

In the Bock case*,

* Note by the Registrar: This case is numbered 1/1988/145/199. The first two figures indicate its place on the list for the year in which the case was referred to the Court; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mrs D. Bindschedler-Robert,
Mr L.-E. Pettiti,
Sir Vincent Evans,
Mr R. Bernhardt,
Mr J. De Meyer,
Mr N. Valticos,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 21 November 1988 and 21 February 1989,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 25 January 1988, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms. It originated in an application (no. 11118/84) against the Federal Republic of Germany lodged with the Commission under Article 25 (art. 25) by Mr Hermann Bock, a German citizen, on 2 July 1982.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby the German Government ("the Government") recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). It sought a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and was granted leave to present his own case pursuant to the second sentence of Rule 30 para. 1. The applicant, who was referred to as "B" in the proceedings before the Commission, subsequently consented to the disclosure of his identity.

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 30 January 1988, in the presence of the Registrar, the President drew by lot the names of the other five

members, namely Mrs D. Bindschedler-Robert, Mr G. Lagergren, Sir Vincent Evans, Mr J. De Meyer and Mr N. Valticos (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr L.-E. Pettiti, substitute judge, replaced Mr Lagergren who had resigned from the Court and whose successor at the Court had taken up his duties before the hearing (Rules 2 para. 3 and 22 para. 1).

4. Mr Ryssdal, who had assumed the office of President of the Chamber (Rule 21 para. 5), consulted - through the Deputy Registrar - the Agent of the Government, the Delegate of the Commission and the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with his order, the Government's memorial and the applicant's memorial were both received by the registry on 30 May 1988; the applicant's in German, by leave of the President (Rule 27 para. 3). On 25 July the Secretary to the Commission notified the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted - through the Deputy Registrar - those appearing before the Court, the President directed that the oral proceedings should commence on 21 November 1988 (Rule 38). On 8 October 1988, he granted the members of the Government's delegation leave to address the Court in German (Rule 27 para. 2).

On 17 November, the Registrar received from the Commission several documents which he had requested on the President's instructions.

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Meyer-Ladewig, Ministerialdirigent, Federal Ministry of Justice,	Agent,
Mr H.A. Stöcker, Ministerialrat, Federal Ministry of Justice,	Adviser;

(b) for the Commission

Mr J.A. Frowein,	Delegate;
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(c) the applicant in person, Mr Hermann Bock.

The Court heard their addresses and their replies to its questions.

On 21 November and 21 December 1988 and on 13 and 20 January 1989, the Registrar received observations from, respectively, the applicant, the Government and the Commission on the question of the application of Article 50 (art. 50) of the Convention to this case.

AS TO THE FACTS

7. The applicant was born in 1928 and is a German citizen living in Düsseldorf where he works as a senior legal officer in the Ministry of Science and Research of North Rhine-Westphalia.

He married in 1961 and there were three children of the marriage. Divorced in 1983, he complains of the length of divorce proceedings which he started against his then wife in 1974.

1. THE PROCEEDINGS BEFORE THE DÜSSELDORF REGIONAL COURT (LANDGERICHT)
(18 MARCH 1974 - 30 JUNE 1977)

8. On 18 March 1974 the applicant started divorce proceedings in the Düsseldorf Regional Court. He stated that he doubted whether his wife was faithful to him and that she had threatened to have him placed under guardianship on the ground of mental illness. However, a psychiatric examination by Dr Lemmer, a public medical officer, which he underwent, at his wife's instigation, in September 1973, revealed no indication of any mental illness. The applicant put the medical report in evidence and cited Dr Lemmer as a witness.

9. After the applicant had filed his divorce petition, the applicant's wife brought guardianship proceedings (Gebrechlichkeitspflegschaft) before the Ratingen District Court (Amtsgericht) against Mr Bock. On 24 April 1974, the Court heard evidence given by the applicant's wife, by a friend, Dr Firnhaber, a judge, and by her aunt. It then made the guardianship order and appointed Dr Firnhaber to be the applicant's guardian. Two days later, on 26 April 1974, at the guardian's request, the District Court ordered that the applicant should be committed to a mental hospital. On the same day Dr Firnhaber entered Mr Bock's place of employment and, without prior notice, had him taken from his office to a mental hospital where he remained until 3 May when the orders of 24 and 26 April were set aside on appeal on the ground that they had been given without the applicant's being heard. The case was referred back to the District Court before which, on 30 May 1974, Mr Bock objected to the doctors who had examined him at the mental hospital. The Düsseldorf Regional Court upheld the objection on 21 June 1974. Subsequently, the District Court, on 4 July 1975, rejected the application to have a guardian appointed for Mr Bock on the ground that, even if he did have mental-health problems, he was still capable of dealing with his personal affairs; moreover, no complaint had ever been made as regards the exercise of his professional duties.

A subsequent attempt by Mrs Bock to have her husband declared incapacitated (Entmündigung) also failed; on 1 July 1976, the Düsseldorf District Court refused her application and this decision was upheld on 17 September 1976 by the Düsseldorf Regional Court.

10. On 31 May 1974, Mrs Bock had submitted her reply to the divorce petition. According to her, her husband was afflicted by a mental illness and therefore was not competent to start legal proceedings. As evidence of such incapacity, she asked Dr Firnhaber to be called as a witness.

Under section 52 of the German Code of Civil Procedure, a person shall have the capacity to conduct legal proceedings to the same extent as he can bind himself by contracts, in accordance with the relevant provisions of the Civil Code. Under the terms of section 104 of the latter:

"The following shall be incapable of performing legal transactions:

1. minors under seven years of age;
2. persons who, owing to a pathological disturbance of their mental faculties, are unable freely to determine their intentions, in so far as this state of affairs is not by its nature purely temporary;
3. a person who has been declared incapacitated on account of mental illness."

However, persons who have been declared incapacitated or placed under temporary guardianship on account of imbecility, prodigality, dipsomania or drug addiction, have, as regards the performance of legal transactions, the same capacity as children of more than seven years of age. Nevertheless, such a person may conduct matrimonial

proceedings (Ehesachen; Article 607 of the Code of Civil Procedure).

It is recognised under German law that a person may be regarded as being partially incapacitated in respect of certain matters, such as matrimonial causes. To that extent, a person cannot introduce an action under section 52 aforesaid.

In accordance with section 56 para. 1 of the Code of Civil Procedure, the courts are required ex officio to take into consideration a lack of capacity to take legal proceedings.

11. On 6 June 1974, the Düsseldorf Regional Court heard the parties and Mr Bock declared that he was prepared to undergo a medical examination. On 10 July 1974, the court instructed Dr Wegener to give an opinion on the applicant's state of mental health. He received the applicant's file on 22 July 1974 and reported to the court in November 1974 that he had examined the applicant.

On 13 November 1974, Mr Bock challenged the doctor and informed the court that he had instructed a new lawyer. On 21 November 1974, Dr Wegener presented his report: he considered the applicant to be seriously ill and suffering from a paranoid psychosis. However, on 9 December 1974, the court upheld the challenge of 13 November. On 23 December 1974, it appointed Dr Baucke as the expert and asked the parties for their views on this choice.

12. On 1 April 1975, after an extension of the time-limit for submitting his observations, Mr Bock challenged Dr Baucke and refused to be examined by him: according to the applicant, having succeeded to Dr Wegener's official functions, Dr Baucke might be influenced by the expert opinion given by his predecessor.

The Regional Court found against the applicant on 17 April 1975; the applicant's appeal (sofortige Beschwerde) dated 9 May 1975 was dismissed by the Düsseldorf Court of Appeal (Oberlandesgericht) on 26 August 1975. Prior thereto, that is to say on 13 August 1975, the applicant had changed his lawyer; he did so again on 3 December 1975.

On 26 January 1976, Dr Baucke returned the file, stating that the applicant still refused to be examined. Three days later, the court instructed its registry to inform the parties thereof but the registry inadvertently omitted to do so.

On 12 May 1976, Mr Bock's lawyer asked for the proceedings to be continued. On 25 May 1976, the Court decided to hold a hearing on 1 July 1976.

13. At the hearing on 1 July 1976, the Regional Court decided to hear two witnesses proposed by the applicant's wife, namely Dr Firnhaber and a medical doctor, Dr De Boor. However, at the hearing on 9 September 1976, only Dr Firnhaber appeared. The applicant requested the court to adjourn the hearing but it refused to do so. The applicant then challenged the judges who overruled his objection on 3 November 1976. He appealed against this decision on 19 November 1976 and, on 14 February 1977, challenged one of the judges at the Court of Appeal. The file was then transferred to another chamber of the Court of Appeal which found against the applicant on 8 March 1977.

14. On 30 March 1977, the Regional Court decided to hold a hearing on 2 June 1977 to take the evidence of Dr Firnhaber and Dr De Boor. However, the hearing was cancelled at the request of the applicant's new lawyer, whom Mr Bock had chosen on 1 June 1977. On 16 June 1977 the lawyer informed the court that he no longer represented the applicant.

15. Prior thereto, a fresh incident had occurred between the

spouses.

On 20 August 1976, Mrs Bock had alerted the police, claiming that her husband was threatening her. The applicant was forcibly conducted to a psychiatric hospital where he was examined by two doctors, including Dr Roth who, as a result of their examination refused to admit him. The police then released Mr Bock who, on 31 August 1976, was barred from the matrimonial home pursuant to a court order obtained by his wife.

A complaint laid by the police officers against the applicant for resisting them in the course of their duty was dismissed. On 25 March 1977, Mr Bock was acquitted by the Magistrates Court (Schöffengericht) after testimony was given by Dr Roth who declared that the applicant was not mentally deranged. On 23 December 1981, the Düsseldorf Court of Appeal awarded him compensation for the police action which was held to have been unjustified.

16. In 1976, new legislation reforming the law on marriage and the family was enacted in the Federal Republic of Germany. It provided, inter alia, for the abolition of the notion of matrimonial fault in divorce proceedings and established at the District Courts special divisions for family cases (Familiengerichte), consisting of a single judge.

As a result of the new laws, the pending divorce proceedings were transferred, with effect from 1 July 1977, from the Regional Court to the Family Court in Düsseldorf.

2. THE FIRST PROCEEDINGS BEFORE THE FAMILY COURT AND THE DÜSSELDORF COURT OF APPEAL (1 JULY 1977 - 9 JANUARY 1980)

(a) Family Court proceedings (1 July 1977 - 5 January 1979)

17. On 26 July 1977, the Family Court invited the parties to amend their arguments in the light of the new legislation. Mr Bock's new lawyer - the sixth withdrew from the case on 30 November 1977 - submitted his observations on 21 December 1977.

The Court heard the parties on 22 May 1978 and, having regard to the applicant's supplementary memorial relating to custody of the children, decided to hold a fresh hearing which, for organisational reasons affecting the parties and the court, did not take place until 13 November 1978.

Having seen the children on 30 November and held a fresh hearing on 4 December, the Family Court pronounced the divorce on 21 December 1978. In its view, the divorce petition was admissible. Mr Bock was capable of taking legal proceedings. The applicant's alleged behaviour was not necessarily the manifestation of a mental illness.

The divorce judgment, which granted custody of the children to their mother, was served on the parties on 5 January 1979.

(b) Appeal proceedings (5 February 1979 - 9 January 1980)

18. One month later, the applicant's wife appealed to the Düsseldorf Court of Appeal. On the same date, Mr Bock cross-appealed as to custody rights and the costs of the proceedings.

On 18 April 1979, the applicant challenged the Appeal Court judges on the ground that they had previously refused him access to the children. The Court of Appeal rejected his challenge on 27 April 1979. His appeal to the Federal Constitutional Court (Bundesverfassungsgericht) was declared inadmissible on 11 September 1979.

19. Having both been granted extensions of time, the parties submitted their observations on 7 June and 3 October 1979 respectively.

The Court of Appeal granted legal aid to Mrs Bock on 5 November and heard the parties on 12 November 1979. Having in the meantime instructed a new lawyer, the applicant submitted supplementary observations on 11 December relating to his capacity to take legal proceedings and a private expert opinion by Dr Lemmer dated 7 December 1979.

20. On 9 January 1980, the Düsseldorf Court of Appeal quashed the divorce judgment pronounced on 21 December 1978 by the Family Court and ordered that court to hear the case again. By failing to consider the applicant's alleged lack of capacity to take proceedings in this case, it had failed to observe section 56 of the Code of Civil Procedure (see paragraph 10 above).

The Düsseldorf Court of Appeal set out its reasoning as follows (translation):

"Generally speaking, a court may act on the assumption that a party is capable of conducting legal proceedings. However, should serious doubts arise about capacity, the court may not permit litigation to continue where a decision on the merits is being sought, but, under section 56 of the Code of Civil Procedure, must examine the question of capacity ex officio as a precondition for the lawfulness of a decision on the merits. In such a case, the court, without being bound by any procedural rules on the taking of evidence, must exhaust all the evidentiary possibilities necessary to the forming of a definite view ... This the court failed to do in disregard of the applicable substantive and procedural provisions.

In the present case, as may be seen from the following considerations, there are serious doubts about the petitioner's capacity to conduct proceedings, which are not dispelled by the report of the retired chief medical officer, Dr Lemmer, of 7.12.1979, now submitted, this in turn meaning that there is no need to re-open the oral hearing in pursuance of section 156 of the Code of Civil Procedure.

In a letter of 17.4.1974 ..., Dr Firnhaber, who was for many years a friend of the petitioner, approached the Ratingen District Court with the aim of securing - by way of a guardianship - medical treatment for him. In this letter, Dr Firnhaber, referring to numerous occurrences in the past, known to him as a result of conversations with the petitioner himself or with members of his family, voiced the suspicion that the petitioner was suffering from a persecution complex directed more and more at the respondent. Mrs Linn, an aunt of the respondent, also expressed similar views to the Ratingen District Court ... One cannot without more ado accuse these persons of merely being hostile to the petitioner; rather, in the view of this court, it must be presumed that they acted out of genuine concern for the petitioner.

Their statements cannot therefore be ignored and are such as to raise doubts as to the petitioner's legal capacity and therefore his capacity to conduct legal proceedings. In this respect it is not of decisive importance whether accounts of the occurrences are accurate in every detail and the conclusions drawn the right ones. In any event, such statements raise doubts which need to be looked into. These doubts are not, for example, unfounded because the occurrences referred to concern solely the personal and family sphere and the petitioner is successfully carrying on a professional activity in a post of responsibility. This is evident from the fact that capacity to conduct legal proceedings may be present only as regards a specific number of matters, that this possibility cannot be excluded in the light of what has already been said, and that the present case

concerns precisely a matter falling within the area of the petitioner's relationship with the respondent.

These doubts have not thus far been dispelled. Least apt in this respect are the observations made by the petitioner on 1.5.1974. Nor does the assessment provided by the senior doctor Dr Roth, when the petitioner was brought by the police to the Grafenberg Hospital on 20/21.8.1976, as also when the hearing took place before the court hearing the criminal charge on 25.3.1977, permit any such conclusion. The latter is, admittedly, an expert opinion given by a doctor. It cannot however be ruled out that the basis for this assessment was not broad enough and that the personal and family area, including the relationship between the petitioner and the respondent, was not considered in the assessment.

Nor can the opinion of Dr Lemmer ... remove the doubts which have arisen. This specialist, commissioned by the petitioner, drew up his report following repeated and lengthy examinations of the petitioner, and after familiarising himself with those sections of the file which are important in this respect. He found no morbid paranoid tendencies and comes to the conclusion that there were no limiting factors or signs of a partial lack of capacity to conduct legal proceedings. What is missing from his expert opinion, however, is any detailed discussion of Dr Wegener's report of 7.1.1975, which he had at his disposal and to which he makes reference; the latter report came to the conclusion that the petitioner was suffering from a paranoid psychosis negating his power of judgment in certain areas. Again, the value of the testing procedures used by Dr Lemmer in producing his specialist report is not apparent to the panel, in the absence of detailed explanations. It is furthermore not made sufficiently clear in this report whether the expert takes as correct the occurrences and remarks of the petitioner described by the other side - for instance, Dr Firnhaber, the respondent or Dr Wegener - or whether he merely proceeds on the basis of what the petitioner has told him during the examinations. Similarly, the rather summary assessment of the observations made by the petitioner on 1.5.1974 in reply to the respondent's statements to the Ratingen District Court and on 20.3.1975 in reply to the expert opinion of Dr Wegener, do not appear to suffice as they stand. The expert does not go into detail; in particular, he does not consider more closely the concern expressed by the petitioner himself that, during a stay in Holland, he may have been sterilised at the instigation of the respondent.

The question of the petitioner's capacity to conduct proceedings, which accordingly is still open, can only be resolved by means of expert opinion. This was the task of the District court. The failure to conduct such an examination constitutes a serious procedural defect which, pursuant to section 539 of the Code of Civil Procedure requires the setting aside of the contested judgment."

3. THE SECOND PROCEEDINGS BEFORE THE FAMILY COURT AND THE DÜSSELDORF COURT OF APPEAL (18 MARCH 1980 - 29 SEPTEMBER 1980)

(a) Family Court proceedings (18 March 1980 - 3 July 1980)

21. On 16 June 1980 the Family Court, which had been in possession of the file since 18 March and held hearings on 5 and 22 May 1980, again pronounced the divorce granting custody of the children to the mother. The Family Court disagreed with the Court of Appeal's statement that it had not examined the applicant's capacity to take part in the proceedings. If the Court of Appeal had reason to doubt the applicant's capacity, it should have examined and determined this question itself. For these reasons, the Family Court considered itself not bound by the Court of Appeal's decision of 9 January 1980 and refused to take further evidence on the question of the applicant's alleged mental illness. In view of the expert opinion submitted by Dr Lemmer on 7 December 1979 and the fact that the

applicant never gave rise to any objections in his career as a high-ranking civil servant, not to mention the personal impression he gave at several oral hearings, there was no reason to doubt his mental capacities.

The judgment was served on the parties on 3 July 1980.

(b) Appeal proceedings (14 July 1980 - 29 September 1980)

22. On 29 September 1980, on the appeal of the applicant's wife dated 14 July 1980, the second divorce judgment was also quashed and the case again sent back for a new trial. The Düsseldorf Court of Appeal relied on the principle laid down in settled case-law that in the same proceedings a lower court is bound by the decision of the higher court. In the Appeal Court's view, the Family Court, which was bound by the judgment of 9 January 1980, had wrongly refused to take expert evidence on the question of the applicant's state of mental health.

4. THE THIRD PROCEEDINGS BEFORE THE FAMILY COURT AND THE DÜSSELDORF COURT OF APPEAL (15 OCTOBER 1980 - 7 JUNE 1983)

(a) Family Court proceedings (15 October 1980 - 24 February 1982)

23. On 15 October 1980, the case files were returned to the Family Court judge whom Mrs Bock challenged on the same date. The Regional Court rejected the challenge on 27 November 1980 but it was upheld on appeal on 22 January 1981. The Court of Appeal stated that, in view of the Family Court judge's attitude as expressed in the judgment of 16 June 1980, the applicant's wife had reason to doubt his impartiality. The applicant's constitutional complaint against the decision of 22 January 1981 was rejected on 1 April 1981 by the Federal Constitutional Court.

24. On 22 May 1981 the Family Court appointed another medical expert. On 6 July 1981 an assistant of that expert was heard by the Family Court. He considered the applicant fully capable of taking part in the proceedings.

At the hearing the applicant's wife challenged the Family Court judge. This motion was rejected by the Regional Court on 8 July 1981. Her second motion of 15 July 1981 was rejected by the Regional Court on 25 September 1981 and by the Court of Appeal on 19 November 1981.

25. On 24 February 1982 the divorce was pronounced for the third time. Custody of the daughter (the two older children having reached the age of majority in 1979 and 1980, respectively) was granted to the applicant's wife who was also granted a right to pension splitting (Versorgungsausgleich).

(b) Appeal proceedings (25 February 1982 - 7 June 1983)

26. On 25 February 1982 the applicant's wife again appealed against the divorce judgment, which was served on the parties on 10 March 1982. On 13 April 1982 the applicant, who had in the meantime changed his lawyer, cross-appealed with regard to the right to custody of the daughter and the pension splitting. A statement of the grounds of Mrs Bock's appeal was, after an extension of the time-limit, filed on 16 April 1982. Having appointed a new lawyer the applicant filed a statement of the grounds of his appeal on 9 June 1982.

27. On 4 August 1982 the Düsseldorf Court of Appeal, following a hearing of the parties on 14 June 1982, decided to take further evidence and instructed the expert, who had been appointed on 22 May 1981 (see paragraph 24 above) to examine the applicant again. The supplementary expert opinion was received on 15 October 1982. On

21 December 1982 the applicant's wife challenged the expert, and on 22 December 1982 the applicant challenged some of the judges at the Court of Appeal. These challenges were both rejected: the applicant's on 21 January 1983 and his wife's on 1 February 1983.

On 28 February 1983 the Düsseldorf Court of Appeal, following a hearing of the parties on 21 February 1983, decided to hear the same expert, which it did on 6 April 1983.

28. On 30 May 1983 the Court of Appeal dismissed both the appeal and the cross-appeal. The Court stated that the expert medical opinion showed that no doubts as to the applicant's legal capacity now existed. It further considered it justified to give custody of the daughter to the mother as the latter had expressed the wish to live with her. As regards the claim to pension splitting the Court found the applicant's wife had not forfeited it on the ground that in 1973 she caused her husband's examination by a psychiatrist. She could not be blamed for having misinterpreted the applicant's distrusting attitude towards her as indicating a need for medical treatment. There had been reasons to doubt the applicant's capacity to take part in the proceedings and these doubts could not solely be attributed to his wife's allegations.

The judgment was served on the parties on 7 June 1983. The divorce thereby became effective.

5. PROCEEDINGS BEFORE THE FEDERAL CONSTITUTIONAL COURT

(a) First complaint (11 March 1983 - 11 October 1983)

29. On 11 October 1983 the Federal Constitutional Court, sitting as a panel of three judges, rejected a constitutional complaint submitted by the applicant on 11 March 1983 against mainly the length of the divorce proceedings partly as being inadmissible and partly as offering no sufficient prospects of success. The Court stated that there was nothing to show that any delays in the proceedings were not justified by objective procedural requirements. Admittedly, an avoidable delay was caused by the fact that the Family Court only obtained an expert opinion after the Court of Appeal's decision of 29 September 1980 as the two courts had differing opinions as to the need for an expert opinion and the binding nature of the decision for the Family Court. However, as the Constitutional Court pointed out, the Family Court had accepted the applicant's argument on the capacity question. From this point of view, it would have meant delaying the proceedings, had an expert opinion, which the Family Court considered unnecessary, been obtained.

(b) Second complaint (4 July 1983 - 11 January 1984)

30. A further constitutional complaint submitted by the applicant on 4 July 1983 against the final divorce judgment was rejected by the Federal Constitutional Court on 11 January 1984, partly as being inadmissible and partly as offering no prospects of success. As regards the right to care for his daughter, this could no longer be invoked as she had reached the age of majority. The pension splitting ordered by the Court of Appeal gave rise to no misgivings under the Constitution, either as regards its legal basis, the 1977 legislation, or as regards the fact that, owing to doubts as to the applicant's capacity to conduct legal proceedings, the divorce was pronounced only after the entry into force of this legislation. The duration of the proceedings had not infringed the applicant's fundamental rights. Nor did the judgment impugned disclose an erroneous conception of the fundamental rights alleged to be infringed. Nor had the applicant's right to be heard in the proceedings (rechtliches Gehör) been infringed.

PROCEEDINGS BEFORE THE COMMISSION

31. Mr Bock applied to the Commission on 2 July 1982. He complained under Article 6 para. 1 (art. 6-1) of the Convention of the length of the divorce proceedings. He also complained under this provision that the proceedings were unfair. Moreover, he alleged, under Article 8 of the Convention and Article 1 of Protocol No. 1 (art. 8, P1-1), a violation of his right to respect for his private life and his possessions as a consequence of the court orders denying him access to the matrimonial home, and under Article 8 para. 1 (art. 8-1) that he was deprived of contact with his daughter.

32. By decision of 13 November 1986, the Commission declared the application admissible in respect of the complaint made under Article 6 para. 1 (art. 6-1) concerning the length of the divorce proceedings. The other claims made by the applicant were all declared inadmissible.

In its report adopted on 13 November 1987 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion, by thirteen votes to one, that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and the dissenting opinion is reproduced in an annex to this judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

33. At the hearing of 21 November 1988 the Government maintained the final submissions contained in its memorial, whereby it requested the Court "to hold that the Federal Republic of Germany has not breached the first sentence of Article 6 para. 1 (art. 6-1)".

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 6 PARA. 1 (art. 6-1)

34. According to the applicant, the time taken by the German courts to hear his divorce action was not "reasonable" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, according to which:

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

The Commission agreed with this view which was contested by the Government.

A. Relevant period to be taken into consideration

35. The starting point of the relevant period to be taken into consideration is 18 March 1974, the date on which the divorce petition was lodged with the Düsseldorf Regional Court (see paragraph 8 above).

36. As far as the close of the relevant period is concerned, the divorce proceedings proper came to an end on 7 June 1983, which was the date of service of the final decree (see paragraph 28 above). The applicant did, however, also bring two complaints before the Federal Constitutional Court (see paragraphs 29 and 30 above). The first complaint was brought against mainly the length of the divorce proceedings; the second related to various matters ancillary to the divorce judgment. They were instituted and decided on 11 March and 11 October 1983 and 4 July 1983 and 11 January 1984, respectively. The question arises whether either of these proceedings is to be taken into account in addition to the divorce proceedings themselves in order to calculate the length of the time whose reasonableness falls to be reviewed, thus bringing the overall period to an end on 11 October 1983 or 11 January 1984, rather than 7 June 1983.

The Government maintained that Article 6 para. 1 (art. 6-1) of the Convention does not apply to constitutional complaint proceedings before the Federal Constitutional Court. They invited the Court to reaffirm, on this point, its Buchholz judgment of 6 May 1981 (Series A no. 42, p. 15, para. 48), and not to follow its Deumeland judgment of 29 May 1986 (Series A no. 100, p. 26, para. 77).

37. The Court has also had occasion to address itself to this question in the Eckle judgment of 15 July 1982 (Series A no. 51, pp. 17-18, para. 34, and pp. 34-35, paras. 76-79), the Erkner and Hofauer judgment of 23 April 1987 (Series A no. 117, p. 46, para. 16, p. 50, para. 33 and pp. 61-62, para. 65), the Poiss judgment of 23 April 1987 (Series A no. 117, p. 103, paras. 50-52) and, mutatis mutandis, the Ringeisen judgment of 16 July 1971 (Series A no. 13, pp. 11-12, para. 23, p. 34, paras. 79-80, and pp. 39-41, paras. 94-99), the Sramek judgment of 22 October 1984 (Series A no. 84, pp. 11-12, paras. 16-17, and p. 17, para. 35) and the Ettl and Others judgment of 23 April 1987 (Series A no. 117, p. 17, paras. 33-35). As a review of its case-law demonstrates, there are circumstances in which proceedings before the Constitutional Court of a State must be taken into the reckoning in determining the relevant period. It has to be considered whether the Constitutional Court's decision was capable of affecting the outcome of the case which has been litigated before the ordinary courts. The question whether Article 6 para. 1 (art. 6-1) is applicable to constitutional complaint proceedings must accordingly be treated on the merits of each case, in the light of all the circumstances.

It should be noted that the applicant himself asked that the duration of the proceedings before the Federal Constitutional Court should be left out of consideration because, according to him, his constitutional complaints cannot be said to have involved lengthy proceedings. Indeed, the Federal Constitutional Court dealt with the two complaints lodged by Mr Bock in an expeditious manner; the first complaint took seven months and the second six months and one week (paragraphs 29 and 30 above).

The Court considers that the question whether those proceedings come within the purview of Article 6 para. 1 (art. 6-1) does not need to be resolved in order to decide the main issue, regard being had to all the circumstances of the present case and the overall length of the applicant's divorce proceedings. The Court will therefore confine its examination to the period from 18 March 1974 to 7 June 1983.

B. Reasonableness of the length of the proceedings

38. The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard, *inter alia*, to the complexity of the case, the conduct of the parties and of the authorities concerned and what is at stake in the litigation (see the *H v. the United Kingdom* judgment of 8 July 1987, Series A no. 120-B, p. 59, para. 71).

The most striking feature of this case was the amount of time devoted to a consideration of the applicant's mental capacity to take legal proceedings. The German courts, as the Government pointed out, have an *ex officio* duty under section 56 of the Code of Civil Procedure to investigate a plaintiff's capacity to take proceedings; this being so they have all the more reason to comply with the requirement of Article 6 (art. 6) as to reasonable time (see the *Martins Moreira* judgment of 26 October 1988, Series A no. 143, p. 17, para. 46). Also the Code of Civil Procedure itself (section 272) provides generally for proceedings to be expedited.

It is in the light of these factors that the Court will review the conduct of the several stages of the proceedings.

1. Proceedings before the Düsseldorf Regional Court (18 March 1974 -

30 June 1977)

39. The divorce action before the Düsseldorf Regional Court, brought by the applicant on 18 March 1974, lasted three years, three months and approximately two weeks (see paragraphs 8-16 above). When that court's jurisdiction in divorce matters ceased at the end of June 1977, Mr Bock's divorce petition had not been examined as to its merits; the Court had limited itself to an investigation of a question going to admissibility, namely the applicant's capacity to sue.

Although Mr Bock's mental state had been investigated in September 1973 by Dr Lemmer (see paragraph 8 above) whom the applicant cited as a witness, the Regional Court ordered on 6 June 1974 that the applicant be examined by another specialist, Dr Wegener. On 13 November 1974, Mr Bock made an application challenging Dr Wegener for bias. On 21 November 1974, Dr Wegener reported to the court that he considered the applicant to be suffering from a paranoid psychosis. But less than three weeks later, on 9 December 1974, Mr Bock's application challenging Dr Wegener was granted and another expert, Dr Baucke, was asked to prepare an expert opinion (see paragraph 11 above). Mr Bock refused to be examined by Dr Baucke but his objections against this expert were finally dismissed on appeal on 26 August 1975. Five months later, Dr Baucke informed the Court that he had been unable to examine the applicant. Owing to inadvertence on the part of the court's registry, it was not until May 1976 that the proceedings were continued (see paragraph 12 above).

40. On the assumption that doubts as to the state of Mr Bock's mental health could be legitimately entertained, the Düsseldorf Regional Court failed to ensure a speedy taking of evidence on this issue.

Certainly, as the Government contended, it cannot be regarded as arbitrary that the Regional Court considered it necessary to take evidence as to the applicant's capacity to sue. The appointment of Dr Baucke, after Dr Wegener had been successfully challenged, was consonant with the provisions of the Code of Civil Procedure.

In the Court's view, the Düsseldorf Regional Court did, however, persist too long in its attempts to have Dr Baucke accepted and ought to have chosen another expert. This is particularly so in the light of the Government's own argument to the effect that German law does not provide any possibilities for coercive measures to oblige the divorce petitioner to submit to a psychiatric examination. Moreover, as early as 4 July 1975 the Düsseldorf District Court had dismissed the guardianship application against Mr Bock (see paragraph 9 above).

41. As to the latter half of 1976, the Court notes that into this period fell the second forced admission of Mr Bock into a mental hospital (see paragraph 15 above). This measure was found by the domestic courts to be unjustified. However much of a distraction it may have been for the conduct of the divorce proceedings proper, it did result in Mr Bock's incidentally receiving two further favourable opinions on his mental health, both by Dr Roth, of which, so it appears, no account was taken in the context of those proceedings. Instead, the Düsseldorf Regional Court was seeking, at this time, to hear Dr De Boor, who - it later transpired - had never examined the applicant and Dr Firnhaber, at a time when the application for him to be made Mr Bock's guardian had been dismissed.

In fact, by the time the Regional Court's jurisdiction ceased, no examination of the merits of Mr Bock's divorce petition had taken place, although attestations by two doctors of his soundness of mind were in existence against one contrary diagnosis whose author had been disqualified for bias. The Court therefore considers that the conduct of the Düsseldorf Regional Court had the effect of delaying unduly this stage of the proceedings. Certainly, some measure of

responsibility also rests with the parties. The applicant's frequent changes of lawyer and his objections to certain judges cannot be overlooked. Moreover, it appears, as the Government pointed out, that the respondent to the divorce petition sought to prolong the proceedings. However, these factors cannot exclude the Regional Court's responsibility.

2. The subsequent proceedings following the reform in the law (1 July 1977 - 7 June 1983)

(a) First set of proceedings (1 July 1977 - 9 January 1980)

42. The first proceedings before the newly established Family Court lasted from 1 July 1977 to 5 January 1979 (see paragraph 17 above). There were hearings on 22 May 1978 and 13 November 1978. In view of the delays which had already accumulated, it may be thought that it would have been better at least to have advanced the second hearing somewhat.

43. As regards the first appeal proceedings, which were pending before the Düsseldorf Court of Appeal from 5 February 1979 to 9 January 1980 (see paragraphs 18-20 above), the Commission stated that it was not satisfied that the prolongation of the proceedings caused by the decision to refer the case back to the Family Court was justified in the interests of a proper administration of justice (paragraph 102 of the report). The Government argued that the Court of Appeal was entitled to do this under section 539 of the Code of Civil Procedure as the first instance proceedings disclosed a serious defect due to a failure to take the necessary evidence.

However, the Court of Appeal's judgment of 9 January 1980 is, to some extent, based on evidence adduced in the context of the earlier guardianship application which had been dismissed and on the opinion of Dr Wegener against whom a challenge had previously been upheld by the Regional Court. The question may legitimately be asked why the capacity question could not have been determined by the Court of Appeal.

Be that as it may, the Düsseldorf Court of Appeal was in the best position to judge whether the case ought to be referred back to the lower court under the relevant provision of German law.

(b) Second set of proceedings (18 March 1980 - 29 September 1980)

44. The second proceedings before the Family Court lasted from 18 March 1980 to 3 July 1980 (see paragraph 21 above). This in itself was not a long period. However, the Family Court granted the divorce without taking the evidence which had been required by the Court of Appeal's earlier judgment. This led to further appeal proceedings before the Düsseldorf Court of Appeal (see paragraph 22 above) and thus occasioned further delay.

The Government argued that no State can guarantee that its judges will not make mistakes. An error of law made by a judge can lead to an appeal and thus extend the length of proceedings. If this in itself were to give rise to a violation of the right to a hearing "within a reasonable time", that would be tantamount to acknowledging that there is a right to court decisions free of error.

In the Court's view, an error by a court leading to a delay in the proceedings brought about by the need for appeal proceedings to correct the error may, in combination with other factors, be taken into account in the determination of the reasonableness of the relevant period pursuant to Article 6 para. 1 (art. 6-1). In the present case, the Family Court's failure to give effect to the Court of Appeal's earlier decision was a factor which contributed to the delay. However, the resulting proceedings before the Court of Appeal,

which took from 14 July 1980 to 29 September 1980, were not of unreasonable duration.

(c) Third set of proceedings (15 October 1980 - 7 June 1983)

45. For a third time, therefore, the divorce action came before the Family Court. The proceedings were pending before that court for a period of one year, four months and about one week (15 October 1980 - 24 February 1982, see paragraphs 23-25 above). Much of this period was taken up by the wife's challenges of the Family Court judge, one of which succeeded on appeal and gave rise, in its turn, to an unsuccessful constitutional complaint by the applicant. During these proceedings also, the Family Court obtained the expert psychiatric evidence which it had been required to do in pursuance of the appeal court's judgment. In all the circumstances, therefore, the Court, like the Commission, does not find this period to be excessive.

46. As to the third set of appeal proceedings before the Düsseldorf Court of Appeal (25 February 1982 - 7 June 1983), the Commission expressed doubts as to the reasonableness of this period, particularly in view of the overall time already spent by the German courts on the applicant's divorce petition.

The Court agrees with the Commission that there was by this stage an even greater obligation on the Court of Appeal to act as speedily as possible. A period of more than fifteen months - including ten which were lost before the appeal court heard the expert psychiatrist - therefore appears excessive.

C. Overall assessment

47. This case, viewed as a whole, differs from certain others involving the "reasonable time" requirement of Article 6 para. 1 (art. 6-1). Here there was not so much a lack of judicial activity as an excessive amount of activity which focused on the petitioner's mental state. A decisive cause of the protracted length of the proceedings was the doubt cast by Mr Bock's then wife on his capacity to conduct legal proceedings.

In principle, national courts have to proceed on the basis that a prospective or actual plaintiff is not suffering from mental incapacity. Should any reasonable doubt arise in this regard, they have to clarify as soon as possible the extent to which he is competent to conduct legal proceedings. The relevance of this principle in the present case is heightened by the availability in German procedural law of special provisions enabling parties to matrimonial causes to take part in proceedings even where their legal capacity is found to be attenuated (see paragraph 10 above).

It may be, as the Government argued, that the rift between Mr and Mrs Bock was so serious that it presented the German courts with very difficult problems, but such a situation cannot absolve the courts from their obligation to determine the capacity question as quickly as possible. The Court emphasises that, whilst it does not question the right of national courts to investigate a plaintiff's capacity to take proceedings, arrangements must be made to ensure a swift determination thereof.

48. In the present case, the Court notes first that, one after the other, proceedings based on Mr Bock's alleged mental ill-health failed. A guardianship application was dismissed in 1975; a further action for a declaration of his incapacity was turned down in the following year (see paragraph 10 above). Yet doubts still persisted in the national courts as to his soundness of mind, although, by the time of the final divorce judgment, there was a total of five reports attesting Mr Bock's soundness of mind against one whose author had been disqualified. Moreover, this case concerned matters central to

the enjoyment of private and family life, namely relations between spouses, as well as between the parents and their children.

Finally, the Court cannot disregard the personal situation of the applicant who, for some nine years, suffered by reason of the doubts cast on the state of his mental health which subsequently proved unfounded. This represented a serious encroachment on human dignity.

Conclusion

49. In all, the litigation extended over more than nine years. A period of this length is abnormal for the circumstances. Although some responsibility for the duration of the proceedings rests with the parties, the applicant's divorce petition was not heard within a reasonable time owing to the cumulative delays which are attributable to the competent courts. Regard being had to the particular diligence required in cases concerning civil status and capacity, there has accordingly been a breach of Article 6 para. 1 (art. 6-1) of the Convention.

II. APPLICATION OF ARTICLE 50 (art. 50)

50. The applicant seeks just satisfaction under Article 50 (art. 50) which is in the following terms:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

51. First of all, Mr Bock asks the Court to award to him such sum as it may think fit *ex aequo et bono* in respect of non-material damage flowing from the excessive length of his divorce proceedings. In the Commission's view, too, Mr Bock should be compensated for the prolonged uncertainty engendered by the problems raised in connection with his mental capacity.

The Government contended that, as the applicant was largely to blame for any delays, it was not appropriate to make an award under this head; in any event, he had received compensation of DM 5,000 from the North Rhine-Westphalian authorities in respect of unjustified police action (see paragraph 15 above), and this already constituted adequate satisfaction.

52. The compensation referred to by the Government was not intended to indemnify the applicant for the hardship caused to him by the excessive length of the proceedings but merely for certain incidents not directly connected with the present case. The Court considers that the excessive length of the proceedings, brought about by the persistent doubts as to Mr Bock's mental health, was highly detrimental to a person in the applicant's position. It is therefore appropriate, on an equitable basis, to award him under this head the amount of DM 10,000.

B. Pecuniary damage

53. In addition, Mr Bock seeks damages related to pension splitting (*Versorgungsausgleich*), available following the 1977 reform, maintenance payments and expenditure incurred in renting separate accommodation for himself. The Government contended that no causal connection existed between the pecuniary damage claimed and the length of the divorce proceedings.

54. Even if the proceedings before the Düsseldorf Regional Court had been conducted without delay, it is not established that the divorce action would have been disposed of before the reform of the divorce laws (see paragraph 16 above). Furthermore, had the proceedings been concluded before the entry into force of the new legislation it is by no means certain that Mr Bock would not have been obliged to make financial provision for his former wife, or, in any case, for the maintenance of the children of the marriage.

As to the amount representing expenditure by Mr Bock on rent here again, it is not established that, even if it had been possible to conclude the divorce proceedings somewhat earlier, similar costs would not have been incurred in respect of the accommodation arrangements of Mr Bock and his family.

It is therefore not appropriate to make an award under these heads.

C. Costs and expenses

55. Finally, Mr Bock claims an amount of DM 74,590.72 for legal costs and expenses - a year-by-year list of which he also furnished together with invoices in support - in respect of the proceedings conducted by him between 1974 and 1987. Of this amount DM 26,544.57 related to the divorce proceedings proper. The Court will deal with this claim in accordance with the criteria it has established (see, among other authorities, the Belilos judgment of 29 April 1988, Series A no. 132, p. 33, para. 79).

1. Costs incurred in the domestic proceedings

56. The Government pointed out that the greater part of these costs did not result from the excessive length of the proceedings in this case.

Certainly, the application brought on 4 March 1983 before the Constitutional Court did essentially relate thereto (see paragraph 29 above). The costs incurred in that connection may be taken into account but do not appear specifically from the itemised details provided by the applicant. Nevertheless, the excessive length of the proceedings must have involved the applicant in some additional expenses, which the applicant is entitled to recover. The Court awards him the sum of DM 10,000 in this respect.

2. Costs incurred in the European proceedings

57. Mr Bock represented himself in the proceedings before both the Commission and the Court and was not afforded legal aid. He appeared in person before the Commission and the Court on 13 November 1986 and 21 November 1988 respectively and incurred travelling and other expenses, in respect of which he did not give precise figures. In particular, he claimed expenses for photocopying and undertaking five journeys to Strasbourg. On an equitable basis, it is appropriate to award him the sum of DM 2,000 under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention;
2. Holds that the defendant State shall pay to Mr Bock, for non-pecuniary damage, DM 10,000 (ten thousand Deutschmarks) and, in respect of costs and expenses, DM 12,000 (twelve thousand Deutschmarks);
3. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in

the Human Rights Building, Strasbourg, on 29 March 1989.

Signed: Rolv Ryssdal
President

Signed: Marc-André Eissen
Registrar