Gustl Mollath und Waltraud Storck

Wer denkt, der Fall Mollath sei nicht steigerungsfähig, sollte den **Case of Storck v. Germany** lesen.

siehe auch **http://de.wikipedia.org/wiki/Vera_Stein**

THIRD SECTION

CASE OF STORCK v. GERMANY

(Application no. 61603/00)

JUDGMENT

STRASBOURG

16 June 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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.M. ZUPANCIC,

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 to different psychiatric hospitals and her medical treatment violated Articles 5 and 8 of the Convention. She also complained that the proceedings to review the legality of these measures did not satisfy 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 of the Convention.

5. On 28 January 2003 the same committee decided to re-open 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 Court 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 Section III.

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 respective compensation claims.

12. The applicant is today 100 % handicapped and receives an invalidity pension. She claimed to be constantly suffering from significant pain, especially in her arms and legs and her vertebral column. She 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 (the applicant was then 15 years old), and from October 1974 to January 1975 (she was then 16 years old), the applicant was placed in the department for children and youth psychiatry of the Frankfurt / Main university clinic for seven months at her father's demand.

14. From 29 July 1977 (she was then 18 years old) to 5 April 1979, she was placed in a locked ward (*geschlossene Station*) of a private psychiatric institution, the clinic of Dr Heines in Bremen, at her father's demand. 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 had at that time attained 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* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts (see 'Relevant domestic law' 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 in that clinic, the applicant had been unable to maintain regular social contacts with persons outside the clinic. She had become ill with poliomyelitis when she was three years old. Following her medical treatment in the clinic, she had developed a 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 accidentally been saved from having to stay on there by a patient in the hospital, who accommodated her.

18. From 21 January to 20 April 1981, she once more received medical treatment in the clinic of Dr Heines, having lost, at that moment, 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 in the clinic for neurology and psychiatry of Dr Horst Schmidt.

20. From 3 September 1991 to 28 July 1992 the applicant received medical treatment (*stationäre Behandlung*) in the Mainz university clinic for psychosomatic medicine and psychotherapy, a legal entity of public law, where she regained her ability to speak.

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

22. On 18 April 1994 Dr Lempp, a professor for paedopsychiatry psychiatry at the Tübingen university and member of the investigating committee of the Federal Government, prepared an expert report on the applicant's demand. He indicated that "at no point in time, the applicant suffered from a psychosis in the domain of schizophrenia" ("*zu keinem Zeitpunkt lag eine Psychose aus dem schizophrenen Formenkreis vor*") and that her excessive behaviour had resulted especially from conflicts with her family.

23. On 6 October 1999 Dr Köttgen, a psychiatrist, rendered a second expert opinion, again on the applicant's demand. 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, at the relevant time, in the midst of an identity crisis (*Pubertätskrise*). Because of the wrong diagnosis then made, she had received medicaments for many years, the negative consequences of which had already been known. Due to the applicant's poliomyelitis, she would have had to be treated with the greatest caution possible. In this respect, the situation in the clinic of Dr Heines seemed to have been particularly dramatic: deprivation of liberty without a judicial decision, absence of a legal basis for the detention, a dosage of the medicaments which was too high and was used in order to question the applicant, as well as methods belonging to "black pedagogy" (*schwarze Pädagogik*).

B. The proceedings brought by the applicant in the national courts

1. Proceedings in the Bremen courts

24. On 12 February 1997 the applicant, based on the expert report of Dr Lempp, brought a motion for legal aid and an action for damages against the clinic of Dr Heines in the Bremen Regional Court. She claimed, on the one hand, 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. On the other hand the medical treatment she had received had been counter-indicated because of her poliomyelitis. She argued that her detention by force 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 had access to her medical file of the clinic of Dr Heines, 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 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* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts (*Gesetz über die Unterbringung von Geisteskranken, Geistesschwachen und Süchtigen (Unterbringungsgesetz)*; see 'Relevant domestic law' 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. On the one hand, she had not signed the admission form filled in on the day of her first admission to the clinic. On the other hand, she had not consented implicitly (*konkludente Einwilligung*) to her placement and treatment in the clinic. The mere fact that on the day of her first admission to the clinic she had come there, accompanied by her father, did not suffice to establish a valid consent (*wirksame Einwilligung*). According to the submissions of the private clinic, it could not be excluded 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 resulted, in particular, from the fact that the applicant had been given very strong medicaments since the time of her arrival.

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

"Even assuming the applicant's initial consent, it would have lapsed by the applicant's uncontested attempts to escape and the necessity to fetter her. From these moments onward, which have not been further specified by the defendant, it would, at the latest, have been necessary to obtain a judicial 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 also for the second period of the applicant's placement in the psychiatric hospital (from 21 January to 20 April 1981), she had not consented to her commitment, as she had shown signs of autism and had suffered from a temporary loss of speech. Therefore, a judicial order would also have been necessary for this period.

31. As the applicant was, therefore, in any event entitled to damages, 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. According to Section 852 § 1 of the Civil Code (see 'Relevant domestic law' 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 recalled that a victim could only be perceived to have that knowledge when he was in a position to bring an action for damages which had sufficient prospects of success. Only from then on he could reasonably be expected to bring that action ("*dass ihm die Klage zuzumuten ist*"), having also regard to his state of health. The court referred to the case-law of the Federal Court of Justice (*Bundesgerichtshof*) on this 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 medications. When she had been released from the clinic, she had still received medical treatment, and she had always been considered as mentally ill. The applicant had also suffered from serious physical troubles ("*schwere körperliche Ausfallerscheinungen*") and had, in particular, subsequently lost the ability to speak for more than eleven years (from 1980 to 1991/1992). It was not before the end of these medical treatments and after the presentation of Dr Lempp's expert report on 18 April 1994 – which, for the first time, had concluded that she had never suffered from schizophrenia – that she became sufficiently aware of her situation, of her possible right to damages and of the possibility to bring an action in court. Her motion to be granted legal aid lodged on 12 February 1997 interrupted the period of limitation of three years. 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 the clinic's appeal, 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 in the clinic. It noted that the Regional Court had not taken evidence on this 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*) due to an illegal deprivation of liberty or due to damage caused to her body by her medical treatment. In any event, such a claim would be time-barred pursuant to Section 852 § 1 of the Civil Code, providing for a three-years 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 rendered by Dr Lempp. She had also been aware that she had allegedly been forced to take antipsychotic medicaments. Therefore, she had also been in a position to bring an action in court, despite her physical troubles. 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 did not have a compensation claim on a contractual basis either (*Schadensersatzansprüche aus Vertrag*) following her medical treatment. According to the Court of Appeal, the applicant had not sufficiently proved that she had expressly opposed 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 fleeing, it complied with its duty of care ("*Fürsorgepflicht*"). According to the expert opinion of Dr Rudolf, a psychiatrist who had been 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 unsettled 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 majority, could not be presumed, there was, in any event, a contract between the clinic and the applicant's father, concluded implicitly for the benefit of the applicant. This contract ran at least from 29 July 1977 to January 1978 when attempts were made to place her in a different psychiatric institution.

40. Furthermore, the Court of Appeal considered that the applicant's treatment had neither been erroneous, nor had the dosage of her medicaments been too high. The Court relied, in this respect, on the conclusive expert report of Dr Rudolf. In assessing the opinion expressed by the expert, who had given his report both in writing and orally during the hearing, the court thoroughly considered the partly different conclusions reached in the expert reports of Drs Lempp and Köttgen, which had been prepared at the applicant's demand.

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 in the Mainz university clinic and against the clinic itself. She claimed that she had been treated for psychosomatic symptoms while she had, in fact, been suffering from a post-poliomyelitis syndrome. As the applicant's medical file about her treatment in 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. By a judgment rendered on 5 May 2000, the Mainz Regional Court dismissed the applicant's claim. It found that, according to the expert report of Dr Ludolph, chief physician of the clinic for neurology of the Ulm university, there had not been sufficient elements to prove that her post-poliomyelitis syndrome and her contemporary mental ailments had not been treated correctly.

43. During the appeal proceedings 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. By a judgment rendered on 30 October 2001, the Koblenz Court of Appeal confirmed its own judgment by default of 15 May 2001, rendered for failure of the applicant to attend the hearing (*Versäumnisurteil*). It upheld the judgment of the Mainz Regional Court. Relying on the expert report of Dr Ludolph and another two reports rendered by orthopaedic experts, the court found in particular that the applicant had neither intentionally nor negligently been subjected to a 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 prohibit its use in court. The court-appointed expert had taken full responsibility for the report and had been questioned personally in court. Moreover, even assuming that there had been an error in treatment, the applicant on whom the burden of proof lay in this respect, 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, in any event, not been a serious error in treatment, it was not necessary, pursuant to the constant 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 to the Federal Court of Justice against the judgment of the Bremen Court of Appeal of 22 December 2000, and against the judgments of the Mainz Regional Court of 5 May 2000 and of the Koblenz Court of Appeal of 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 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 reasons 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 decisions of the Bremen Court of Appeal of 22 December 2000 and of the Federal Court of Justice of 15 January 2002. Quoting the relevant articles of the Basic Law, she claimed that her rights to liberty and human dignity and her right 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 rendered 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 of the Mainz Regional Court of 5 May 2000 and of the Koblenz Court of Appeal of 30 October 2001, and against the decision of the Federal Court of Justice 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 the victim of a wrong medical treatment. She set out in detail how she had been treated in the Mainz university clinic, her proceedings in the Mainz and Koblenz courts and why she considered that her said constitutional rights had been violated thereby.

50. On 6 March 2002 the Federal Constitutional Court refused to admit 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* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts ("*Gesetz über die Unterbringung von Geisteskranken, Geistesschwachen und Süchtigen (Unterbringungsgesetz)*") of 16 October 1962.

52. According to its Section 1 § 2, the said Act covered cases where a confinement was effected contrary or without the will of the person concerned.

53. According to Section 2 of the said 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, which could not be otherwise averted.

54. Pursuant to Section 3 of the said Act, the detention had to be ordered by the district court (*Amtsgericht*) on a written motion of the competent administrative authority.

55. Section 7 of the said Act provided that a motion for the detention of an individual had to be accompanied by an expert report rendered by the competent public health officer (*Amtsarzt*) or a

specialist for mental illnesses on the mental disease of the person concerned. This report had to set out whether and to what extent the applicant, by his conduct towards himself or others, posed a serious threat to public safety or order.

56. According to Section 8 of the said Act, the district court was obliged to assign a counsel to the person concerned, if this was necessary for the protection of his interests.

57. Pursuant to Section 9 of the said Act, the court, in principle, had to hear the person concerned before reaching its decision. A hearing in person was exceptionally not necessary if it was likely to have negative effects on the state of health of the person concerned or if a communication with him was not possible. In this case, 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 said 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 said Act).

2. Subsequent developments

59. On 9 July 1979 a new Act of the *Land* Bremen on Measures of Aid and Protection in cases of Mental Disorders (*Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten*) entered into force. That Act replaced the provisions of the Act of the *Land* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts of 1962 with a view to enforcing patients' rights.

60. Section 34 of that Act notably established a Visiting Commission for Psychiatric Hospitals. This Commission visits, without prior notice and at least once a year, the psychiatric hospitals in which persons are detained following a court order in accordance with Section 17 of the said Act. The task of this Visiting Commission is, in particular, to control whether the rights of the persons detained are respected, and to give patients the opportunity to raise complaints. Several years after the said Act entered into force, the Visiting Commission extended its visits to all psychiatric hospitals, whether or not these 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. Pursuant to Section 30 of the Act regulating the Conduct of Trade (*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. Provisions of criminal law

62. According to Section 239 § 1 of the Criminal Code, a person who deprives another person of his liberty shall be punished with imprisonment of up to five years or a fine. Pursuant to paragraph 3 of the said Section, 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, shall be punished with a prison sentence of one year to ten years. Pursuant to Sections 223 to 226 of the Criminal Code, assault is punishable with imprisonment of up to ten years or a fine. A person who unlawfully compels someone with force to commit, acquiesce to or omit an act, shall be punished with imprisonment of up to three years or a fine (Section 240 § 1 of the Criminal Code).

D. Provisions of civil law and case-law on compensation claims

63. Compensation claims in tort are governed by Section 823 of the Civil Code. Pursuant to paragraph 1 of that Section, a person who, intentionally or negligently, injures the body or causes damage to the health of another person or deprives that person of his liberty, is liable to compensate the victim for the damage caused thereby. According to Section 823 § 2 of the Civil Code, the same obligation to compensate the victim rests with a person who intentionally or negligently violates a law designed for the protection of others, as, for example, Sections 223 to 226, 239 and 240 of the Criminal Code. Under Section 847 § 1 of the Civil Code (in its version in force until 31 July 2002 and applicable to damages

caused before that date), damages for pain and suffering can be claimed in case of an injury to the body or the health, or in case of a deprivation of liberty. Pursuant to Section 852 of the Civil Code, in its 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 the person liable to compensate him.

64. At the relevant time, there had not been any explicit provisions on contractual compensation claims in the Civil Code in cases of the defective performance of a contract (*positive Vertragsverletzung*) concluded by a doctor and his patient. However, pursuant to 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 its objection raised at the admissibility stage to the re-opening of the proceedings before the Court, claiming that the Court did not have a right to do so after a committee's inadmissibility decision. The Court also did not have such a competence in cases of a manifest error of fact or in the assessment of the relevant admissibility requirements. In any event, such an error was not 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 iudicata* 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 a re-opening of proceedings before the Court (see *Karel Des Fours Walderode v. Czech Republic* (dec.), no. 40057/98, ECHR 2004-, 18 May 2004; *Harrach v. 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 interest of justice, the inherent power to re-open 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; *Karel Des Fours Walderode*, cited above; *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 by her forced stay in the clinic of Dr Heines in Bremen, she had been deprived of her liberty contrary to Article 5 § 1 of the Convention, which, in so far as relevant, provides:

"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. Had the applicant been deprived of her liberty?

69. The applicant maintained that she had been detained against her will in the clinic of Dr Heines. Referring to the findings of the Bremen Regional Court, she stressed that she had objected to her confinement to that clinic, in which 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 the clinic of Dr Heines. Otherwise, the applicant would certainly not have returned voluntarily to that clinic in 1981.

71. The Court recalls 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; *H.M. v. Switzerland*, no. 39187/98, § 42, ECHR 2002-II).

72. The Court observes that, whereas the applicant's factual situation in the clinic was largely undisputed, the Bremen Regional Court found that the applicant had been deprived of her liberty in the clinic, because she had neither expressly nor implicitly consented to her stay there. On the contrary, the Bremen Court of Appeal took the view either that the applicant had implicitly concluded a contract on her medical treatment with the clinic, or, alternatively, that there had been an implicit contractual agreement between her father and the clinic concluded implicitly 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 in the clinic in Bremen, the Court notes that it is undisputed that the applicant had been placed in a locked ward of that clinic. She had been under continuous supervision and control of the clinic personnel and had not been free to leave the clinic during her entire stay there of some 20 months. When the applicant had attempted to flee it had been necessary to fetter her in order to secure her stay in the clinic. When she had once succeeded in escaping from there she had to be brought back by the police. She had also not been able to maintain regular social contacts with the outside world. Objectively, she must therefore be considered as having 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 to a certain limited place for a not negligible length of time. A person can only be considered as being deprived of his or her 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 which are undisputed between the parties, the Court observes that the applicant had attained majority at the time of her admission to the clinic and had not been placed under guardianship. Therefore, she had been considered to have the capacity to consent or object to her admission and treatment in hospital. It is undisputed that she had not signed the clinic's admission form prepared on the day of her arrival. It is true that she had presented herself to the clinic, 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; *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

– which is uncontested – the applicant, on several occasions, had tried to flee from the clinic. She had to be fettered in order to prevent her from absconding and had to be brought back to the clinic by the police when she had 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 her capacity to consent – had agreed to her continued stay in the clinic. In the alternative, assuming that the applicant had no longer been capable of consenting following her treatment with strong medicaments, she could, in any event, not be considered as having validly agreed to her stay in the clinic.

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 age but lacked the capacity to consent in a psychiatric institution which he had never attempted to leave, and in which the Court had found that there had been a deprivation of liberty. In the present case, *a fortiori*, a deprivation of liberty must be found. The applicant's lack of consent must also be regarded as the decisive feature distinguishing the present case from the case of *H.M. v. Switzerland* (cited above, § 46). In that case, it was held that the placing of an elderly person in a foster home, to ensure necessary medical care, had not amounted to a deprivation of liberty. However, that applicant, 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 could then draw the conclusion that she did not object.

78. The Court therefore concludes that the applicant had been 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 aspects. Even though the clinic of Dr Heines was a private institution, the State was involved in her stay and treatment in the clinic due to the fact that her sickness had been covered by a compulsory health insurance (*gesetzliche Krankenversicherung*). This 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 in 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 flee.

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 Section 852 § 1 of the Civil Code constituted a disproportionate limitation on her right to claim damages. She could only be expected to have had knowledge of a damage caused by a particular person within the meaning of the said Section when she had learnt that the doctors' conduct had been unlawful and that the damage which had resulted from the doctors' medical treatment was attributable to a wrong treatment and not to her own state of health. She had always been treated as a mentally ill person who continued receiving medical treatment long after she had been released from the clinic of Dr Heines. At the relevant time, she had even lost her ability to speak for more than ten years. She could, therefore, not be considered to have had sufficient knowledge and could not reasonably have been expected to bring her claim as long as she had not had access to her medical file. This access had been granted to her only on 24 February 1997, that is, after she had brought her proceedings in the Bremen Regional Court. To support this view, the applicant relied on a decision of the Marburg Regional Court of 19 July 1995 (no. 5 O 33/90). In that decision, the court found that pursuant to Section 852 of the Civil Code, time did not start running for the purposes of limitation before the person concerned had been granted access to his medical file. Only from then onwards 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 caused by the defective performance of a contract that the applicant had implicitly concluded a contract with the clinic. She submitted that this interpretation was absolutely incomprehensible and therefore arbitrary. The same was true for the assumption that she might have agreed to her medical treatment pursuant to a contract concluded by her father with the clinic to her benefit. She stressed that, as was proved by her medical file, she was opposed to her admission to the clinic, to the continuation of her stay in it and to her medical treatment. Her various attempts to flee from the clinic would, in any event, have had to be interpreted as a termination of the alleged contract on her medical treatment. Even assuming the existence of such a contract, it would not have authorised her unlawful detention, the administration of unindicated medicaments by force and her immobilisations.

83. The applicant further took the view that Germany had violated its positive obligation under Article 5 § 1 of the Convention to protect her from a deprivation of liberty by private persons. She pointed out that, having attained majority, her confinement to the clinic would have required a court order. She contested that the health authorities, by their supervisory powers, could sufficiently control whether this requirement had been complied with. She stressed that during her stay in the clinic, in which she had been prevented from fleeing by, *inter alia*, being administered medicaments by force, she had not been in a position to secure help from outside. The telephone had been monitored by the clinic

personnel and it had been only her father who 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 visiting commissions in Section 34 of the Act on Measures of Aid and Protection with respect to Mental Disorders (see paragraphs 59-60 above) had not been effective in her case. The said Act, the enactment of which proved the acknowledgement by the State of a need for protection in this respect, had only entered into force on 9 July 1979, that is, after her first detention in the clinic of Dr Heines. The said Act also did not entitle the health authorities to supervise mental institutions like the clinic of Dr Heines, as this clinic 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 moment, 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 an unlawful deprivation of liberty. While providing retroactive sanctions, they could not prevent the deprivation of liberty itself from occurring or continuing. Having regard to the serious nature of an infringement of the right to liberty, this could not be considered as affording sufficient protection.

b. The Government

84. The Government argued that the applicant had not been the victim of a deprivation of liberty which 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 authorizing the applicant's confinement. State entities had also not been involved in the applicant's detention as a supervisory authority. Such supervision had only been provided for by law for institutions competent to admit patients confined to a psychiatric hospital by a court order. The clinic of Dr Heines had not been such an institution. There had been no obligation, and indeed, due to a doctor's duty of confidentiality, no right of the clinic to inform State authorities about the applicant's treatment in the clinic.

85. The Government further submitted that there had been no violation of Article 5 § 1 of the Convention by a wrong application of the national law. The applicant had not attempted to institute criminal investigations against the persons responsible for her detention in the clinic of Dr Heines. 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 must be had to the margin of appreciation enjoyed by the Contracting States in this sphere.

86. On the one hand, the Bremen Court of Appeal's calculation of the three-years time-limit in Section 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 the clinic of Dr Heines in 1997, that is, eighteen years after the end of her first treatment in the clinic. Pursuant to Section 852 § 1 of the said Code, for the purposes of limitation time for a claim in tort started to run when the person concerned learned that a damage had been caused to him by a particular person. As had been correctly found by the Bremen Court of Appeal, the applicant had known already at the time when she had been confined to the clinic that she had – allegedly – been detained there against her will. This was proved not only 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 learn the profession of a tracer (*technische Zeichnerin*) and to obtain a driving licence. She therefore had possessed the necessary intellectual capacities to have knowledge of the relevant facts. Consequently, the Bremen Court of Appeal could 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. On the other hand, the Bremen Court of Appeal, with respect to the applicant's possible claim for damages caused by the defective performance of a contract, also had not arbitrarily assumed that the applicant had implicitly concluded a contract with the clinic about her medical treatment. She had not opposed her admission to the hospital nor 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 the applicant against her will – were therefore not decisive for the findings of that court.

88. The Government further pointed out that Germany had not violated a 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 or her liberty. Firstly, a confinement to a psychiatric hospital had to be ordered by a judge. Secondly, the competent health authorities disposed of far-reaching supervisory powers to control the execution of these court orders. Thirdly, Section 34 of the Act on Measures of Aid and Protection with respect to Mental Disorders (see paragraphs 59-60 above), which entered into force on 9 July 1979, introduced visiting commissions to control the detention of persons ordered under the said Act in psychiatric hospitals. It thereby created a further innovative mechanism of protection. Fourthly, a person who deprived another person of his liberty risked incurring a prison sentence of up to ten years pursuant to Section 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 non-pecuniary damages, under Sections 823 and 847 of the Civil Code (see paragraph 63 above). Furthermore, pursuant to Section 30 of the Act regulating the Conduct of Trade (see paragraph 61 above), the conduct of a private clinic necessitated a licence issued by the State. In the course of the examination of the application lodged by the clinic of Dr Heines for the issuing and the extension of such a licence, the competent State authorities had controlled the reliability of the clinic management and the sufficient medical treatment of its patients.

2. The Court's assessment

89. The Court recalls 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 which could engage Germany's responsibility under the Convention for the applicant's detention in the private clinic in Bremen. Firstly, the deprivation of liberty could be imputable to the State due 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 violated its positive obligations to protect the applicant against interferences with her liberty carried out 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 to the private clinic in Bremen had not been authorized 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 and conditions of confinement of persons being treated in the said clinic.

91. However, the Court notes that on 4 March 1979 the police, by use of force, had brought the applicant back to the clinic from which she had fled. Thereby, 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 had led to any control on the part of the police or any other public authority of the lawfulness of the applicant's confinement to a private hospital. Therefore, even though State authorities caused the applicant's detention in the clinic only towards the end of her placement, this engaged their responsibility, as her confinement had otherwise 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, 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 had complied with possible positive obligations under Article 5 § 1 (see paragraphs 100-108 below), and to the question whether the applicant had had a fair trial within the meaning of Article 6 § 1 of the Convention (see paragraphs 130-136 below).

93. The Court recalls 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 the national law. However, the Court is called 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 of the Convention Article in question, which is imputable to the State. In this respect, 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, p. 15-16, § 33; *Von Hannover v. Germany*, no. 59320/00, § 71, ECHR 2004-VI).

94. In the present case, the interpretation assumed by the Bremen Court of Appeal in rejecting the applicant's compensation claim warrants examination of its compliance with the spirit of Article 5 under two aspects. Firstly, the Court of Appeal, in considering possible claims *in tort*, took a restrictive view on the moment on which time started to run for the purposes of limitation under Section 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 already during the time of her detention in the clinic.

95. In determining whether such an interpretation of the national law can be considered as complying with the spirit of Article 5 § 1 of the Convention, the Court finds it helpful to compare the national court's approach to the principles developed under the Convention with respect to the calculation of the six-months time-limit of Article 35 § 1 of the Convention. It recalls 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, in particular, be special circumstances – such as the applicant's mental state, which rendered him or her incapable of lodging a complaint within the prescribed time-limit – which 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; *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 period of limitation, 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 which 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 entailed by her after her release from the clinic. The applicant had been treated with strong medicaments during and long after her release. It is undisputed that, at that time, she had suffered from serious physical troubles, and had, in particular, lost the ability to speak for more than eleven years (from 1980 to 1991/1992). She had also been considered as mentally ill until she finally, in 1994 and 1999, obtained two expert reports to the contrary. Furthermore, it has to be noted that the applicant had been refused access to the medical file concerning her treatment in the clinic before she had brought her action in the Bremen Regional Court. In this respect, the Court also takes into consideration that, due to a decision of the Marburg Regional Court presented by the applicant, for the purposes of limitation under Section 852 of the Civil Code, time did not start running 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. 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 had been deprived of her liberty (see paragraphs 71-78 above). Assuming the applicant's capacity to consent, there is no factual basis whatsoever for the assumption that the applicant, who had clearly opposed to her stay and had tried to flee on several occasions, had consented to her stay and treatment in 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 medicaments, she could, in any event, not be considered as having

validly concluded a contract. Given this finding, a contract concluded implicitly between the applicant's father and the clinic to the benefit of the 18-year-old applicant, which the Court of Appeal assumed in the alternative, could, as is undisputed by the Government, not have authorised the applicant's detention against her will.

98. Consequently, the Court of Appeal's finding that, under these circumstances, there had been a contractual relationship by which the applicant had authorized her stay and treatment in the clinic must be considered as arbitrary. The Court of Appeal cannot, therefore, be considered as having 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 had 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 had known already at the time when she had been confined to the clinic that she had been detained there against her will.

99. The Court concludes that the Bremen Court of Appeal, as confirmed by the superior 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 with the applicant's right to liberty as guaranteed by Article 5 § 1 of the Convention which is imputable to the respondent State.

c. Compliance with positive obligations on the State

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 because the latter has violated a positive obligation to protect the applicant against interferences with her liberty as carried out 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; *Wos v. Poland* (dec.), no. 22860/02, § 60, 1 March 2005). Consequently, the Court has expressly found that Article 2 (see, amongst others, *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; *Costello-Roberts*, *ibid*) enjoin 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 private parties.

102. Having regard to this, the Court considers that Article 5 § 1, first sentence, of the Convention must equally be considered 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, moreover, 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; *Ila cu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 332-352, 464, ECHR 2004-VII).

103. With respect 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 from 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; *Wos*, cited above, § 60). The Court recalls that in the case of *Costello-Roberts* (cited above, p. 58, §§ 27-28) the State was held responsible for the act of a headmaster of an independent school due to 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. These institutions, in particular those where persons are held without a court order, need not only a licence, but a competent supervision on a regular basis of the justification of the confinement and medical treatment.

104. Turning to the present case, the Court notes that, under German law, the confinement of a person to 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 supervisory powers to control the execution of these court orders. However, in the applicant's case, the clinic, despite the lack of the applicant's consent, had not obtained the necessary court order. Therefore, no public health officer had ever assessed whether the applicant – what was more than doubtful – posed a serious threat to public safety or order within the meaning of Article 2 of the Act of the *Land* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts. Consequently, the State also did not exercise any supervisory control over the lawfulness of the applicant's detention in the clinic for some 20 months.

105. It is true, though, that, with deprivation of liberty being a crime punishable with up to ten years' imprisonment, German law retrospectively provided sanctions with a deterring effect. Moreover, a victim could, 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 such retrospective measures alone as providing effective protection for individuals in such a vulnerable position as the applicant. It notes that particularly in the Act of the *Land* 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 to a psychiatric institution without such an order. It must be borne in mind that the applicant, once detained and treated with strong antipsychotic medicaments, had no longer been 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, had brought back the applicant to her place of detention from which she had escaped. Thereby, public authorities, as already shown above, had been involved in the applicant's detention in the clinic, without her flight and obvious unwillingness to return having entailed any control of the lawfulness of her forced stay in the clinic. This discloses the great danger of abuse in this field, notably in cases like that of the applicant, in which family conflicts and an identity crisis had been at the root of her troubles and long detention in a psychiatric hospital. The Court is therefore not convinced that the control exercised by State authorities merely in connection with the issuing of a licence for the conduct of a private clinic pursuant to Section 30 of the Act regulating the Conduct of Trade sufficed to ensure a competent and regular supervisory control against a deprivation of liberty in such a clinic. Moreover, Section 30 of the Act regulating the Conduct of Trade as such had not been in force at the beginning 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 have been introduced by Section 34 of the Act on Measures of Aid and Protection with respect to Mental Disorders for individuals detained in psychiatric institutions, responding to the lack of sufficient protection in this field. In particular, visiting commissions were created to inspect psychiatric institutions, to control whether the rights of patients were 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 violated its existing positive obligation to protect the applicant against interferences with her liberty carried out 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. Was the detention “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 contrary or without his will – in case such a detention had been found – necessitated a court order pursuant to

Section 3 of the Act of the *Land* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts.

110. The Court recalls that the question whether the applicant's detention was in accordance with law and with a procedure prescribed by law only needs to be answered insofar as public authorities, notably the courts, have been 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 has been solely the result of acts by private persons (see paragraphs 100-108 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, Commission report, 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 the conformity with domestic law, the Court recalls that the term "lawful" covers procedural and substantive aspects of national law, the "lawful" term 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 26 September 1979, Series A no. 33, p. 17, § 39; *H.L. v. the United Kingdom*, cited above, § 114).

112. The Court notes that, as was found above, the applicant had been deprived of her liberty contrary to or at least without her will. Under these circumstances, it is undisputed that, pursuant to Section 3 of the Act of the *Land* 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 in this respect (see paragraph 29 above):

"Even assuming the applicant's initial consent, it would have lapsed by the applicant's uncontested attempts to escape and the necessity to fetter her. From these moments onward, which have not been further specified by the defendant, it would, at the latest, have been necessary to obtain a judicial order."

As there had been no court order authorising the applicant's confinement to the private clinic, her detention had not been 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 suffered from a mental disorder of a kind or degree warranting compulsory confinement.

113. The Court concludes that the applicant's confinement to the clinic of Dr Heines 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 invoked 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 with respect to Article 5 § 1 of the Convention, pointed out that there had been a lack of sufficient safeguards to ensure that individuals who consider themselves to be detained against their will have 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 recalls 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 for a 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* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts (see paragraphs 51-58 above) did provide that the detention of a person for mental illness had to be reviewed by a court in regular intervals. In the course of these proceedings the person concerned could be assigned counsel to protect his interests and had to be heard in court either in person or *via* a representative. However, in the present case, the applicant, who had apparently been unable to secure outside help during her confinement to the clinic, had not been in a position to institute such judicial review proceedings. Consequently, it is indeed questionable whether there had been sufficient safeguards to guarantee the applicant's effective access to court in order to have the lawfulness of her detention reviewed. The issues raised in this respect are, however, essentially the same as those posed in respect of the State's positive obligation to protect the applicant against interferences with her liberty. Having regard to its above findings with respect to the non-compliance of the State with these positive obligations under Article 5 § 1 of the Convention (see paragraphs 100-108 above), the Court, therefore, 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 deprived her of her right to damages for her detention. She invoked 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 with respect to 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 with respect to Article 5 § 1 of the Convention, took the view that the applicant had not been the victim of a detention contrary to Article 5 § 1. However, even assuming that she had been detained, 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 about the applicant's medical treatment, could not be regarded as unreasonable. Therefore, her compensation claim had not been arbitrarily dismissed.

122. The Court recalls that Article 5 § 5 of the Convention creates a direct right to compensation, provided that the national courts or the Convention organs have found that an applicant had 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, p. 35, § 67). In the present case, the Court has indeed found that the applicant had been detained in the clinic in breach of Article 5 § 1 of the Convention. The Court, however, observes that, with the applicant challenging the national court's interpretation of the provisions on compensation, she repeats, in substance, her complaint under Article 5 § 1. Having regard to its above findings with respect to 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 the clinic of Dr Heines from January to April 1981. She invoked Article 5 § 1 of the Convention, which, in so far as relevant, provides:

"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 did not have sufficient access to 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, deprived her of her right to damages for her unlawful detention. She invoked 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 been deprived of her liberty also during her stay in the clinic of Dr Heines in 1981. She maintained that she had been committed to the clinic by her general practitioner due to the onset of strong withdrawal symptoms after she had abruptly stopped taking any medicaments. She had therefore not consented to her detention in that clinic.

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

126. The Court states that in respect of her second stay in the clinic, the applicant can only be considered as having been deprived of her liberty if she had not consented to her stay and treatment in that clinic. Having regard to the domestic courts' related findings of fact, the Court notes that the applicant had presented herself to the clinic on 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 due to the strong withdrawal symptoms she suffered from after having abruptly stopped taking any medicaments. The fact alone that the applicant may initially have given herself up to be taken into detention, however, does not make her lose 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; *H.L. v. the United Kingdom*, cited above, § 90).

127. It is true that according to the Regional Court's and the Court of Appeal's consistent findings, on the very day of her admission to the clinic, the applicant had been unable to speak and had shown signs of autism. However, the applicant had attained majority and had not been placed under guardianship. It therefore has to be assumed that she had still been capable of validly expressing consent at least in the course of her treatment in the clinic in 1981. The Court further attaches decisive importance to the fact that the applicant, who had known the clinic's regime and methods of medical treatment following her first stay there from 1977 to 1979, had 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 in the clinic due to her need for treatment. Moreover, contrary to the findings with respect to her first placement in the clinic, it had not been found that the applicant had attempted to flee from the clinic in 1981.

128. In these circumstances, the factual background of the applicant's second stay in the clinic, unlike the one of her first stay, does not allow for a conclusion that she had been confined to the clinic against or without her will. She had therefore not been 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.

129. Given the finding that the applicant had not been detained within the meaning of Article 5 of the Convention, there has also 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 STAYS OF THE APPLICANT 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 violated her right to a fair trial guaranteed by Article 6 § 1, which, in so far as relevant, 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 with respect to 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 heard 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 to their submissions concerning Article 5 of the Convention in this respect. They further argued that the applicant and her counsel had ample opportunities – which they seized – to question the expert appointed by the court and to comment on his report orally and in writing. The Court of Appeal, in reasoning its judgment, 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 interpreted and applied the provisions of German law concerning her compensation claim, the Court, referring to its respective 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 heard 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 recalls 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; *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, had given a conclusive medical report, which he had explained in a hearing during which he could also be questioned by the parties. The findings of two expert reports previously prepared on the applicant's demand had thoroughly been taken into consideration by the court in assessing the evidence. With respect to the applicant's complaint that the expert had not seen her in person, the Court observes that the expert had not been called to assess the applicant's state of health at the time of the proceedings, but her health 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 separate issues arise under Article 6 § 1 of the Convention, which have not yet been dealt with from the perspective of Article 5 § 1 of the Convention, there has been no violation of Article 6.

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

137. The applicant claimed that in substance, she had also complained about a violation of Article 8 of the Convention with respect to the restrictions on her liberty, her immobilisation and the medical

treatment against her will during her stays in the clinic of Dr Heines both from 1977 to 1979 and in 1981. She argued that these facts should also be examined under the aspect of a violation of 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, which provides as relevant:

"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 with respect to Article 5 § 1 of the Convention, the applicant argued that she had been treated with medicaments which had been counter-indicated and had caused her to develop a post-poliomyelitis syndrome. Whenever she had refused to take medicaments, these had been administered to her by force. She had been crammed 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 ruined her health, and indeed her life forever. 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 invoked 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 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 an effective protection of the applicant's rights under Articles 3 and 8. It had notably been open to the applicant to lodge a criminal information (*Strafanzeige*) against the doctors who had treated her for assault or coercion 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 by a wrongful medical diagnosis or therapy. As had been found by the Bremen Court of Appeal after its taking of evidence, no erroneous medical treatment had been proved.

141. Due to the different factual backgrounds of the applicant's involuntary placement in the clinic of Dr Heines from 1977 to 1979 on the one hand, and her stay there in 1981 on the other hand, 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 recalls 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 (*argumentum e contrario 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, by complaining about restrictions on her freedom of movement, in substance repeats 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 recalls 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 medical treatment with various medicaments, which had interfered with her physical integrity, had been carried out against her will, the Court refers to its

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

2. Responsibility of the State

145. Similarly to the findings with respect to 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 due to its own involvement in the medical treatment as such, due to a failure of the courts to interpret the national law in the spirit of Article 8, or due to a non-compliance of the State 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 had brought the applicant back to the clinic by force, thereby rendering her further treatment there possible. At that stage, 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 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 a possible interruption or suspension of the running of time for the purposes of limitation –, had not had sufficient regard to the applicant's poor state of health during and following her treatment in the clinic. As regards the Court of Appeal's finding that the applicant had concluded a contract on her medical treatment in the clinic, the Court notes that the applicant had not only opposed to her confinement to the clinic, but also to her medical treatment, and had been administered medicaments by force on several occasions. Under these circumstances, the Court, presuming the applicant's capacity to consent, is unable to discern any reasonable factual basis for the national court's conclusion that the applicant had continuously consented to her medical treatment, thereby having validly concluded and not terminated a contract.

148. The Court of Appeal, as confirmed by the superior courts, therefore had not interpreted 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 to private life which was imputable to the respondent State.

c. Compliance with positive obligations on the State

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 had failed to comply with its positive obligation to protect the applicant against such interferences by private individuals. The Court, referring to its constant case-law, recalls that there is a positive obligation on the State flowing from Article 8 to take reasonable and appropriate measures to secure and protect the individuals' rights to respect for their private life (see, *inter alia*, *X and Y v. the Netherlands*, cited above, p. 11, § 23; *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 100-108 above), considers that due to 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 that also in the sphere of interferences with a person's physical integrity, German law provided retrospective sanctions, with assault being punishable with imprisonment of up to ten years pursuant to

Sections 223 to 226 of the Criminal Code. Moreover, the victim of an interference with his physical integrity could claim pecuniary and non-pecuniary damages in tort. However, just as in cases of a deprivation of liberty, the Court finds that such retrospective measures alone are not sufficient to provide appropriate protection for the physical integrity of individuals in such a vulnerable position as the applicant. The above findings as to a lack of effective State control over private psychiatric institutions at the relevant time (see paragraphs 103-108 above) are equally applicable as far as the individuals' protection 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.

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 public authorities, notably the courts, had been 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 had been 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, aimed at medically treating his disease, 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* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts). The applicant's confinement to the clinic for medical treatment from 1977 to 1979 had not been authorised by a court order. Consequently, the interference with her right to respect for private life had not been lawful within the meaning of Article 8 § 2.

153. It follows that there had been a violation of Article 8 of the Convention.

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 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 126-128 above), it notes, however, that it has not been proved that the applicant had not validly consented to her stay and medical treatment in 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 had concluded, on the basis of the material before it, that she had not been subjected to wrong medical treatment. To support this conclusion, the said court had relied on a duly reasoned report rendered by the expert it had appointed, and had also addressed the partly different conclusions in two expert reports submitted by the applicant. Consequently, there had not been an interference with the applicant's right to respect for her private life within the meaning of Article 8.

155. Consequently, there has been no violation of Article 8 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S MEDICAL TREATMENT IN THE 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, which, in so far as relevant, 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. As the medical file, to which the applicant had claimed access

already in 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 respect to the causal link between her 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. As was shown by the facts 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, 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 had taken responsibility for the report. Furthermore, the courts had carefully assessed the expert report in their judgments. Moreover, the proceedings had also not been unfair because the applicant's medical file concerning her treatment in the Mainz university clinic had temporarily disappeared. 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. Insofar as the applicant complained about the way in which the medical expert had prepared and given his report and about the way in which the courts had assessed this evidence, the Court recalls 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 BV v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, pp. 18-19, § 31; *García Ruiz*, cited above, § 28).

160. The Court notes that the Koblenz Court of Appeal had expressly taken 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. The said court had heard the expert orally, and the applicant had been given the opportunity to question the expert during the hearing. In addition to that, the Court of Appeal had not only relied on the expert report of Dr Ludolph, but had consulted two further medical experts. In the light of these considerations, the Court considers that the applicant cannot validly argue that her proceedings had been unfair in these respects.

161. Insofar 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, had been 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 BV*, cited above, p. 19, § 33; *Hämäläinen and Others v. Finland* (dec.), no. 351/02, 26 October 2004).

162. The Court notes that, whereas 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 already during the first-instance proceedings. The applicant has not established a disadvantage *vis-à-vis* the defendants by reason of the fact that she had not been 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 had considered the applicant's demand to apply a less strict rule on the burden of proof. The Court of Appeal, referring to the constant case-law of the Federal Court of Justice in this respect, had 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 difficulties for a patient to prove that a doctor treating him had made a mistake, which had caused damage to his health. However, it finds that, having regard to all the material available to that court, the reasons given by the Court of Appeal not to

diverge from the usual distribution of the burden of proof cannot be regarded as arbitrary, and did not substantially disadvantage the applicant as plaintiff. Consequently, the facts of the present case do not disclose a non-compliance with the concept of equality of arms.

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

IX. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S MEDICAL TREATMENT IN THE 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 in the Mainz university clinic infringed her right to respect for her private life as guaranteed by Article 8 of the Convention as well as Article 3 of the Convention.

165. The Court considers that these complaints fall to be examined under Article 8 of the Convention alone, which, in so far as relevant, provides:

"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 made with respect to her treatment in the clinic of Dr Heines in Bremen.

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

168. The Court recalls 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 had been treated without her consent in the 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 had reasonably found, with the help of medical experts, that the applicant had neither intentionally nor negligently been subjected to 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.

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 of loss of estimated earnings as a technical engineer – the profession which she had wished to take up before the beginning of her medical treatments – from which she deducted her invalidity pension. She added EUR 237,728.76 of pension which 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, which had not been covered by her health insurance. Alternatively, she claimed a total of EUR 1,126,970.30 in pecuniary damages, based on her estimated income and pension as a tracer, the profession she had learned in 1990. Furthermore, she claimed compensation for all future material

damage resulting from the treatment in the clinic of Dr Heines in Bremen and in the Mainz university clinic in so far as it was not covered by the social security companies.

173. The applicant also sought compensation for 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 resulted in her being 100 % handicapped today and constantly suffering from significant pain in her arms, legs and vertebral column. Her detention and degrading treatment especially in the clinic in Bremen and her medical treatment had also caused in her feelings of anxiety and helplessness and have ruined her life forever. As her state of health was constantly deteriorating due to her 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 damages, the Government maintained that the applicant had failed to prove that there was a causal link between the alleged violation of 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 received wrong medical treatment in the psychiatric institutions in question.

176. With respect 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, amongst 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 the clinic of Dr Heines from 1977 to 1979. It observes that the applicant had neither learned nor exercised the profession of a technical engineer, nor that of a tracer before her confinement to the clinic, so that the detention had not interfered 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 which profession the applicant would have taken up, and which amount of money she would have earned at a later stage without her stay in the clinic from 1977 to 1979. Consequently, a clear causal connection between the applicant's loss of estimated earnings and her pensions calculated on that basis has not been established. Likewise, the Court, on the basis of the material before it, cannot discern a clear causal connection between the applicant's confinement to the clinic of Dr Heines and her claim for dentist's fees and auxiliary devices which had not been covered by her health insurance.

177. As to the applicant's claim for compensation for all future material damage resulting from the treatment in the clinic of Dr Heines in Bremen and in the Mainz university clinic, the Court observes that it has not found a violation of the Convention in respect of the applicant's treatment in the clinic of Dr Heines in 1981 and in the Mainz university clinic. Consequently, no claim for damages can arise in this respect. As to her claim concerning her treatment in the clinic of Dr Heines from 1977 to 1979, the Court finds that it can neither speculate on the exact amount of pecuniary damage which will arise from her confinement to that clinic, nor whether there will be a causal link between this future damage and her treatment in that clinic. Therefore, the Court does not make an award of pecuniary damages.

178. With respect to the applicant's claim for non-pecuniary damages, the Court recalls 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 to 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 by her forced medical treatment was of a particular gravity. It was the cause of the serious irreversible damage to her health and had 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 damages, must also be distinguished from cases like *H.L. v. the United Kingdom* (cited above, §§ 148-150). In the present case, it is most questionable, and had indeed not been 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* Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts, see paragraph 53 above). Having regard to comparable applications in its case-law, in which there have also been substantive interferences with the respective applicants' physical and moral integrity (see, for example, *A. v. the United Kingdom*, no. 25599/94, § 34, ECHR 1998-VI; *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 for the services of her lawyers, medical expert opinions, hotel and travelling costs in the proceedings which started in the Bremen Regional Court (EUR 21,198.51) and in the proceedings which started 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 costs and expenses incurred for 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 prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. 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 which started in the Bremen Regional Court. It accepts that the costs and expenses in these proceedings have been incurred to rectify a violation of Articles 5 and 8 of the Convention. Even though the applicant has not submitted any documentary evidence with respect to her personal expenses in the proceedings before the Federal Constitutional Court, the Court acknowledges that she must have incurred certain expenses also in this respect (cf. *Migon v. Poland*, no. 24244/94, § 95, 25 June 2002; *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 proceedings before this Court, 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 respect 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 respect 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 respect to the applicant's stay in a private clinic in 1981;

5. *Holds* that, insofar as a separate issue arises under Article 6 § 1 of the Convention with respect to both stays of the applicant 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 respect 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 respect 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 respect to the applicant's medical treatment in the university clinic in Mainz;

9. *Holds* that there has been no violation of Article 8 of the Convention with respect to the applicant's medical treatment in the university clinic in Mainz;

10. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to 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