

Time-barring of asbestos victim's case violated the Convention

The case of [Jann-Zwicker and Jann v. Switzerland](#) (application no. 4976/20) concerned the applicants' relative Marcel Jann's death in 2006 from pleural cancer, allegedly caused by exposure to asbestos from a period in the 1960s and 70s. He had been living in a house rented from Eternit AG in the immediate vicinity of one of their plants, where asbestos was processed. Criminal proceedings initiated in 2006 and civil proceedings initiated in 2009 (before and after Marcel Jann's death respectively) were unsuccessful. The Federal Court ruled that the civil claims were time-barred.

In today's **Chamber** judgment¹ the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights as regards lack of access to a court, owing to the Swiss courts' ruling that the limitation period had run from the time Marcel Jann had been exposed and so the claim had been time-barred, and

a violation of Article 6 § 1 as regards the length of the proceedings before the national courts because the Federal Court's adjourning while awaiting new legislation had not been necessary.

Principal facts

The applicants, Regula Jann-Zwicker and Gregor Jann, are Swiss nationals who were born in 1948 and 1983 and live in Thalwil and Zürich (both Switzerland) respectively. They are the widow and son of Marcel Jann, who was born in 1953.

Marcel Jann died in 2006 from pleural cancer, allegedly from exposure to asbestos. From 1961 until 1972 he lived in a house in the immediate vicinity of a plant in Niederurnen belonging to Eternit AG, where fibrous asbestos minerals were processed into cement panels. The house was rented from the company by Marcel Jann's parents. He stated that he had been regularly exposed to asbestos emissions via dust, playing on and around the pipes of the factory, and watching the asbestos being unloaded at the train station.

Use of asbestos was banned in Switzerland in 1989.

Before his death, Marcel Jann had initiated a criminal complaint alleging grievous bodily harm, which was dismissed by the Swiss courts. In 2009, after Marcel Jann's death, the applicants brought an action against Eternit (Schweiz) AG (the alleged legal successor of Eternit AG), the two sons of Eternit AG's previous owner Max Schmidheiny, and Swiss Federal Railways, seeking compensation.

The Glarus Cantonal Court rejected the claims. It held that the limitation period had passed: in particular, to link the beginning of the limitation period to the appearance of damage would be to counteract legal certainty. The time-limit in this case had begun to run from the end of the alleged damaging action (that is to say in 1972 when Marcel Jann had moved away from Niederurnen). For the Cantonal Court, this reasoning was in line with Article 6 of the Convention.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

The applicants appealed. In 2013 the Glarus Court of Appeal (*Obergericht*) upheld the first-instance judgment. The applicants then appealed to the Federal Court, also requesting suspension of proceedings pending the European Court's judgment in [Howald Moor and Others v. Switzerland](#) (nos. 52067/10 and 41072/11). That request was granted after the European Court had delivered its judgment in *Howald Moor and Others* but the proceedings were suspended pending Parliament's debate on amending of the statute of limitations for various civil-law claims.

Following the enactment of a new statute of limitations by Parliament and following a request by the applicants, in 2018 the Federal Court resumed proceedings. It dismissed their claims, upholding the Court of Appeal's verdict, noting also that a compensation fund had been set up for asbestos victims (the *Entschädigungsfonds für Asbestopfer* (EFA) Foundation), and holding that the new limitation periods for killing or causing bodily injury were not applicable to the case. The limitation period had run from when the injury to Marcel Jann had initially been caused.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), the applicants complained that the proceedings before the courts had been overlong and that they had been denied access to a court to hear their complaints on account of the statute-barring of their action.

The application was lodged with the European Court of Human Rights on 14 January 2020.

Judgment was given by a Chamber of seven judges, composed as follows:

Pere **Pastor Vilanova** (Andorra), *President*,
Jolien **Schukking** (the Netherlands),
Yonko **Grozev** (Bulgaria),
Peeter **Roosma** (Estonia),
Ioannis **Ktistakis** (Greece),
Andreas **Zünd** (Switzerland),
Oddný Mjöll **Arnardóttir** (Iceland),

and also Milan **Blaško**, *Section Registrar*.

Decision of the Court

[Article 6 § 1 as regards access to a court](#)

The applicants and the Government disagreed as to whether the formers' situation was the same as that in *Howald Moor and Others* as regards time-barring of claims denying them access to a court. The Court noted that the victim in *Howald Moor and Others*, who had been exposed to asbestos within a professional context, had received accident-insurance payments for damage from asbestos, whereas Marcel Jann had not been eligible for such payments, as the alleged exposure had not occurred within his place of work; both, however, had had a right to protection of their physical integrity including protection via the courts.

The delay after the alleged exposure to asbestos in lodging the relevant civil claims before the national courts had been 27 years in *Howald Moor and Others* and 37 years in the current case (but 34 years as regards the lodging of the criminal complaint), but the Federal Court had not mentioned this in its reasoning and had therefore not considered this difference to be significant, in contrast to the Government's argument. The Court also noted that the victim in *Howald Moor and Others* took legal action 17 months after diagnosis, and the victim in the present case around 2 years after diagnosis.

Furthermore, the new absolute limitation period of 20 years was not applicable to the present case. The Court therefore could not agree with the Government that a different approach was necessary.

The Government argued that the applicants could and should have applied to the EFA Foundation for benefits. The Court noted that as Marcel Jann's symptoms had appeared before 2006, he would not have been eligible, and the definition of what constituted a "hardship situation" for such payments to be made was unclear. Indeed, there did not seem to be a right to a benefit, as the EFA Foundation was a private-law organisation, and its decisions could not be appealed against in court. The receipt of benefits required, moreover, a declaration that the prospective beneficiary would not pursue judicial proceedings. The Court considered it positive in principle that the circle of beneficiaries had been enlarged in 2022 to also include those persons whose symptoms appeared after 1996, but that did not change its conclusion in view of the legal conditions attached to the receipt of benefits.

The Court noted that there was no scientifically recognised maximum latency period between exposure to asbestos and pleural cancer. Latency periods varied in the range of between 15 to 45 years (or more) after exposure. The Court reiterated that when it is scientifically proven that it is impossible for a person to know that he or she suffers from a certain illness, such a circumstance should be taken into account in setting the limitation period. As a result of the case-law of the Federal Court, setting the beginning of the limitation period in the present case as being the end of the harmful act in question, the applicants had not had their claims for compensation examined on the merits by a court. Moreover, as the domestic case-law had placed more weight on giving legal certainty to those responsible for the damage than the victims' rights of access to a court, there had not been a reasonable proportionality between the aims sought and the means employed.

The Swiss courts had limited the applicants' right of access to a court in such a way that the very essence of the right had been impaired. The State had thus gone outside its discretion ("margin of appreciation") in the case, in violation of Article 6 § 1 of the Convention.

[Article 6 § 1 as regards the length of proceedings](#)

The Court reiterated that the length of proceedings had to be assessed in the light of the particular circumstances of the case. In this case the applicants complained, in essence, of the time the proceedings had taken before the Federal Court, a total of six years.

The case had been complex, so essentially the question was whether a four-and-a-half-year suspension of proceedings had been a "reasonable time", as the Government argued. However, although the Government pointed out that the applicants could have lodged an application to resume proceedings more than once, the Court reiterated that it was the responsibility of the State to ensure that proceedings were conducted swiftly. Moreover, in this case, the Federal Court had decided to wait for the reforms of the relevant law before continuing, which the Court did not consider to have been necessary. Nor had the formation of the EFA Foundation for dealing with asbestos victims been relevant, given that it had occurred more than a year after the applicants had requested the resumption of the proceedings and had also not been part of the Federal Court's reasons for the suspension decision.

Overall, the Court concluded that the State had not complied with its duty to ensure expeditious proceedings before the Federal Court, in violation of Article 6 § 1 of the Convention.

[Just satisfaction \(Article 41\)](#)

The Court held that Switzerland was to pay the applicants jointly 20,800 euros (EUR) in respect of non-pecuniary damage and EUR 14,000 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.