145. Similarly to the findings in respect of Article 5 § 1 of the Convention, to which the Court refers, the interference with the applicant's private life could be imputable to the State since it was involved in the medical treatment as such on account of the courts' failure to interpret the national law in the spirit of Article 8, or of the State's non-compliance with its positive obligations under Article 8.

#### (a) Involvement of public authorities in the applicant's medical treatment

146. The Court, referring to its findings under Article 5 § 1 (see paragraphs 90-91 above), observes that on 4 March 1979 the police brought the applicant back to the clinic by force, thereby rendering her further treatment there possible. At that stage, the public authorities became actively involved in, and therefore responsible for, the applicant's ensuing medical treatment.

#### (b) Failure to interpret the national law in the spirit of Article 8

147. In determining whether the Court of Appeal interpreted the provisions of civil law relating to the applicant's compensation claim arising from her medical treatment in the spirit of her right to respect for her private life under Article 8, the Court again refers to its findings regarding Article 5 § 1 (see paragraphs 92-99). It finds in particular that the Court of Appeal, in its interpretation of the provisions governing the time-limit for bringing the compensation claim – including the possibility of interrupting or suspending the running of time for the purposes of limitation – did not have sufficient regard to the applicant's poor state of health during and following her treatment at the clinic. As regards the Court of Appeal's finding that the applicant had concluded a contract concerning her medical

treatment at the clinic, the Court notes that the applicant objected not only to her confinement in the clinic, but also to her medical treatment, and was administered medication by force on several occasions. Under these circumstances, the Court, presuming that the applicant had the capacity to consent, is unable to discern any reasonable factual basis for the national courts' conclusion that the applicant continuously consented to her medical treatment, thereby having validly concluded and not terminated a contract.

148. Accordingly, the Court of Appeal, as the higher courts confirmed, did not interpret the provisions of civil law relating to the applicant's compensation claim in tort or contract in the spirit of Article 8. It follows that there has been an interference with the applicant's right to respect for private life that was imputable to the respondent State.

**(c) Compliance with the State's positive obligations**

149. It remains to be determined whether the interference with the applicant's right to respect for private life is also imputable to the respondent State because the latter failed to comply with its positive obligation to protect the applicant against such interferences by private individuals. The Court, referring to its settled case-law, reiterates that there is a positive obligation on the State flowing from Article 8 to take reasonable and appropriate measures to secure and protect individuals' rights to respect for their private life (see, *inter alia*, *X and Y v. the Netherlands*, cited above, p. 11, § 23, and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII).

150. The Court, referring again to its findings concerning Article 5 § 1 (see paragraphs 100-08 above), considers that on account of its obligation to secure to its citizens their right to physical and moral integrity, the State remained under a duty to exercise supervision and control over private psychiatric institutions. It notes also that in the sphere of interferences with a person's physical integrity, German law provided for retrospective sanctions, assault being punishable by up to ten years' imprisonment under Articles 223 to 226 of the Criminal Code. Moreover, a person whose physical integrity had been harmed could claim damages in tort for pecuniary and non-pecuniary loss. However, just as in cases of deprivation of liberty, the Court finds that such retrospective measures alone are not sufficient to provide appropriate protection of the physical integrity of individuals in such a vulnerable position as the applicant. The above findings as to the lack of effective State control over private psychiatric institutions at the relevant time (see paragraphs 103-08 above) are equally applicable as far as the protection of individuals against infringements of their physical integrity is concerned. The Court therefore concludes that the respondent State failed to comply with its positive obligation to protect the applicant against interferences with her private life as guaranteed by Article 8 § 1 of the Convention.

*3. Justification under Article 8 § 2 of the Convention*

151. The Court, referring to its findings concerning Article 5 § 1 (see paragraph 110 above), reiterates that it only needs to be determined whether the interference with the applicant's right to respect for private life was justified under paragraph 2 of Article 8 in so far as the public authorities, notably the courts, were actively involved in this interference. In so far as the State was found not to have complied with its positive obligation under Article 8 § 1 to protect the applicant against interferences with her private life by private individuals, this finding entails a violation of Article 8.

152. It therefore needs to be determined whether the interference with the applicant's right to respect for private life by the national courts was in accordance with the law within the meaning of Article 8 § 2. The Court notes that it is undisputed between the parties that the detention of a mentally insane person for the purpose of medical treatment necessitated a court order if the person concerned did not, or was unable to, consent to his detention and treatment (section 3 of the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts). The applicant's confinement in the clinic for medical treatment from 1977 to 1979 was not authorised by a court order. Consequently, the interference with her right to respect for private life was not lawful within the meaning of Article 8 § 2.

153. It follows that there has been a violation of Article 8 of the Convention on that account.

## B. Stay in the clinic in 1981

154. The Court observes that the applicant's medical treatment during her second stay in the clinic in 1981 would have interfered with her right to respect for private life under Article 8 if it had been carried out against her will. Referring to its findings regarding Article 5 § 1 (see paragraphs 126-28 above), it notes, however, that it has not been proved that the applicant did not validly consent to her stay and medical treatment at the clinic in 1981. Even assuming that she could merely be considered to have agreed to being treated with due diligence and according to the medical standards at the relevant time, the Court observes that the Court of Appeal concluded, on the basis of the material before it, that she had not been given the wrong medical treatment. To support this conclusion, that court relied on a duly reasoned report submitted by the expert it had appointed, and also addressed the partly different conclusions in two expert reports submitted by the applicant. Consequently, there was no interference with the applicant's right to respect for her private life within the meaning of Article 8.

155. It follows that there has been no violation of Article 8 of the Convention on that account.

## VIII. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S MEDICAL TREATMENT AT MAINZ UNIVERSITY CLINIC

156. The applicant complained that the proceedings in the Mainz Regional Court and the Koblenz Court of Appeal had been unfair because the courts had wrongly assessed an unsuitable expert report and had refused to apply a less strict rule on the burden of proof. She relied on Article 6 § 1 of the Convention, the relevant part of which reads:

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

157. The applicant maintained that her trial had been unfair in that the expert Dr Ludolph had not properly addressed the questions put to him, and had assessed issues of which he could not have had any knowledge. The competent courts had not thoroughly assessed the expert report, which had been prepared with the aid of assistant doctors. Given that the medical file, to which the applicant had sought access since 1993, had been withheld for seven years, this procedural defect could not be remedied in the proceedings before the Court of Appeal. The principle of equality of arms would have necessitated applying a less strict rule on the burden of proof with regard to the causal link between being given the wrong medical treatment and the damage done to her physical integrity.

158. The Government argued that the expert opinion given at the hearing had not been contradictory. The fact that the expert had been summoned to explain his report at the hearing, could be questioned and had been invited to prepare two supplementary reports demonstrated that the applicant had had sufficient opportunities to question the expert. It was irrelevant that the expert report had been prepared with the aid of assistant doctors, as the expert had supervised and taken responsibility for it. Furthermore, the courts had carefully assessed the expert report in their judgments. Moreover, the proceedings had also not been unfair as a result of the temporary disappearance of the applicant's medical file concerning her treatment at Mainz University Clinic. The applicant's lawyer had been granted access to a substitute file (*Notakte*) of more than 100 pages compiled by the clinic. He had later been granted access to the original file, which had been found during the proceedings before the Koblenz Court of Appeal. As had rightly been found by the Koblenz Court of Appeal, it had also not been necessary to apply a less strict rule on the burden of proof, in particular as the original medical file had been taken into consideration by the Court of Appeal.

159. In so far as the applicant complained about the way in which the medical expert had prepared and presented his report and the way in which the courts had assessed this evidence, the Court reiterates that Article 6 does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national

law and the national courts. Whereas the Court is not called upon to substitute its own assessment of the facts or evidence for that of the national courts, its task is to ascertain whether the proceedings in their entirety, including the way in which the evidence was assessed, were "fair" within the meaning of Article 6 § 1 (see, *inter alia*, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, pp. 18-19, § 31, and *García Ruiz*, cited above, § 28).

160. The Court notes that the Koblenz Court of Appeal expressly took into consideration and dealt with the applicant's complaint that Dr Ludolph's expert report had been drawn up with the help of assistant doctors. It heard oral evidence from the expert, and the applicant was given the opportunity to question the expert during the hearing. In addition to that, the Court of Appeal did not only rely on the expert report by Dr Ludolph, but consulted two further medical experts. In the light of these considerations, the Court considers that the applicant cannot validly argue that the proceedings in her case were unfair in these respects.

161. In so far as the applicant complained about the failure of the competent courts to apply a less strict rule on the burden of proof, given the fact that the original of her medical file had temporarily disappeared, the Court is called upon to examine whether the concept of equality of arms, being an aspect of the right to a fair trial guaranteed by Article 6 § 1 of the Convention, was complied with. It reiterates that the principle of equality of arms implies that each party, in litigation involving opposing private interests, must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, *inter alia*, *Dombo Beheer B.V.*, cited above, p. 19, § 33, and *Hämäläinen and Others v. Finland* (dec.), no. 351/02, 26 October 2004).

162. The Court notes that, although the original of the applicant's medical file could not be found until after the proceedings had started before the Court of Appeal, the applicant's lawyer had been granted access to a substitute medical file of some 100 pages during the first-instance proceedings. The applicant has not established that she was placed at a disadvantage *vis-à-vis* the defendants by reason of the fact that she was not able to inspect the medical file as a whole in the course of the proceedings before the Mainz Regional Court. Furthermore, the Court observes that the Court of Appeal considered the applicant's request to apply a less strict rule on the burden of proof. The Court of Appeal, referring to settled case-law of the Federal Court of Justice on the subject, argued that it had not been necessary to apply a less strict rule on the burden of proof, as there had in any event not been a serious error in her medical treatment. The Court is aware of the general difficulty for a patient to prove that a doctor treating him made a mistake that caused damage to his health. However, it finds that, having regard to all the material available to the Court of Appeal, the

reasons given by that court for not diverging from the usual distribution of the burden of proof cannot be regarded as arbitrary and did not substantially disadvantage the applicant as the claimant. Consequently, the facts of the present case do not disclose any failure to comply with the principle of equality of arms.

163. The Court concludes that there has been no violation of Article 6 § 1 of the Convention on that account.

## IX. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S MEDICAL TREATMENT AT MAINZ UNIVERSITY CLINIC

164. The applicant maintained that the restrictions on her liberty, the interference with her physical integrity and the refusal of adequate medical treatment at Mainz University Clinic had infringed her right to respect for her private life as guaranteed by Article 8 of the Convention, and also Article 3 of the Convention.

165. The Court considers that these complaints fall to be examined under Article 8 alone, the relevant parts of which provide:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

166. In support of her complaints, the applicant repeated her submissions with regard to her treatment at Dr Heines's clinic in Bremen.

167. The Government pointed out that the Mainz Regional Court, as the Koblenz Court of Appeal had confirmed, had found with the help of a medical expert that the applicant had received the correct medical treatment at Mainz University Clinic. Consequently, the applicant's rights under Articles 3 and 8 had not been infringed.

168. The Court reiterates that even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life under Article 8 if it is carried out against the individual's will (see the case-law cited in paragraph 143 above). It notes that there is no indication that the applicant was treated without her consent at Mainz University Clinic. Even assuming that she could only be considered to have agreed to being treated with due diligence and according to the medical standards at the relevant time, the Court notes that the national courts reasonably found, with the help of medical experts, that the applicant was neither intentionally nor negligently given the wrong medical

treatment. Consequently, there has been no interference with the applicant's right to respect for her private life within the meaning of Article 8.

169. It follows that there has been no violation of Article 8 of the Convention on that account.

## X. APPLICATION OF ARTICLE 41 OF THE CONVENTION

170. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

171. The applicant claimed compensation for pecuniary and non-pecuniary damage and the reimbursement of her costs and expenses.

### A. Damage

172. The applicant claimed a total of 1,449,259.66 euros (EUR) for pecuniary damage. This sum comprised EUR 1,211,530.90 for the loss of estimated earnings as a technical engineer – the profession she had wished to take up before the beginning of her medical treatment – from which she deducted her invalidity pension. She added EUR 237,728.76 in respect of the pension she would have received until the age of 84. In addition to that, the applicant claimed a total of EUR 1,548.36 for dentist's fees and auxiliary devices not covered by her health insurance. In the alternative, she claimed a total of EUR 1,126,970.30 for pecuniary damage, based on her estimated income and pension as a draughtswoman, the profession she had trained for in 1990. Furthermore, she claimed compensation for all future pecuniary damage resulting from her treatment at Dr Heines's clinic in Bremen and at Mainz University Clinic in so far as it was not covered by the social security companies.

173. The applicant also sought compensation for the non-pecuniary damage arising from the serious violations of Articles 3, 5, 6 and 8 of the Convention. She stressed the severe physical harm done to her by her forced and erroneous medical treatment, which had resulted in her being 100% disabled today and constantly suffering from significant pain in her arms, legs and vertebral column. Her detention and the degrading treatment to which she had been subjected, especially at the clinic in Bremen, and her medical treatment had also aroused in her feelings of anxiety and helplessness and had ruined her whole life. As her state of health was constantly deteriorating owing to her being given the wrong medical treatment when she was young, she would be even more isolated and

dependent on the help of others in the future. The applicant claimed not less than EUR 500,000 under this head.

174. As to the applicant's claim for pecuniary damage, the Government maintained that the applicant had failed to prove that there was a causal link between the alleged violation of her Convention rights and the loss of her estimated earnings and pension.

175. Furthermore, they considered the sum claimed by the applicant for non-pecuniary damage to be excessive. They stressed that the national courts had found that the applicant had neither deliberately nor negligently been given the wrong medical treatment in the psychiatric institutions in question.

176. With regard to the applicant's claim for pecuniary damage, the Court reiterates that there must be a clear causal connection between the pecuniary damage claimed by the applicant and the violation of the Convention found, and that this may, where appropriate, include compensation in respect of loss of earnings or other sources of income (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV). In the present case, the Court notes that it has found violations of Article 5 § 1 and 8 with respect to the applicant's stay in Dr Heines's clinic from 1977 to 1979. It observes that the applicant had neither trained in nor practised the profession of a technical engineer, or draughtswoman, before her confinement in the clinic, so that the detention did not interfere with an existing source of income. The Court is aware that the applicant's involuntary placement in the clinic, her medical treatment there and its consequences for her health entailed a loss of opportunities with regard to her professional career. It cannot, however, speculate as to what profession the applicant would have taken up, or how much money she would have earned at a later stage if she had not stayed in the clinic from 1977 to 1979. Consequently, no clear causal connection between the applicant's loss of estimated earnings and her pensions calculated on that basis has been established. Likewise, the Court, on the basis of the material before it, cannot discern a clear causal connection between the applicant's confinement in Dr Heines's clinic and her claim for dentist's fees and auxiliary devices not covered by her health insurance.

177. As to the applicant's claim for compensation for all future pecuniary damage resulting from the treatment at Dr Heines's clinic in Bremen and at Mainz University Clinic, the Court observes that it has not found a violation of the Convention in respect of the applicant's treatment at Dr Heines's clinic in 1981 and at Mainz University Clinic. Consequently, no claim for damages can arise in this respect. As to her claim concerning her treatment at Dr Heines's clinic from 1977 to 1979, the Court finds that it can neither speculate as to the exact amount of pecuniary damage that will

arise from her confinement in that clinic, nor as to whether there will be a causal link between such future damage and her treatment there. Therefore, the Court makes no award in respect of pecuniary damage.

178. With regard to the applicant's claim for non-pecuniary damage, the Court refers to its findings above of grave violations of Articles 5 § 1 and 8 of the Convention in the present case. It notes again that the applicant was confined in the clinic without a legal basis and was treated there at a rather young age for a period of more than twenty months. The interference with the applicant's physical integrity as a result of her forced medical treatment was of particular gravity. It was the cause of the serious and irreversible damage to her health and, indeed, deprived her of the opportunity to lead an autonomous professional and private life. The Court points out that the applicant's case, as regards the assessment of non-pecuniary damage, must also be distinguished from cases like *H.L. v. the United Kingdom* (cited above, §§ 148-50). In the present case, it is most questionable, and indeed was not assumed by either of the parties, that the applicant could have been detained at all against her will as a person posing a serious threat to public safety or order under the applicable legislation (section 2 of the Act of the *Land* of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts – see paragraph 53 above). Having regard to previous comparable applications in which there have also been substantive interferences with applicants' physical and moral integrity (see, for example, *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2701, § 34, and *Peers v. Greece*, no. 28524/95, § 88, ECHR 2001-III), and deciding on an equitable basis, the Court awards the applicant EUR 75,000 in compensation for non-pecuniary damage, together with any tax that may be chargeable on that amount.

### B. Costs and expenses

179. The applicant, relying on documentary evidence, claimed a total of EUR 32,785.10 for costs and expenses. She sought reimbursement of the costs and expenses incurred in the proceedings before the national courts in respect of the services of her lawyers, medical expert opinions, hotel and travelling costs in the proceedings in the Bremen Regional Court (EUR 21,198.51) and in the proceedings in the Mainz Regional Court (EUR 4,260.82). She further claimed a lump sum of EUR 2,500 for her personal expenses during these proceedings, including her expenses for drafting the constitutional complaints herself. Furthermore, she claimed EUR 4,825.77 for the costs and expenses incurred in respect of the services of the lawyer representing her in the proceedings before the Court.

180. The Government considered these sums excessive.

181. According to the Court's consistent case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek the

prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress for it. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, *inter alia*, *Venema v. the Netherlands*, no. 35731/97, § 117, ECHR 2002-X).

182. As regards the applicant's costs and legal expenses incurred in the proceedings before the national courts, the Court observes that it has only found a violation of the Convention with respect to the proceedings in the Bremen Regional Court. It accepts that the costs and expenses in those proceedings were incurred to rectify a violation of Articles 5 and 8 of the Convention. Even though the applicant has not submitted any documentary evidence of her personal expenses in the proceedings before the Federal Constitutional Court, the Court acknowledges that she must also have incurred certain expenses in those proceedings (see *Migoń v. Poland*, no. 24244/94, § 95, 25 June 2002, and *H.L. v. the United Kingdom*, cited above, § 152). Having regard to its case-law, and making its own assessment of the reasonableness of her costs and expenses, the Court awards the applicant EUR 15,000 under this head, plus any tax that may be payable on that amount.

183. As regards the applicant's costs and legal expenses incurred in the Convention proceedings, the Court, having regard to its case-law and making its own assessment, awards the applicant EUR 4,000 less the EUR 685 received by way of legal aid from the Council of Europe, together with any tax that may be chargeable on that amount.

### C. Default interest

184. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention with regard to the applicant's placement in a private clinic from 1977 to 1979;

3. *Holds* that no separate issue arises under Article 5 §§ 4 and 5 of the Convention with regard to the applicant's placement in a private clinic from 1977 to 1979;

4. *Holds* that there has been no violation of Article 5 of the Convention with regard to the applicant's stay in a private clinic in 1981;

5. *Holds* that, in so far as a separate issue arises under Article 6 § 1 of the Convention with regard to both of the applicant's stays in a private clinic, there has been no violation of Article 6 § 1 of the Convention;

6. *Holds* that there has been a violation of Article 8 of the Convention with regard to the applicant's stay in a private clinic from 1977 to 1979;

7. *Holds* that there has been no violation of Article 8 of the Convention with regard to the applicant's stay in a private clinic in 1981;

8. *Holds* that there has been no violation of Article 6 § 1 of the Convention with regard to the applicant's medical treatment at Mainz University Clinic;

9. *Holds* that there has been no violation of Article 8 of the Convention with regard to the applicant's medical treatment at Mainz University Clinic;

10. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 75,000 (seventy-five thousand euros) in respect of non-pecuniary damage;

(ii) EUR 18,315 (eighteen thousand three hundred and fifteen euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

11. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 June 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| Vincent BERGER | Ireneu CABRAL BARRETO |
|---|---|
| Registrar | President |