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

CASE OF WAITE AND KENNEDY v. GERMANY

(Application no. 26083/94)

JUDGMENT

STRASBOURG

18 February 1999

In the case of Waite and Kennedy v. Germany,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr L. FERRARI BRAVO,
Mr L. CAFLISCH,
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANȚÎRU,
Mr E. LEVITS,
Mr K. TRAJA,
Mr E. KLEIN, ad hoc *judge*,

and also of Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 25 November 1998 and 3 February 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 16 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 26083/94) against the Federal Republic of

Notes by the Registry
1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.
3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

Germany lodged with the Commission under former Article 25 by two British nationals, Mr Richard Waite and Mr Terry Kennedy, on 24 November 1994.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Germany recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

2. The applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 31 of former Rules of Court B[1]).

The Government of the United Kingdom, having been informed by the Registrar of their right to intervene (former Article 48 (b) of the Convention and former Rule 35 § 3 (b)), indicated that they did not intend to do so.

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Thór Vilhjálmsson, acting through the Registrar, consulted the Agent of the German Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 30 July and 31 July 1998 respectively.

4. On 22 October 1998 the President of the Chamber decided, under former Rule 28 § 3, to give the applicants' lawyers leave to use the German language at the hearing before the Court. The Agent of the Government was also given leave to address the Court in German, under former Rule 28 § 2.

5. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr G. Ress, the judge elected in respect of Germany (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr L. Caflisch, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panţîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3 and Rule 100 § 4).

1. *Note by the Registry*. Rules of Court B, which came into force on 2 October 1994, applied until 31 October 1998 to all cases concerning States bound by Protocol No. 9.

Subsequently, Mr Ress, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Mr E. Klein to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr K. Herndl, to take part in the proceedings before the Grand Chamber. The Commission also produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

7. By a letter sent by fax on 19 November 1998 the Committee of Staff Representatives of the Coordinated Organisations sought leave to submit written comments (Rules 61 § 3 and 71). On 20 November 1998 the President granted leave subject to certain conditions. The comments were filed at the Registry on 23 November 1998.

8. In accordance with the President's decision, a hearing in this case and in the case of Beer and Regan v. Germany (application no. 28934/95) took place in public in the Human Rights Building, Strasbourg, on 25 November 1998.

There appeared before the Court:

(a) *for the Government*
Mrs H. VOELSKOW-THIES, *Ministerialdirigentin*,
Federal Ministry of Justice, *Agent*,
Mr K.-H. OEHLER, *Ministerialrat*,
Federal Ministry of Justice,
Mr D. MARSCHALL, *Ministerialrat*,
Federal Ministry of Labour,
Mr W.M. THIEBAUT,
Head of Legal Division,
European Space Agency, Paris, *Advisers*;

(b) *for the applicants*
Mr G. LAULE, of the Frankfurt Bar, *Counsel*,
Mr A. MEYER-LANDRUT, of the Frankfurt Bar,
Mr C. JUST, of the Frankfurt Bar, *Advisers*;

(c) *for Mr Beer and Mr Regan*
Mr W.J. HABSCHEID, of the Kempten Bar, *Counsel*,
Mr E. HABSCHEID, of the Dresden Bar, *Adviser*;

(d) *for the Commission*
Mr K. HERNDL, *Delegate*.

The Court heard addresses by Mr Herndl, Mr Laule, Mr W.J. Habscheid and Mrs Voelskow-Thies.

9. Subsequently, applicants and the Government variously produced a number of documents, either at the President's request or of their own accord.

THE FACTS

10. Mr Richard Waite is a British national, born in 1946 and resident in Griesheim. Mr Terry Kennedy is also a British national, born in 1950 and resident in Darmstadt.

I. THE CIRCUMSTANCES OF THE CASE

11. In 1977 the applicants, systems programmers by profession and employed by the British company SPM, were placed at the disposal of the European Space Agency to perform services at the European Space Operations Centre in Darmstadt.

12. The European Space Agency ("ESA") with headquarters in Paris, formed out of the European Space Research Organisation ("ESRO") and the European Organisation for the Development and Construction of Space Vehicle Launchers ("ELDO"), was established under the Convention for the Establishment of a European Space Agency ("ESA Convention") of 30 May 1975 (*United Nations Treaty Series* 1983, vol. 1297, I – no. 21524). ESA runs the European Space Operations Centre ("ESOC") as an independent operation in Darmstadt (Agreement concerning the European Space Operations Centre of 1967 – Official Gazette (*Bundesgesetzblatt*) II no. 3, 18.1.1969).

13. In 1979 the applicants' contracts were taken over from SPM by CDP, a limited company established in Dublin. In 1982 the applicants founded Storepace, a limited company with its registered office in Manchester, which contracted with CDP on the services to be performed by the applicants for ESA and on the payment due. As from 1984 ESA participated in the above contractual relations through Science System, a firm associated with it. Subsequently, the applicants liquidated Storepace, replacing it by Network Consultants, a company with its registered office on the island of Jersey. These changes in contractual relations had no bearing on the applicants' services at ESOC.

14. By letter of 12 October 1990, CDP informed the applicants that the cooperation with their company Network Consultants would terminate on 31 December 1990, when the term of their contracts expired.

15. The applicants thereupon instituted proceedings before the Darmstadt Labour Court (*Arbeitsgericht*) against ESA, arguing that, pursuant to the German Provision of Labour (Temporary Staff) Act (*Arbeitnehmerüberlassungsgesetz*), they had acquired the status of employees of ESA. In their submission, the termination of their contracts by the company CDP had no bearing on their labour relationship with ESA.

16. In the labour court proceedings, ESA relied on its immunity from jurisdiction under Article XV § 2 of the ESA Convention and its Annex I.

17. On 10 April 1991 the Darmstadt Labour Court, following a hearing, declared the applicants' actions inadmissible, considering that ESA had validly relied on its immunity from jurisdiction.

In its reasoning, the Labour Court considered in particular that ESA had been established in 1975 as a new and independent international organisation. It therefore rejected the applicants' argument that ESA was bound by Article 6 § 2 of the Agreement concerning ESOC, which had subjected the former ESRO to German jurisdiction in cases of disputes with its employees which were outside the competence of its Appeals Board.

18. On 20 May 1992 the Frankfurt/Main Labour Appeals Court (*Landesarbeitsgericht*) dismissed the applicants' appeal. It gave leave to an appeal on points of law (*Revision*) to the Federal Labour Court (*Bundesarbeitsgericht*).

19. The Labour Appeals Court, referring to sections 18 to 20 of the Courts Act (*Gerichtsverfassungsgesetz*), considered that immunity from jurisdiction meant that foreign States, members of diplomatic missions, etc. were generally not subject to German jurisdiction and that no judicial action could be taken against them. Section 20(2) of the Courts Act supplemented the provisions of sections 18 and 19, listing three further sources of law, *inter alia* international agreements, which could give rise to immunity from jurisdiction, especially for international organisations. ESA in principle enjoyed such immunity from jurisdiction under Article XV § 2 of the ESA Convention and its Annex I. Moreover, even assuming that the former ESRO had previously waived immunity as regards labour disputes outside the competence of its Appeals Board, ESA was not bound thereby. In this respect, the Labour Appeals Court, referring to the reasoning of the decision of the first instance, set out in detail that ESA had been established as a new international organisation and not as a mere legal successor to the former ESRO.

20. In 1992 the applicants unsuccessfully requested the German federal government and the British authorities to intervene with the Council of ESA in their favour with regard to a waiver of immunity in accordance with Article IV § 1 (a) of Annex I. While the British authorities did not reply, the German Federal Foreign Office referred the applicants to the ESA Appeals Board. In response to their letter to the Council of ESA, its Chairman, by letter of 16 December 1992, informed the applicants that the Council, at its 105th meeting of 15 and 16 December 1992, had decided not to waive the immunity from jurisdiction in their case. This position was confirmed in subsequent correspondence.

21. On 10 November 1993 the Federal Labour Court dismissed the applicants' appeal on points of law (file no. 7 AZR 600/92).

22. The Federal Labour Court considered that immunity from jurisdiction was an impediment to court proceedings, and that an action against a defendant who enjoyed immunity from jurisdiction, and had not waived this immunity, was inadmissible. According to section 20(2) of the Courts Act, German jurisdiction did not extend to international organisations which were exempted in accordance with international agreements. In this respect, the Federal Labour Court noted that, pursuant to Article XV § 2 of the ESA Convention, ESA had the immunities provided for in Annex I of the said Convention, and that it had not waived immunity under Article IV § 1 (a) of that annex.

23. As regards the question of waiver, the Federal Labour Court found that Article 6 § 2 of the Agreement concerning ESOC did not apply in the applicants' situation as they had not been employed by ESA, but had worked for ESA on the basis of a contract of employment with a third person. The questions of whether the rule in question amounted to a waiver of immunity and whether ESA was bound by this rule could therefore be left open.

24. Furthermore, the Federal Labour Court found no violation of the right of recourse to court under Article 19 § 4 of the German Basic Law (*Grundgesetz*), as the acts of ESA, being those of an international organisation, could not be regarded as acts of a public authority within the meaning of that provision.

25. Finally the Federal Labour Court considered that a rather broad competence of international organisations to regulate staff matters was not unusual. The regulations on the immunity of ESA did not conflict with fundamental principles of German constitutional law. Employees of ESA could either lodge an appeal with the Appeals Board of the organisation, or the labour contract had to provide for arbitration in accordance with Article XXV of Annex I. In case of any contract conflicting with the Provision of Labour (Temporary Staff) Act which was not covered by the aforementioned regulation, the employee hired out was not without any legal protection, but could file an action against his or her employer. The

question of whether the applicants could claim under German public law that positive action be taken by the German government to use their influence to achieve a waiver of immunity in the present case, or to submit the case to international arbitration under Article XVIII of the ESA Convention, could not be solved in labour court proceedings.

26. Sitting as a panel of three members, on 11 May 1994 the Federal Constitutional Court (*Bundesverfassungsgericht*) declined to accept the applicants' appeal (*Verfassungsbeschwerde*) for adjudication.

27. The Federal Constitutional Court found in particular that the applicants' appeal did not raise a matter of general importance. The alleged absence of rights resulted from the particular contracts entered into by the applicants, who had not been directly employed by an international organisation but had worked there on the order of a third person.

28. Furthermore, the alleged violation of the applicants' constitutional rights was not of special importance, nor were the applicants significantly affected. In this respect the Constitutional Court noted the applicants' submissions according to which they had suffered major disadvantages on the ground that the European legislation on the hiring out of temporary staff had been insufficient and that the termination of their contracts had affected their earning capacity. However, they had failed to show any disadvantages other than those associated with any loss of work. In particular there was no indication that they remained permanently unemployed and dependent upon social welfare benefits.

II. RELEVANT LAW

1. The Provision of Labour (Temporary Staff) Act

29. Section 1(1)(1) of the Provision of Labour (Temporary Staff) Act (*Arbeitnehmerüberlassungsgesetz*) provides that an employer who, on a commercial basis (*gewerbsmäßig*), intends to hire out his employees to third persons – hiring employers (*Entleiher*) – must obtain official permission. Section 1(9)(1) provides that contracts between the hirer-out (*Verleiher*) and the hiring employer and between the hirer-out and the employee hired out (*Leiharbeitnehmer*) are void if no official permission has been obtained as required by section 1(1)(1). If the contract between a hirer-out and an employee hired out is void under section 1(9)(1), a contract between the hiring employer and the employee hired out is deemed to have been concluded (*gilt als zustande gekommen*) as from the envisaged start of employment (section 1(10)(1)(1)). Section 1(10)(2) further provides for a claim in damages against the hirer-out in respect of any loss suffered as a

consequence of having relied on the validity of the contract, except where the employee hired out was aware of the factor rendering the contract void.

2. Immunity from jurisdiction

30. Sections 18 to 20 of the German Courts Act (*Gerichtsverfassungsgesetz*) regulate immunity from jurisdiction (*Exterritorialität*) in German court proceedings. Sections 18 and 19 concern the members of diplomatic and consular missions, and section 20(1) other representatives of States staying in Germany upon the invitation of the German government. Section 20(2) provides that other persons shall have immunity from jurisdiction according to the rules of general international law, or pursuant to international agreements or other legal rules.

3. The ESA Convention

31. The ESA Convention came into force on 30 October 1980, when ten States, members of ESRO or ELDO, had signed it and had deposited their instruments of ratification or acceptance.

32. The purpose of ESA is to provide for and to promote, for exclusively peaceful purposes, cooperation among European States in space research and technology and their space applications, with a view to their being used for scientific purposes and for operational space applications systems (Article II of the ESA Convention). For the execution of the programmes entrusted to it, the Agency shall maintain the internal capability required for the preparation and supervision of its tasks and, to this end, shall establish and operate such establishments and facilities as are required for its activities (Article VI § 1 (a)).

33. Article XV regulates the legal status, privileges and immunities of the Agency. According to paragraph 1, the Agency shall have legal personality. Paragraph 2 provides that the Agency, its staff members and experts, and the representatives of its member States, shall enjoy the legal capacity, privileges and immunities provided for in Annex I. Agreements concerning the headquarters of the Agency and the establishments set up in accordance with Article VI shall be concluded between the Agency and the member States on whose territory the headquarters and the establishments are situated (Article VI § 3).

34. Article XVII concerns the arbitration procedure in case of disputes between two or more member States, or between any of them and ESA, concerning the interpretation or application of the ESA Convention or its annexes, and disputes arising out of damage caused by ESA, or involving any other responsibility of ESA (Article XXVI of Annex I), which are not settled by or through the Council.

35. Article XIX provides that on the date of entry into force of the ESA Convention the Agency shall take over all the rights and obligations of ESRO.

36. Annex I relates to the privileges and immunities of the Agency.

37. According to Article I of Annex I, the Agency shall have legal personality, in particular the capacity to contract, to acquire and to dispose of movable and immovable property, and to be a party to legal proceedings.

38. Pursuant to Article IV § 1 (a) of Annex I, the Agency shall have immunity from jurisdiction and execution, except to the extent that it shall, by decision of the Council, have expressly waived such immunity in a particular case; the Council has the duty to waive this immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency.

39. Article XXV of Annex I provides for arbitration with regard to written contracts other than those concluded in accordance with the Staff Regulations. Moreover, any member State may submit to the International Arbitration Tribunal referred to in Article XVII of the ESA Convention any dispute, *inter alia*, arising out of damage caused by the Agency, or involving any other non-contractual responsibility of the Agency. According to Article XXVII of Annex I, the Agency shall make suitable provision for the satisfactory settlement of disputes arising between the Agency and the Director General, staff members or experts in respect of their conditions of service.

40. Chapter VIII of the ESA Staff Regulations (Regulations 33 to 41) concerns disputes within ESA. As regards the competence of its Appeals Board, Regulation 33 provides as follows:

> "33.1 There shall be set up an Appeals Board, independent of the Agency, to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member, a former staff member or persons entitled under him.
>
> 33.2 The Appeals Board shall rescind any decision against which there has been an appeal if the decision is contrary to the Staff Regulations; Rules or Instructions or to the claimant's terms of appointment or vested rights; and if the claimant's personal interests are affected.
>
> 33.3 The Appeals Board may also order the Agency to repair any damage suffered by the claimant as a result of the decision referred to in paragraph 2 above.
>
> 33.4 Should the Agency – or the claimant – maintain that execution of a rescinding decision would raise major difficulties the Appeals Board may, if it considers the argument valid, award compensation to the claimant for the damage he has suffered.
>
> 33.5 The Appeals Board shall also be competent in the case where a staff member wishes to sue another staff member and such action has been prevented by the Director General's refusal to waive the immunity of the latter.

33.6 The Appeals Board shall also be competent to settle disputes concerning its jurisdiction, as defined in these Regulations, or any question of procedure."

4. The Agreement concerning ESOC

41. The Agreement was concluded between the government of the Federal Republic of Germany and ESRO for the purpose of establishing a European Space Operations Centre, including the European Space Data Centre. Articles 1 to 4 of the Agreement concern the site for construction of the ESOC buildings and related matters.

42. Part III of the Agreement contains general provisions. Article 6 provides as follows:

"1. Subject to the provisions of the Protocol on Privileges and Immunities of the Organisation and of any complementary Agreement between the Federal Republic of Germany and the Organisation according to Article 30 of that Protocol, the activities of the Organisation in the Federal Republic of Germany shall be governed by German law. If the terms of employment of a staff member of the Organisation are not governed by the Organisation's staff regulations, then they shall be subject to German laws and regulations.

2. Disputes between the Organisation and such staff members of the Organisation in the Federal Republic of Germany who are not within the competence of the Organisation's Appeals Board, shall be subject to German jurisdiction."

PROCEEDINGS BEFORE THE COMMISSION

43. Mr Waite and Mr Kennedy applied to the Commission on 24 November 1994. Relying on Article 6 § 1 of the Convention, they complained that they had been denied access to a court for a determination of their dispute with ESA in connection with an issue under German labour law.

44. On 24 February 1997 the Commission declared the application (no. 26083/94) admissible. In its report of 2 December 1997 (former Article 31 of the Convention), it expressed the opinion that there had been no violation of Article 6 § 1 (seventeen votes to fifteen). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[1].

1. *Note by the Registry.* For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

45. In their memorial the Government asked

> "for the applications to be rejected as inadmissible, or as an alternative for a finding that the Federal Republic of Germany has not violated Article 6 of the Convention".

46. The applicants invited the Court to hold that their rights pursuant to Article 6 § 1 of the Convention had been violated and to award them just satisfaction under former Article 50 of the Convention (now Article 41).

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

47. The applicants contended that they had not had a fair hearing by a tribunal on the question of whether, pursuant to the German Provision of Labour (Temporary Staff) Act, a contractual relationship existed between them and ESA. They alleged that there had been a violation of Article 6 § 1 of the Convention, which provides:

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

48. The Government and the Commission took the opposite view.

A. Applicability of Article 6 § 1

49. The Government did not dispute that the labour court proceedings instituted by the applicants involved the "determination of [their] civil rights and obligations". This being so, and bearing in mind that the parties' arguments before it were directed to the issue of compliance with Article 6 § 1, the Court proposes to proceed on the basis that it was applicable to the present case.

B. Compliance with Article 6 § 1

50. Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters,

constitutes one aspect only (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, § 36, and the recent Osman v. the United Kingdom judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3166, § 136).

51. The applicants had access to the Darmstadt Labour Court and then the Frankfurt/Main Labour Appeals Court and the Federal Labour Court, only to be told that their action was barred by operation of law (see paragraphs 17 to 25 above). The Federal Constitutional Court declined to accept their case for adjudication on the grounds that it did not raise a matter of general importance and that the alleged violation of their constitutional rights was not of special importance (see paragraphs 26 to 28 above).

The proceedings before the German labour courts had thus concentrated on the question of whether or not ESA could validly rely on its immunity from jurisdiction.

52. In their memorial and at the hearing before the Court, the applicants maintained their argument that ESA had wrongfully pleaded immunity before the German labour courts. According to them, the waiver of immunity which had been agreed for its predecessor organisation, ESRO, under Article 6 § 2 of the Agreement concerning ESOC (see paragraph 42 above) was binding on ESA.

53. In the Government's submission, this view was not justifiable, having regard to the clear differentiation between the immunity enshrined in Article XV and the transfer of rights and duties set out in Article XIX of the ESA Convention (see paragraphs 33, 35 to 38 above).

54. The Court would recall that it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, *inter alia*, the Pérez de Rada Cavanilles v. Spain judgment of 28 October 1998, *Reports* 1998-VIII, p. 3255, § 43). This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention.

55. The German labour courts regarded the applicants' action under the German Provision of Labour (Temporary Staff) Act inadmissible as the defendant, ESA, had claimed immunity from jurisdiction in accordance with Article XV § 2 of the ESA Convention and Article IV § 1 of its Annex I. Section 20(2) of the German Courts Act provides that persons shall have immunity from jurisdiction according to the rules of general international law, or pursuant to international agreements or other legal rules (see paragraph 30 above).

56. In the instant case the German labour courts concluded that the conditions under section 20(2) of the German Courts Act for finding that the applicants' action was inadmissible were fulfilled. The Darmstadt Labour

Court, as upheld by the Frankfurt/Main Labour Appeals Court, considered that ESA enjoyed immunity from jurisdiction according to the ESA Convention and its Annex I. In their view, ESA had been established as a new and independent organisation and was therefore not bound by Article 6 § 2 of the Agreement concerning ESOC (see paragraphs 17 to 19 above). According to the Federal Labour Court, this provision could not, in any event, apply in the applicants' situation as they had not been employed by ESA, but had worked for that organisation on the basis of a contract of employment with a third person (see paragraphs 21 to 25 above).

57. The Court observes that ESA was formed out of ESRO and ELDO as a new and single organisation (see paragraph 12 above). According to its constituent instrument, ESA enjoys immunity from jurisdiction and execution except, *inter alia*, to the extent that the ESA Council expressly waives immunity in a particular case (see paragraphs 33 and 36 to 38 above). Considering the exhaustive rules in Annex I to the ESA Convention and also the wording of Article 6 § 2 of the ESOC Agreement (see paragraph 42 above), the reasons advanced by the German labour courts to give effect to the immunity from jurisdiction of ESA under Article XV of the ESA Convention and its Annex I cannot be regarded as arbitrary.

58. Admittedly, the applicants were able to argue the question of immunity at three levels of German jurisdiction. However, the Court must next examine whether this degree of access limited to a preliminary issue was sufficient to secure the applicants' "right to a court", having regard to the rule of law in a democratic society (see the Golder judgment cited above, pp. 16-18, §§ 34-35).

59. The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see the Osman judgment cited above, p. 3169, § 147, and the recapitulation of the relevant principles in the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65).

60. The applicants maintained that the right of access to the courts was not met merely by the institution of proceedings. This right, they argued, required that the courts examine the merits of their claim. They considered that the German courts had disregarded the priority of human rights over

immunity rules based on international agreements. They concluded that the proper functioning of ESA had not required immunity from German jurisdiction in their particular cases.

61. The Government and the Commission were of the opinion that the purpose of immunity in international law lay in the protection of international organisations against interference by individual governments. They saw therein a legitimate aim of restriction of Article 6. According to the Government, international organisations performed tasks of a particular significance in an age of global, technical and economic challenges; they were able to function only if they adopted uniform internal regulations, including appropriate service regulations, and if they were not forced to adapt to differing national regulations and principles.

62. The Committee of Staff Representatives of the Coordinated Organisations in their written comments (see paragraph 7 above) considered that the statutory provisions concerning immunity had to be interpreted so as to satisfy the fundamental rights under Article 6 § 1 of the Convention.

63. Like the Commission, the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.

The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society.

Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective.

64. As to the issue of proportionality, the Court must assess the contested limitation placed on Article 6 in the light of the particular circumstances of the case.

65. The Government submitted that the limitation was proportionate to the objective of enabling international organisations to perform their functions efficiently. With regard to ESA, they considered that the detailed system of legal protection provided under the ESA Convention concerning disputes brought by staff and under Annex I in respect of other disputes satisfied the standards set in the Convention. In their view, Article 6 § 1 required a judicial body, but not necessarily a national court. The remedies available to the applicants were in particular an appeal to the ESA Appeals

Board if they wished to assert contractual rights, their years of membership of the ESA staff and their integration into the operation of ESA. According to the Government, the applicants were also left with other possibilities, such as claiming compensation from the foreign firm which had hired them out.

66. The Commission in substance agreed with the Government that in private-law disputes involving ESA, judicial or equivalent review could be obtained, albeit in procedures adapted to the special features of an international organisation and therefore different from the remedies available under domestic law.

67. The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, as a recent authority, the Aït-Mouhoub v. France judgment of 28 October 1998, *Reports* 1998-VIII, p. 3227, § 52, referring to the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, pp. 12-13, § 24).

68. For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.

69. The ESA Convention, together with its Annex I, expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation (see paragraphs 31 to 40 above).

Since the applicants argued an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board. In accordance with Regulation 33 § 1 of the ESA Staff Regulations, the ESA Appeals Board, which is "independent of the Agency", has jurisdiction "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member" (see paragraph 40 above).

As to the notion of "staff member", it would have been for the ESA Appeals Board, under Regulation 33 § 6 of the ESA Staff Regulations, to

settle the question of its jurisdiction and, in this connection, to rule whether in substance the applicants fell within the notion of "staff members".

70. Moreover, it is in principle open to temporary workers to seek redress from the firms that have employed them and hired them out. Relying on general labour regulations or, more particularly, on the German Provision of Labour (Temporary Staff) Act, temporary workers can file claims in damages against such firms. In such court proceedings, a judicial clarification of the nature of the labour relationship can be obtained. The fact that any such claims under the Provision of Labour (Temporary Staff) Act are subject to a condition of good faith (see paragraph 29 above) does not generally deprive this kind of litigation of reasonable prospects of success.

71. The significant feature of the instant case is that the applicants, after having performed services at the premises of ESOC in Darmstadt for a considerable time on the basis of contracts with foreign firms, attempted to obtain recognition of permanent employment by ESA on the basis of the above-mentioned special German legislation for the regulation of the German labour market.

72. The Court shares the Commission's conclusion that, bearing in mind the legitimate aim of immunities of international organisations (see paragraph 63 above), the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.

73. In view of all these circumstances, the Court finds that, in giving effect to the immunity from jurisdiction of ESA on the basis of section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation. Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention.

74. Accordingly, there has been no violation of that provision.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 February 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar