



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

FIFTH SECTION

**CASES OF KUHLEN-RAFSANDJANI v. GERMANY**

*(Applications nos. 21980/06, 26944/07 and 36948/08)*

JUDGMENT

STRASBOURG

20 January 2011

**FINAL**

*20/04/2011*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the cases of** Kuhlen-Rafsandjani v. Germany,

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

Peer Lorenzen, *President*,  
Renate Jaeger,  
Rait Maruste,  
Isabelle Berro-Lefèvre,  
Mirjana Lazarova Trajkovska,  
Zdravka Kalaydjieva,  
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 December 2010,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in three applications (nos. 21980/06, 26944/07 and 36948/08) 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 the German national, Mr Iradj Kuhlen-Rafsandjani (“the applicant”), on 29 May 2006, 6 June 2007 and 11 July 2008 respectively.

2. The applicant, who had been granted legal aid, was represented by Ms C. Krüger-Rauch, a lawyer practising in Schifferstadt. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, Federal Ministry of Justice.

3. The applicant alleged, in particular, that the length of two sets of proceedings concerning custody of his children had been excessive.

4. On 9 December 2009 the President of the Fifth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1939 and lives in Heidelberg.

### A. Background to the case

6. The applicant and his former wife married in 1996. They have two children, a son born in December 1992 and a daughter born in May 1996. Until 1997 the applicant assumed a major part of the child care while the mother completed her studies. In July 1997 the couple separated and the children remained with the mother. The applicant had regular contact with his children until the beginning of 1998 when the mother and children moved from Heidelberg to Rees in North Rhine-Westphalia. Following the move the mother's parents assumed a large part of the child care because the mother was in full-time employment.

7. The applicant subsequently found that his regular contacts with the children were obstructed by the mother and her parents and lodged an application for the regulation of his contact rights (*Umgangsrecht*) with the Emmerich District Court in March 1998. By a court decision of 23 July 1998 (file no. 5 F 105/98) he was granted contact with his children every second and fourth weekend of the month from 6 p.m. Friday to 6 p.m. Sunday.

8. Since disputes regarding the applicant's contact with his children persisted, the applicant instituted further proceedings for the regulation of his contact rights. At the same time, proceedings for a provisional decision on custody were opened, as well as divorce proceedings which also dealt with the issues of custody and contact rights as ancillary matters (*Folgesachen*). The proceedings were to a large extent conducted jointly until the applicant's former wife's petition for divorce was granted by a judgment dated 29 November 2001 and custody of the children was decided as an ancillary matter to the divorce. However, no decision on the applicant's contact rights was taken at that time.

9. The parties continued to argue about the applicant's contact rights with the children and regular contact was interrupted repeatedly and for longer intervals. The applicant instituted several further proceedings for the regulation of his contact rights on his own behalf and on behalf of his children, as well as proceedings to restrict contact between the children and their grandparents who, according to the applicant, were manipulating the children so as to alienate them from him. A court settlement on the regulation of the applicant's contact rights, concluded on 9 September 2002, was never accepted by the applicant, and he later challenged it.

## **B. The proceedings concerning custody of the children and the applicant's contact rights**

### *1. The proceedings before the divorce*

10. On 31 August 1998 the applicant filed an application with the Emmerich District Court to be granted contact with his children in accordance with the aforementioned decision of 23 July 1998, arguing that the mother was not complying with the regulations set out therein. The proceedings were instituted under file no. 5 F 272/98. At approximately the same time custody proceedings were opened before the same court under file no. 5 F 283/98. A first hearing in the custody and contact rights proceedings was held on 29 September 1998, during which the older child was heard.

11. In 1999 the applicant's wife filed a petition for divorce with the Emmerich District Court under file no. 5 F 18/99.

12. A joint hearing in the custody, contact rights and divorce proceedings took place on 22 April 1999. The parties agreed to the commissioning of an expert opinion on a possible regulation of custody and contact rights. They further agreed that until the completion of the expert opinion the contact of the applicant with his children should be provisionally regulated by the acting judge in cooperation with the Kleve child protection agency (*Kinderschutzbund*).

13. On 28 April 1999 the District Court ordered an expert opinion on the question of what attribution of custody rights and – should sole custody be awarded to the mother – what contact with their father would be in the children's best interest.

14. In the meantime the applicant had supervised contact in cooperation with the Kleve child protection agency, as determined for the transitional period following the hearing of 22 April 1999. However, by written submissions dated 12 August 1999 he revoked his approval of the supervised contacts and applied to the District Court for contact in accordance with the regulations set out in the court's decision of 23 July 1998, as his attempts to exercise his contact rights in August and September 1998 had been to no avail.

15. At a court hearing on 28 September 1999 the parties agreed that from 15 October 1999 the applicant would be entitled to visit his children every fortnight, accompanied by a representative of the Kleve child protection agency, and that he could have telephone contact with the children every two weeks at a set time. Nevertheless, it appears that regular contact between the father and the children ceased temporarily during the year 2000.

16. The expert opinion was finalised on 31 August 2000. The mother had previously cancelled appointments for appraisals in connection with the drawing up of the expert opinion, thereby delaying its completion.

17. In view of the repeated disputes between the parents and the fact that the children had been living with the mother for a considerable time and were settled, the expert recommended that sole custody be transferred to her. However, finding that the mother and grandparents were influencing the children against their father, she proposed that the question of where the children should reside (*Aufenthaltsbestimmungsrecht*) be referred to the Rees Youth Welfare Office (*Jugendamt*) with a view to ensuring the establishment of regular contact between the applicant and his children. The expert further recommended that the applicant be granted contact every second weekend on Saturday and Sunday from 10 a.m. to 6 p.m. at the children's home in Rees and suggested that the applicant should be entitled to spend holidays of one or several weeks with the children at his home in Heidelberg.

18. At a further joint hearing in the separate custody, contact rights and divorce proceedings on 19 October 2000, the District Court again heard the parties, as well as the Kleve child protection agency, which had been appointed as the children's *curator ad litem* (*Verfahrenspfleger*). The mother requested sole custody of the children for the duration of the separation of the spouses. The applicant asked to be granted contact rights in accordance with his request as reformulated on 18 October 2000 including, in addition to regular contact at the weekends, the right to spend the second Christmas holiday and half of each of the summer, autumn and Easter holidays with his children. The *curator ad litem* emphasised, in particular, that the son's apparent rejection of his father was due to the influence of the mother and the grandparents and recommended that regular contact between the son and the father be re-established as soon as possible.

19. On 9 November 2000, in the separate custody proceedings, the District Court decided to provisionally grant sole custody of the children to the mother. The District Court found that relations between the parents had deteriorated to the extent that joint custody was no longer in the children's best interest and since the children's main focal point and familiar environment remained with the mother it was in their interest that sole custody be awarded to her. However, the District Court deprived the mother of the right to determine the children's place of residence because her past behaviour had demonstrated that she was not willing to accept regular contact between the father and his children. It appointed the Kleve District Youth Welfare Office as the children's guardian in this respect (*Aufenthaltsbestimmungsrechtspfleger*). The District Court reserved its decision on the details of the applicant's contact rights until further consultation with the guardian.

20. On 13 December 2000 the applicant appealed against the attribution of sole custody to the mother and requested legal aid for the appeal proceedings. By a decision of 17 May 2001 in the divorce proceedings the District Court suspended the custody proceedings conducted as an ancillary matter to the divorce proceedings pending the decision of the Düsseldorf Court of Appeal on the applicant's appeal.

21. On 21 May 2001 the Düsseldorf Court of Appeal dismissed the applicant's request for legal aid in the appellate proceedings on the ground that his claim was devoid of any prospect of success. The Court of Appeal confirmed that, in view of the tensions and lack of cooperation between the parents, the transfer of sole custody to the mother was in the children's best interest. Furthermore, by transferring the right to determine the children's place of residence to the Kleve District Youth Welfare Office, the District Court had set the stage for implementing regular contact between the father and his children.

22. Regarding the contact rights proceedings, the applicant or his counsel reminded the District Court on several occasions that the question of contact rights was still outstanding. By a decision dated 18 June 2001 the District Court, in view of failed mediation attempts by the guardian, set a deadline of 20 July 2001 for the parties to reach an agreement on the contact rights, failing which these would have to be determined by a court decision after consultation with the guardian. The District Court referred to the expert report and stressed that the implementation of the applicant's contact rights could no longer be delayed.

23. By a letter dated 12 July 2001 the District Court asked the parties whether a decision in the divorce and ancillary custody proceedings could be taken solely on the basis of the written submissions of the parties. On 18 July 2001 the applicant's counsel agreed.

24. On 27 August 2001 the Düsseldorf Court of Appeal dismissed the applicant's appeal against the decision of the District Court dated 9 November 2000 in the proceedings regarding the provisional attribution of sole custody to the mother (5 F 283/98), referring to the reasoning given in its decision of 21 May 2001.

25. By written submissions of 4 October 2001 the applicant lodged a constitutional complaint with the Federal Constitutional Court against the decisions of the Emmerich District Court of 9 November 2000 and the Düsseldorf Court of Appeal of 27 August 2001 regarding the provisional regulation of custody.

26. By a joint judgment (*Verbundurteil*) of 29 November 2001 the District Court granted the wife's petition for divorce and transferred sole custody of the children to her. The court again found that, in view of the lack of cooperation between the parents on matters concerning their children, as demonstrated in particular in the previous separate proceedings on the provisional regulation of custody, joint custody was not an option.

Since the children's main focal point for several years had been their mother, sole custody had to be awarded to her.

27. The applicant appealed on 18 February 2002 and requested to be granted joint custody with the mother and to leave the right to determine the children's place of residence with a guardian.

28. By written submissions of 7 March 2002 the Kleve District Youth Welfare Office recommended that sole custody remain with the mother but at the same time the right to determine the children's place of residence should lie with the District Youth Welfare Office.

29. On 10 May 2002 a hearing took place before the Düsseldorf Court of Appeal to which the children had also been summoned. The children attended the hearing but were not heard by the Court of Appeal.

30. By a decision of 26 June 2002 the Düsseldorf Court of Appeal partially varied the judgment of the District Court dated 29 November 2001 (5 F 18/99). It confirmed the attribution of sole custody to the mother but, with a view to enabling and encouraging regular contact between the father and his children, appointed the Kleve District Youth Welfare Office as guardian as far as the right to determine the children's place of residence was concerned.

31. By written submissions dated 30 July 2002 the applicant lodged a constitutional complaint against the decisions of the District Court of 29 November 2001 and the Court of Appeal of 26 June 2002 complaining, in particular, that the children had not been heard by either the District Court or the Court of Appeal.

*2. The proceedings regarding the applicant's contact rights following the divorce*

32. Following the divorce the parties continued to argue about the applicant's contact rights. The applicant unsuccessfully objected twice to the participation of the acting judge in the respective proceedings (5 F 272/98). On 5 September 2002 a hearing took place. The applicant did not attend in person but was represented by counsel. The parties, the children's guardian and their *curator ad litem* were heard. The applicant, represented by his counsel, and his former wife entered into a court settlement (*Prozessvergleich*) stipulating that the applicant should have contact with the children every fortnight on Saturdays or Sundays from 2 p.m. in the mother's presence and by prior agreement with her. The parties further agreed that with effect from 2003 they would plan at least one holiday per year with the children at approximately the same place and time, so as to enable the applicant to meet the children regularly for a period of several days during the holidays. The applicant was further granted the right to visit the children at their mother's house on the occasion of the Iranian public holidays at a time to be previously agreed with the mother.



33. The applicant subsequently challenged the court settlement on the ground that he had not authorised counsel to enter into such agreement. He further alleged that the agreement was void since it did not sufficiently take into account the interests of the children and had therefore been concluded *contra bonos mores*. On 10 July 2003 a hearing took place which was attended by the applicant and a representative of the Kleve Youth Welfare Office in its capacity as guardian. The mother did not attend. On 28 August 2003 the District Court rejected the applicant's further application for a decision on his contact rights since the court settlement of 5 September 2002 constituted a binding agreement between the parties in this regard. On 2 April 2004 the Düsseldorf Court of Appeal dismissed the appeal and confirmed that the settlement was neither invalid nor void and had therefore effectively terminated the proceedings.

34. On 4 October 2004 the applicant filed an application with the Emmerich District Court to modify the settlement and extend his contact rights with a view to enabling him to spend holidays with his children at his home in Heidelberg and to have contact with them for part of the Easter and Christmas holidays. Proceedings were instituted under file no. 5 F 271/04.

35. On 20 January 2005 the District Court appointed a *curator ad litem* for the children. A hearing took place on 11 March 2005, during which the children were heard. By a decision of 2 May 2005 the District Court ordered an expert psychological opinion on the question of what regulation of the father's contact rights would be in the children's best interest and whether the mother and the grandparents were facilitating regular contact between the children and their father. For the period until finalisation of the expert opinion the applicant was granted unaccompanied contact with the children every fortnight on Saturdays or Sundays from 10.00 a.m. to 6 p.m.

36. On 31 August 2005 the District Court, referring to the considerable length of the proceedings in connection with the determination of the applicant's contact rights, discharged the appointed expert on the ground that she had announced that she could not provide an opinion before February 2006. A new expert was appointed who agreed to provide an opinion by the end of November 2005. The applicant objected to the new expert on the ground that she did not have the necessary professional qualifications and refused to be examined by her. An expert opinion could therefore not be established.

37. On 10 March 2006 a further hearing took place, during which the parties, the *curator ad litem* and the guardian were heard. By a decision of 29 March 2006 the District Court amended the court settlement of 5 September 2002 and granted the applicant access to his children every second weekend on Saturdays or Sundays from 10.00 a.m. to 6 p.m. but refrained from regulating the applicant's contact rights for the holidays since at the hearing of 11 March 2005 the children had objected to spending holidays alone with their father. The court further found that there was no

evidence that the children had been manipulated by their grandparents. It specified that in reaching its conclusion it could not rely on an expert opinion because the father had refused to be examined by the appointed expert.

38. Following an appeal by the applicant on 10 April 2006, reasoned on 9 May 2006, a hearing took place before the Düsseldorf Court of Appeal on 2 March 2007, during which the parties, the children and their guardian were heard. The *curator ad litem* could not attend. On 20 March 2007 the Düsseldorf Court of Appeal dismissed the applicant's appeal and held that an extension of the applicant's contact rights could not be granted, mainly because the children had objected and thus it could not be in their interest. The Court of Appeal also found that while it was probable that the children had been negatively influenced by the mother's family as regards their father, the applicant's fixation on the conflict with the grandparents was partly responsible for the difficulties in finding a practicable regulation of his contact rights with the children.

39. On 15 May 2007 the Düsseldorf Court of Appeal dismissed a complaint by the applicant that his right to be heard had been infringed in the proceedings.

40. On 12 June 2007 the applicant lodged a constitutional complaint against the decision of the Emmerich District Court of 29 March 2006, as well as the decisions of the Düsseldorf Court of Appeal of 20 March 2007 and 15 May 2007 in the proceedings instituted under file no. 5 F 271/04. He also complained about the court settlement dated 5 September 2002 in the proceedings 5 F 272/98 and the related decisions of the Düsseldorf Court of Appeal of 2 April 2004.

41. In February 2008 the applicant filed a request to spend summer holidays with his children at his home in Heidelberg from 23 July to 3 August 2008 (file no. 5 F 33/08). A hearing took place on 21 May 2008, during which the parents and the children were heard. By a decision of 6 June 2008 the District Court rejected the request since the children had objected to spending the holidays with him; the request therefore could not be regarded as being in their interest. On 19 August 2008 the Düsseldorf Court of Appeal dismissed an appeal against that decision, since because of the passage of time a decision in the matter was no longer required.

### *3. The decisions of the Federal Constitutional Court*

#### **(a) The separate custody proceedings (file no. 5 F 283/98)**

42. On 7 December 2005 the Federal Constitutional Court declined to consider the constitutional complaint (file no. 1 BvR 1716/01) concerning the separate custody proceedings (5 F 283/98) in which the applicant challenged the provisional attribution of sole custody to the mother. The decision was served on the applicant on 20 December 2005.

**(b) The divorce and ancillary custody proceedings (file no. 5 F 18/99)**

43. By a decision of 17 October 2006 (file no. 1 BvR 1400/02) the Federal Constitutional Court declined to consider the applicant's constitutional complaint regarding the attribution of sole custody to the mother as an ancillary matter to the divorce proceedings. Since the applicant had failed to inform the Federal Constitutional Court of his new address the decision could only be served on him on 9 December 2006.

44. The Federal Constitutional Court held that the applicant's parental rights as guaranteed by the Basic Law included an obligation for the courts to conduct custody proceedings in such a way as to obtain a reliable basis for a decision founded on the child's wellbeing. Section 50 b § 1 of the Act on Non-Contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*, see “II. Relevant Domestic Law“ below), which required the court to hear a child in person, reflected the constitutional requirement to take the child's wishes into account when taking decisions on custody. A decision in line with the child's concerns could only be taken after the child had been given the opportunity to disclose its personal relations with the other family members during the proceedings.

45. The Federal Constitutional Court pointed out that it was questionable in the case at hand whether the proceedings had satisfied these requirements since the lower courts had not given any convincing reasons why the children had not been heard. However, there was no need to take a decision in this respect because in any event the applicant could not claim to have suffered a particularly serious disadvantage since his complaint did not have any prospect of success even if remitted to the lower courts. As had been established in the decision of the District Court of 29 March 2006 in the proceedings instituted subsequently under file no. 5 F 271/04 regarding the applicant's contact rights, it had been difficult for years to regulate the father's contact rights with his children. At a hearing that had taken place in those proceedings it had transpired that the children were rather opposed to an extension of the applicant's contact rights.

**(c) The contact rights proceedings (file no. 5 F 272/98 and file no. 5 F 271/04)**

46. By a decision of 4 January 2008, served on the applicant on 12 January 2008, the Federal Constitutional Court (file no. 1 BvR 1544/07) declined to consider his constitutional complaint regarding the proceedings for the regulation of his contact rights, instituted under file no. 5 F 272/98 and file no. 5 F 271/04.

### **C. The proceedings instituted on behalf of the applicant's children**

47. On 15 March 2001 the applicant lodged a separate application with the Emmerich District Court on behalf of and in the name of his children for the regulation of the children's contact rights with respect to their father. On 4 July 2001 (file no. 5 F 134/01) the District Court dismissed his request as inadmissible on the ground that the determination of contact arrangements between the father and the children was already the subject of the still pending proceedings under file no. 5 F 272/98.

48. On 24 July 2001 the applicant lodged a complaint against that decision, providing a statement of the grounds of appeal on 10 August 2001. On 10 September 2001 he was informed by the Düsseldorf Court of Appeal that there existed doubts as to his entitlement to represent his children in the proceedings. On 7 November 2001 the Düsseldorf Court of Appeal dismissed the appeal as inadmissible. It found that the applicant could not represent the children in the proceedings since the power of representation was part of the right to custody which in proceedings no. 5 F 283/98 had been transferred solely to the mother, with the exception of the right to determine the children's place of residence.

49. By written submissions dated 11 December 2001 the applicant lodged a complaint with the Federal Constitutional Court against the decisions of the District Court and Court of Appeal and further argued that Article 1671 of the German Civil Code in its current version was unconstitutional. By a decision of 7 December 2005, served on the applicant on 20 December 2005, the Federal Constitutional Court declined to consider the applicant's constitutional complaint (File no. 1 BvR 2127/01).

### **D. The proceedings regarding the grandparents' contact rights**

50. On 9 January 2001 the applicant requested the District Court to prohibit any contact by the grandparents with his children and alternatively to grant them contact only in the presence of a third person to be determined by the children's guardian. The applicant argued that the grandparents were setting the children against him and obstructing the exercise of his contact rights.

51. The applicant had already lodged a similar application in previous proceedings (5 F 155/99), which had been rejected by a decision of the District Court dated 9 November 2000.

52. On 12 February 2001 the District Court granted the applicant's request for legal aid for the alternative motion but rejected it for his main application since the latter was devoid of any prospect of success. The Court held that even though the grandparents might have a negative impact on the children's relations with their father, a complete ban on their contact with the children was neither practicable, owing to the proximity of their

respective homes, nor in the children's interest, given the close relations between them and their grandparents.

53. On 22 March 2001 the parties were heard by the District Court, and on 5 April 2001 the court rejected the application. It found that preventing contact between the children and their grandparents could in no way help to ensure regular contact between the applicant and his children but would to the contrary further obstruct such an aim. In view of the close relationship between the mother, children and the grandparents and the fact that the grandparents assumed a considerable part of the child care, a prohibition of contact with the children was neither practicable nor in the children's best interest.

54. Following an appeal lodged by the applicant on 10 May 2002, a hearing took place before Düsseldorf Court of Appeal. By a decision of 17 May 2002 the Court of Appeal rejected the applicant's request for legal aid for the appellate proceedings since his appeal was devoid of any prospect of success. On 3 June 2002 the Düsseldorf Court of Appeal dismissed the appeal since there was nothing to establish that contact with their grandparents was contrary to the children's wellbeing and there was no evidence that the grandparents had obstructed contact between the children and their father or had damaged their relationship.

55. On 17 October 2006 (1 BvR 1194/02) the Federal Constitutional Court declined to consider the applicant's constitutional complaint that his parental rights had been violated by the decisions of the lower courts. It held that the right to determine the contact of the children with third persons was part of the right of custody which had been awarded solely to the mother. The applicant's parental rights could therefore not be directly affected by the contact of his children with third persons and his own contact rights could be affected only indirectly. However, a limitation on the contact rights of third persons with the children could not entail any binding regulation of the applicant's contact with his children and he could thus not claim that his own rights were affected.

## II. RELEVANT DOMESTIC LAW

### A. Relevant provisions of the German Civil Code

56. The statutory provisions on custody and contact are to be found in the German Civil Code (*Bürgerliches Gesetzbuch*).

57. Article 1626 § 1 of the Civil Code provides that the father and the mother have the right and the duty to exercise parental authority (*elterliche Sorge*) over a minor child. Parental authority includes the custody of the child.

58. Article 1671 of the Civil Code stipulates that where parents exercising joint parental authority are separated not merely temporarily, each parent may make an application to the family court to be awarded sole parental authority or shared parental authority. The application shall be allowed where the other parent agrees, unless the child has reached the age of fourteen and objects to such sharing or if it may be expected that the withdrawal of joint parental authority and its transfer to the petitioner is in the best interests of the child.

### **B. The Act on Non-Contentious Proceedings**

59. At the time of the decisions of the domestic courts, proceedings in family matters were governed by the Act on Non-Contentious Proceedings.

60. According to section 12 of that Act, the court shall, of its own motion, take the measures of investigation that are necessary to establish the relevant facts and take such evidence as appears appropriate.

61. Section 50 b § 1 of the Act on Non-Contentious Proceedings stipulates that in proceedings regarding custody issues a child shall be heard if its affinities, attachments or its wishes are of relevance for the court's decision or if the determination of the facts requires the court to hear the child. In that case, the court is only dispensed from hearing the child if this is justified by serious reasons (section 50 b § 3).

## **THE LAW**

### **I. JOINDER OF THE APPLICATIONS**

62. As the domestic proceedings were interrelated to a large extent and thus have a general factual link, and since the applications themselves refer to each other as regards the description of the facts and complaints, the Court decides that the applications shall be joined (see Rule 42 § 1 of the Rules of Court).

### **II. COMPLAINT ABOUT THE LENGTH OF THE PROCEEDINGS (FILE NOS. 5 F 272/98, 5 F 283/98, 5 F 18/99 AND 5 F 271/04)**

63. The applicant complained under Articles 6 and 8 of the Convention about the length of the custody proceedings (file nos. 5 F 283/98 and 5 F 18/99) and the proceedings regulating his contact rights (file nos. 5 F 272/98 and 5 F 271/04); in particular, he complained about the

length of the proceedings before the Federal Constitutional Court regarding the custody proceedings (file nos. 1 BvR 1716/01 and 1 BvR 1400/02).

64. The Court who is the master of the characterisation to be given in law to the facts of the case (see *Kutzner v. Germany*, no. 46544/99, § 56, ECHR 2002-I) considers that the complaint raised by the applicant under Article 8 is closely linked to his complaint under Article 6 and will accordingly be examined solely under Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

65. The Government contested that argument as regards the proceedings before the lower courts.

66. The period to be taken into consideration as regards the contact rights proceedings 5 F 272/98 began with the filing of the applicant's request on 31 August 1998 and ended – at the latest – with the decision of the Federal Constitutional Court of 4 January 2008. It thus lasted – at the most – nine years and some four months at three levels of jurisdiction.

67. The period to be taken into consideration as regards the proceedings 5 F 271/04 began on 4 October 2004 with the submission of a new request by the applicant and ended – at the latest – with the decision of the Federal Constitutional Court of 4 January 2008. It thus lasted three years and three months at three levels of jurisdiction.

68. The period to be taken into consideration as regards the proceedings 5 F 283/98 began on 14 September 1998 with the applicant's application for custody. It ended with the Federal Constitutional Court's decision of 7 December 2005 and thus lasted almost seven years and three months.

69. The period to be taken into consideration as regards the proceedings 5 F 18/99 began on 27 January 1999 and ended with the Federal Constitutional Court's decision of 17 October 2006, served on the applicant on 9 December 2006. It thus lasted almost seven years and nine months.

## A. Admissibility

### 1. Complaint about the length of the proceedings 5 F 18/99

70. As regards this length complaint contained in application no. 26944/07, lodged on 6 June 2007, the Government raised concerns that because of the Court's judgment of 8 June 2006 in the case of *Sürmeli v. Germany* ([GC], no. 75529/01, § 108, ECHR 2006-VII) the applicant could be considered to have failed to comply with the six-month period laid down in Article 35 § 1 of the Convention. In that judgment the Court had held that a constitutional complaint was not capable of affording effective redress for the excessive length of pending civil proceedings. The

Government argued that the applicant could have learned of the partial ineffectiveness of his constitutional complaint – lodged in 2002 – within some months after pronouncement of the Court's judgment. He should thus have submitted his complaint about the length of the proceedings 5 F 18/99 to the Court earlier than one year after the *Sürmeli* judgment.

71. The Court notes at the outset that at the time when the applicant lodged his constitutional complaint he could still rightly consider the constitutional complaint to be an effective remedy against excessively long civil proceedings. And given that his constitutional complaint was still pending when the *Sürmeli* judgment was delivered, the Court finds that it could not be expected of the applicant to partially withdraw his constitutional complaint in reaction to that judgment and submit an application with the Court. Rather, he could await the Federal Constitutional Court's decision which was served on him on 9 December 2006. It is therefore appropriate to calculate the six-month period from that date. Accordingly, the applicant has complied with the time-limit of Article 35 § 1 of the Convention as regards this complaint.

72. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

*2. Complaint about the length of the proceedings 5 F 272/98 and 5 F 271/04*

73. The Court notes that application no. 36948/08, lodged on 11 July 2008, contains complaints about the length of the proceedings for the regulation of the applicant's contact rights which were first dealt with in the proceedings 5 F 272/98 and subsequently in the proceedings 5 F 271/04.

74. The proceedings conducted under file no. 5 F 272/98 were concluded by the courts dealing with family matters (see paragraph 59 above) on 2 April 2004 when the Düsseldorf Court of Appeal dismissed the applicant's appeal and confirmed the validity of the court settlement of September 2002. In the proceedings 5 F 271/04 – which could be seen as a continuation of the previous proceedings – the last decision of the courts dealing with family matters was delivered on 15 May 2007. On 12 June 2007 the applicant then challenged both sets of proceedings with a constitutional complaint which was dismissed on 4 January 2008 by the Federal Constitutional Court.

75. By virtue of Article 35 § 1 of the Convention, the Court may deal only with applications lodged with it within six months from the date on which the final domestic decision was taken. The Court cannot decide not to apply the six-month rule simply because a Government has not submitted an objection that the application was lodged out of time (see *Otto v. Germany* (dec.), no. 21425/06, 10 November 2009).



76. Reviewing the facts of the instant case under the *Sürmeli* perspective the Court notes the following: despite the fact that the Court's *Sürmeli* judgment was published in German on 14 August 2006 (NJW 2006, 2389) and instead of therefore turning to the Court within six months after the last decision of the courts dealing with family matters as regards the length of the proceedings, the applicant submitted on 12 June 2007 – and thus one year after the Court's *Sürmeli* judgment – a constitutional complaint, complaining *inter alia* about the length of the proceedings; it was only six months after the Federal Constitutional Court's decision of 4 January 2008 that the applicant turned to the Court, also complaining about the length of the contact rights proceedings. In these circumstances and applying its findings in the *Sürmeli* judgment the Court cannot but find that the appropriate date for the calculation of the six-month period must be the last decision of the courts dealing with family matters, and thus – at the latest – the Düsseldorf Court of Appeal decision of 15 May 2007.

77. It follows that the length complaint regarding the contact rights proceedings (file nos. 5 F 272/98 and 5 F 271/04) was lodged out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

### 3. Complaint about the length of the proceedings 5 F 283/98

78. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

79. The applicant maintained that the length of the two proceedings still at issue (5 F 283/98 and 5 F 18/99) had been excessive, in particular the proceedings before the Federal Constitutional Court conducted under file nos. 1 BvR 1716/01 and 1 BvR 1400/02; these proceedings both lasted more than four years.

80. The Government submitted that the proceedings 5 F 283/98 only lasted two years and eleven months before the courts dealing with family matters. This could not be considered excessively long.

81. As far as the custody issue in the proceedings 5 F 18/99 was concerned the Government argued that the period to be taking into consideration only started with the Düsseldorf Court of Appeal's decision of 27 August 2001 in the parallel proceedings 5 F 283/98, since custody was also at issue (and provisionally decided on) in those proceedings. They ended with the same court's decision on 26 June 2002 in the proceedings 5 F 18/99. The relevant period according to the Government thus only amounted to an unproblematic ten months at two levels of jurisdiction.

82. Regarding the proceedings before the Federal Constitutional Court the Government conceded that they had been long. They emphasized, however, that the applicant had contact with and access to his children during all of the proceedings. Only an extension of contact rights was at stake for him. Throughout the proceedings he thus had the opportunity to prevent or minimise a possible estrangement from his children. Furthermore, the Government submitted that the proceedings had been somewhat complex, from a legal as well as from a factual point of view. As regards the proceedings 1 BvR 1400/02 they maintained that since the Federal Constitutional Court was aware that further proceedings were pending before the District Court it could await further constitutional complaints in order to then rule on them together for reasons of procedural economy. Finally, as regards service of the Federal Constitutional Court's decision of 17 October 2006 the Government submitted that the first attempt of delivery failed because the applicant had in the meantime moved without informing the Federal Constitutional Court. Only after verification of the new address could service be effected on 9 December 2006.

83. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

84. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above).

85. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. The Court accepts that the proceedings before the courts dealing with family matters which lasted at the most between some three and three and a half years at two levels of jurisdiction might still be considered to have been concluded “within a reasonable time” as required by Article 6 § 1 of the Convention. However, given that both sets of proceedings were subsequently pending for more than four years each before the Federal Constitutional Court, the same cannot be said for the proceedings as a whole, even in view of the factual and legal complexity of the cases. Furthermore, even though the applicant had – more or less – contact with and access to his children during the proceedings it cannot be overlooked that the proceedings were of extreme importance to him because the relationship with his children was at stake. Against this background the Court also does not accept the Government's argument that the Federal Constitutional Court could await further constitutional complaints in order to rule on them together for reasons of procedural economy. While this might be acceptable in some cases, for

example where a leading decision is sought, the Court finds that it is unacceptable in cases like the one at hand, where custody and contact rights in family law proceedings are at stake.

86. As regards possible delays attributable to the applicant the Court accepts that the delayed service of the Federal Constitutional Court's decision (1 BvR 1400/02) because of a change of address, amounting to a period of some five weeks, falls within the area of responsibility of the applicant.

87. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

### III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

88. Further, the applicant complained that he had not had an effective remedy at his disposal to complain about the length of the proceedings. He alleged a violation of Article 13 of the Convention, which reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

89. The Government did not contest that argument but submitted that work on a new draft bill in this regard was underway.

90. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

91. The Court reiterates that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI). In the present case, having regard to its conclusion with regard to the excessive length of the proceedings, the Court considers that the applicant had an arguable claim of a violation of Article 6 § 1.

92. The Court reiterates that according to its recent case-law there is no effective remedy under German law capable of affording redress for the unreasonable length of civil proceedings (see *Sürmeli v. Germany* [GC], no. 75529/01, §§ 103–108, ECHR 2006-VII and *Herbst v. Germany*, no. 20027/02, §§ 63–68, 11 January 2007). Moreover, the Court recently delivered a pilot judgment against the respondent State because of the continuous lack of an effective remedy at national level against an unreasonable length of civil proceedings (*Rumpf v. Germany*, no. 46344/06, 2 September 2010).

93. Accordingly, the applicant did not have at his disposal an effective remedy within the meaning of Article 13 of the Convention.

There has therefore been a violation of Article 13 of the Convention.

#### IV. THE REMAINDER OF THE APPLICANT'S COMPLAINTS

94. The applicant further complained about the outcome and conduct of the custody proceedings (5 F 283/98 and 5 F 18/99); he alleged in particular that the District Court had been obliged to take one single definitive decision on the attribution of custody when the spouses separated, that the attribution of sole custody to the mother had been contrary to the children's best interest and that the acting judge had been biased. He further complained that his children had not been heard in either set of proceedings, and that he and his former wife had also not been heard. The applicant further complained about the court's failure to determine his contact rights within the scope of the joint judgment granting the divorce and determining the custody rights. With respect to the proceedings 5 F 283/98 and 5 F 18/99 the applicant finally complained under Articles 8 and 17 of the Convention about the possibility of one parent to apply for sole custody according to Article 1671 of the German Civil Code. As regards the proceedings for the regulation of his contact rights (5 F 272/98, 5 F 271/04 and 5 F 33/08) the applicant, relying on Articles 6, 8 and 14 of the Convention further complained about the content of the court settlement of 5 September 2002 and that he had allegedly not been involved in its conclusion. He also complained that his children had not been heard prior to the settlement, that the acting judge had been biased and that the domestic courts had failed to protect his relationship with his children, who had now been alienated from him. Finally, he also complained under Article 6 of the Convention about the length of the proceedings instituted under file no. 5 F 33/08. As regards the proceedings for the regulation of the children's contact rights with their father (5 F 134/01) the applicant complained under Articles 8, 17 and 18 of the Convention that he had been prevented from representing his children in these proceedings. As regards the proceedings for the regulation of the grandparents' contact rights the applicant, relying on Article 8 of the Convention, again complained that he had also been prevented from representing his children and that the domestic courts had given priority to the grandparents' contact rights.

95. As to the applicant's complaint that the decision-making process had been defective since his children had not been heard in the proceedings conducted under file nos. 5 F 272/98, 5 F 283/98 and 5 F 18/99 the Court notes that in his written submission of 16 June 2010 the applicant explicitly stated that in neither of his applications did he "reprimand the non-hearing of his children as a violation of Article 8". The applicant must therefore be regarded to have withdrawn his complaint under Article 8 in this regard.

96. As regards the remainder of the applicant's complaints the Court considers that in the light of all the material in its possession, and in so far

as the matters complained of are within its competence, this part of the applications does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 (a) as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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.”

### A. Damage

98. The applicant claimed a minimum of 10,000 euros (EUR) in respect of pecuniary damage, *inter alia* for travel expenses relating to father- children-interactions, costs for hotel accommodation and for the second apartment he rented in Rees. He failed, however, to submit documentary evidence for the alleged damage. In respect of non-pecuniary damage he claimed EUR 100,000, in particular for the emotional pain inflicted on him by the separation of his children and the psychological suffering caused by the court proceedings.

99. The Government contested the claim for pecuniary damage, submitting that the applicant had not substantiated this claim. As regards the non-pecuniary damage claimed, the Government maintained that the claim was excessive and left the matter to the Court's discretion.

100. The Court observes that the applicant did not submit any documentary evidence in regard of his claim for pecuniary damage; it therefore rejects this claim. As regards non-pecuniary damage the Court considers that the applicant must have sustained such damage as a result of the excessively long court proceedings and the lack of an effective remedy in this regard. Ruling on an equitable basis, it awards him EUR 10,000 under that head.

### B. Costs and expenses

101. The applicant also claimed costs and expenses for legal advice and representation without specifying them or submitting documentary evidence. For the proceedings before this Court the applicant was granted legal aid in the amount of EUR 1,700.

102. The Government contested the claim.

103. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case the Court rejects the claim for costs and expenses in the domestic proceedings for lack of substantiation. As regards counsel fees for the proceedings before this Court the Court notes that the applicant was granted legal aid and has not shown that he incurred more than the EUR 1,700 already awarded under the Court's legal aid scheme.

### **C. Default interest**

104. 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. *Decides* to join the applications;
2. *Declares* the complaints concerning the length of the proceedings nos. 5 F 283/98 and 5 F 18/99 as well as the complaint concerning the lack of an effective remedy in this respect admissible and the remainder of the applications inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the proceedings conducted under file no. 5 F 283/98;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the proceedings conducted under file no. 5 F 18/99;
5. *Holds* that there has been a violation of Article 13 of the Convention;
6. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Peer Lorenzen  
President