



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

FOURTH SECTION

CASE OF SOMMERFELD v. GERMANY

(Application no. 31871/96)

JUDGMENT

STRASBOURG

11 October 2001

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
08/07/2003**

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

In the case of Sommerfeld v. Germany,

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

Mr A. PASTOR RIDRUEJO, *President*,

Mr G. RESS,

Mr L. CAFLISCH,

Mr I. CABRAL BARRETO,

Mr V. BUTKEVYCH,

Mrs N. VAJIĆ,

Mr M. PELLONPÄÄ, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 20 September 2001,

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

PROCEDURE

1. The case originated in an application (no. 31871/96) against the Federal Republic of Germany lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Manfred Sommerfeld (“the applicant”), on 7 June 1995.

2. The applicant, who had been granted legal aid, was represented before the Court by Mrs S. Hierstetter, a lawyer practising in Munich. The German Government (“the Government”) were represented by their Agents, Mrs H. Voelskow-Thies, *Ministerialdirigentin*, of the Federal Ministry of Justice, at the initial stage of the proceedings, and subsequently by Mr K. Stoltenberg, *Ministerialdirigent*, also of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that the German court decisions dismissing his request for access to his daughter, born out of wedlock, amounted to a breach of his right to respect for his family life and that he was a victim of discriminatory treatment in this respect. He further complained about a breach of his right to a fair hearing. He invoked Articles 6, 8 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 12 December 2000 the Chamber declared the application partly admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, born in 1953, is the father of the child M., born out of wedlock on 25 January 1981. The applicant recognised his paternity of M.

9. The applicant and the child's mother lived together at the time of the child's birth. They separated in September 1986. The child's mother prohibited any contacts between the applicant and the child. The applicant still met M. several times at school until such contacts were no longer possible. Subsequently the child's mother married Mr W., the father of her child A., born in August 1985, W. being the common family name.

A. The first request for visiting arrangements

10. On 2 October 1990 the applicant applied to the Rostock District Court for a decision granting him a right of access (*Umgangsregelung*) to his daughter. Having heard the persons concerned, the Rostock Youth Office advised against a right of access. The Youth Office submitted that M. had established a close relationship with Mr. W. which would be adversely affected by contacts between M. and her natural father. It also stated that M., when heard in the absence of her mother, had indicated that she was not keen to see the applicant and was suffering from his continuing efforts for access.

11. On 27 June 1991 M., then ten years old, was heard by the competent District Court Judge. She stated that the fact that the applicant was always standing at the fence of the schoolyard disturbed her and that she did not wish to visit the applicant even if access should be ordered by the court.

12. At a court hearing on 31 July 1991, the applicant and the child's mother declared that they would attempt to settle the question of a visiting arrangement with the assistance of the Youth Office.

On 30 September 1991 the Youth Office informed the District Court that no agreement could be achieved and that M. had stated that she did not wish to see the applicant.

13. On 12 December 1991 the court ordered a psychological expert opinion. On 9 April 1992, in one-page submissions, the psychologist of the

Rostock Health Services (*Gesundheitsamt*) stated that, as the contacts between the applicant and M. were disrupted for six years, no diagnosis of their actual relationship appeared possible. The psychologist considered that M. did not wish any personal contacts with the applicant who should give her the necessary time to take up contacts on her own motion. The psychologist noted that she had arranged a meeting between the applicant and M. which, however, had been cancelled by M.'s stepfather.

14. On 24 June 1992 the competent District Court Judge heard the applicant and M. in the presence of the psychological expert. M. having repeatedly stated that she did not wish to have contacts with the applicant, the latter affirmed that he would withdraw his request for a right of access.

The applicant withdrew his request on 1 July 1992.

B. The second request for a right of access

15. On 13 September 1993 the applicant again applied to the District Court for a right of access to his daughter.

16. On 15 February 1994 the District Court Judge heard the thirteen-year-old M. who stated that she did not wish to talk to the applicant or accept presents from him and that he should no longer bother her. She also said that she had a father whom she loved though it was not her natural father. The court held a hearing with the applicant and the child's mother on 26 April 1994.

17. On 1 June 1994 the District Court dismissed the applicant's request.

The District Court noted the comments filed by the Rostock Youth Office as well as the parents' and the child's statements in court. The Court had also regard to the comments filed by the Youth Office in April 1991 and by the psychologist of April 1992, both in the context of the first set of access proceedings.

The District Court found that the applicant was not entitled to have access to his daughter. Referring to section 1711 of the Civil Code, the Court observed that the mother, in the exercise of her right to custody, determined the child's relations with third persons, and that therefore her will was decisive. The father could only be granted a right of access by court order, if this was in the interest of the child. According to the District Court's findings, in particular M.'s statements in 1992 and February 1994, these conditions were not met. The District Court considered that M., then thirteen years old and capable of forming her own will, unequivocally refused contacts with her natural father. In the District Court's view, it was not in M.'s interest to enforce contacts contrary to her will, as her mental and psychological well-being would be endangered thereby. The applicant's argument that contacts with the natural father were generally in a child's interest was rejected.

18. On 17 June 1994 the Rostock Regional Court dismissed the applicant's appeal.

Endorsing the District Court's findings, the Regional Court found that contacts were not in the child's interest. It regarded as decisive that for many years the now thirteen-year-old girl had clearly refused contacts with her father. The applicant should accept his adolescent daughter's will in his own and her interest. Only if he would stop to inflict himself on her, contacts might eventually be possible. The court further observed that contacts between the applicant and M. could hardly be enforced against her will.

On 22 July 1994 the applicant filed a constitutional complaint with the Federal Constitutional Court.

On 19 January 1996 a panel of three judges of the First Chamber of the Federal Constitutional Court refused to entertain the applicant's complaint.

II. RELEVANT DOMESTIC LAW

A. Legislation on family matters currently in force

19. The statutory provisions on custody and access are to be found in the German Civil Code. They have been amended on several occasions and many were repealed by the amended Law on Family Matters (*Reform zum Kindschaftsrecht*) of 16 December 1997 (Federal Gazette 1997, p. 2942), which came into force on 1 July 1998.

20. Section 1626 § 1 reads as follows (the Court's translation):

"The father and the mother have the right and the duty to exercise parental authority (*elterliche Sorge*) over a minor child. The parental authority includes the custody (*Personensorge*) and the care of property (*Vermögenssorge*) of the child."

21. Pursuant to section 1626 a § 1, as amended, the parents of a minor child born out of wedlock jointly exercise custody if they make a declaration to that effect (declaration on joint custody) or if they marry. According to Section 1684, as amended, a child is entitled to have access to both parents; each parent is obliged to have contact with, and entitled to have access to, the child. Moreover, the parents must not do anything that would harm the child's relationship with the other parent or seriously interfere with the child's upbringing. The family courts can determine the scope of the right of access and prescribe more specific rules for its exercise, also with regard to third parties; and they may order the parties to fulfil their obligations towards the child. The family courts can, however, restrict or suspend that right if such a measure is necessary for the child's welfare. A decision restricting or suspending that right for a lengthy period or permanently may only be taken if otherwise the child's well-being would

be endangered. The family courts may order that the right of access exercised in the presence of a third party, such as a Youth Office authority or an association.

B. Legislation on family matters in force at the material time

22. Before the entry into force of the amended Law on Family Matters, the relevant provision of the Civil Code concerning custody and access for a child born in wedlock was worded as follows (the Court's translation):

Section 1634

"1. A parent not having custody has the right to personal contact with the child. The parent not having custody and the person having custody must not do anything that would harm the child's relationship with others or seriously interfere with the child's upbringing.

2. The family court can determine the scope of that right and can prescribe more specific rules for its exercise, also with regard to third parties; as long as no decision is made, the right, under section 1632 § 2, of the parent not having custody may be exercised throughout the period of contact. The family court can restrict or suspend that right if such a measure is necessary for the child's welfare.

3. A parent not having custody who has a legitimate interest in obtaining information about the child's personal circumstances may request such information from the person having custody in so far as this is in keeping with the child's interests. The guardianship court shall rule on any dispute over the right to information.

4. Where both parents have custody and are separated not merely temporarily, the foregoing provisions shall apply *mutatis mutandis*."

23. The relevant provisions of the Civil Code concerning custody of and access to a child born out of wedlock were worded as follows (the Court's translation):

Section 1705

"Custody over a minor child born out of wedlock is exercised by the child's mother..."

Section 1711

"1. The person having custody of the child shall determine the father's right of access to the child. Section 1634 § 1, second sentence, applies by analogy.

2. If it is in the child's interests to have personal contact with the father, the guardianship court can decide that the father has a right to personal contact. Section 1634 § 2 applies by analogy. The guardianship court can change its decision at any time.

3. The right to request information about the child's personal circumstances is set out in Section 1634 § 3.

4. Where appropriate, the youth office shall mediate between the father and the person who exercises the right of custody."

C. The Act on Non-Contentious Proceedings

24. Like proceedings in other family matters, proceedings under former section 1711 § 2 of the Civil Code were governed by the Act on Non-Contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*).

25. According to section 12 of that Act, the court shall, *ex officio*, take the measures of investigation that are necessary to establish the relevant facts and take the evidence that appears appropriate.

26. In proceedings regarding access, the competent youth office has to be heard prior to the decision (section 49(1) (k)).

27. As regards the hearing of parents in custody proceedings, section 50a (1) stipulates that the court shall hear the parents in proceedings concerning custody or the administration of the child's assets. In matters relating to custody, the court shall, as a rule, hear the parents personally. In cases concerning placement into public care, the parents shall always be heard. According to paragraph 2 of section 50a, a parent not having custody shall be heard except where it appears that such a hearing would not contribute to the clarification of the matter.

28. Section 63 provides for a right of a further appeal challenging the first appeal decision. Section 63a of that Act as in force at the material time excluded this right in proceedings concerning a natural father's access to his child born out of wedlock. This provision has been repealed by the Law on Family Matters of 1997.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicant complained that German court decisions dismissing his second request for access to his child, born out of wedlock, amounted to a breach of Article 8 of the Convention, the relevant part of which provides:

"1. Everyone has the right to respect for his ... family life

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society

... for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. The parties’ submissions

30. The applicant submitted that contacts between him and his daughter would have been in the child’s interest. The mother had alienated M. He maintained that the submissions which the psychologist of the Rostock Youth Office had sent to the Rostock District Court did not constitute an expert opinion. He also criticised the lack of expert advice by a family psychologist.

31. The Government admitted that the relationship between the applicant and his daughter came within the notion of family life under Article 8 § 1. However, in their submission, the statutory regulations on the right of access of fathers to their children born out of wedlock did not, as such, amount to an interference with the rights under that provision.

The Government conceded that the German court decisions in the applicant’s case, which were based on this legislation, amounted to an interference with the applicant’s right under Article 8 § 1. In their view, this interference was in accordance with German law and served to protect the interests of the applicant’s child. Moreover, the interference complained of was necessary in a democratic society within the meaning of Article 8 § 2. In this respect, the Government submitted that the child’s best interests were the principle guiding the German courts.

B. The Court’s assessment

1. Whether there was an interference with the applicant’s right to respect for his family life

32. The Court recalls that the notion of family under this provision is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit from the moment and by the very fact of his birth. Thus there exists between the child and his parents a bond amounting to family life (see the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 18-19, § 44).

Furthermore, the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, amongst others, the Johansen v. Norway judgment of 7 August 1996, *Reports of Judgments and Decisions*

1996-III, pp. 1001-1002, § 52, and *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII).

33. In the present case, the applicant lived with his child from her birth in January 1981 to September 1986. The subsequent decisions refusing the applicant access to his child therefore interfered with the exercise of his right to respect for his family life as guaranteed by paragraph 1 of Article 8 of the Convention.

34. In these circumstances, the Court considers that there is no need to examine whether or not section 1711 of the Civil Code as such constituted an interference with the applicant's right to respect for his family life.

2. Whether the interference was justified

35. The interference mentioned in the preceding paragraph constitutes a violation of Article 8 unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society".

a. "In accordance with the law"

36. The relevant decisions had a basis in national law, namely, section 1711 § 2 of the Civil Code as in force at the relevant time.

b. Legitimate aim

37. In the Court's view the court decisions of which the applicant complained were aimed at protecting the "health or morals" and the "rights and freedoms" of the child. Accordingly they pursued legitimate aims within the meaning of paragraph 2 of Article 8.

c. "Necessary in a democratic society"

38. In determining whether the impugned measure was "necessary in a democratic society", the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see the *Hokkanen v. Finland* judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55, and, *mutatis mutandis*, *Elsholz v. Germany* cited above, § 48).

39. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care.

However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed (see *Elsholz v. Germany* cited above, § 49).

40. The Court further recalls that a fair balance must be struck between the interests of the child and those of the parent and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (see *Elsholz v. Germany* cited above, § 50; and *T.P. and K.M. v. the United Kingdom*, no. 28945/95, § 71, ECHR-..).

41. In the present case, the District Court, when refusing the applicant's request for a visiting arrangement, relied on the statements made by child, questioned by the District Court in 1994 at the age of thirteen and, in a preceding set of access proceedings, at the age of ten. It had also heard the applicant and the child's mother. Equally considering comments filed by the local Youth Office and material obtained in the first set of access proceedings, the District Court found that contacts were not in the child's interest. The Regional Court endorsed the District Court's findings.

42. The Court does not doubt that these reasons were relevant. However, it must determine whether, having regard to the particular circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests (see the *W. v. the United Kingdom* judgment of 8 July 1987, Series A no. 121, p. 29, § 64; *Elsholz v. Germany* cited above, § 52; and *T.P. and K.M. v. the United Kingdom* cited above, § 72).

43. The Court notes that District Court heard the child and the parents and had regard to material obtained in a first set of access proceedings, *inter alia*, comments filed by a psychologist of the local health services of April 1992. The Court considers that, given the psychologist's rather superficial submissions in the first set of proceedings, the lapse of time and bearing in mind what was at stake in the proceedings, namely, the relations between a father and his child, the District Court should not have been satisfied with hearing only the child as to her wishes on the matter without having at its

disposal psychological expert evidence in order to evaluate the child's seemingly firm wishes. Correct and complete information on the child's relationship with the applicant as the parent seeking access to the child is an indispensable prerequisite for establishing a child's true wishes and thereby striking a fair balance between the interests at stake. The Court further recalls that the Regional Court, which had full power to review all issues relating to the request for access, endorsed the District Court findings on the basis of the file.

44. In the Court's opinion, the German courts' failure to order a psychological report on the possibilities of establishing contacts between the child and the applicant reveals an insufficient involvement of the applicant in the decision-making process.

45. Having regard to all circumstances, the Court concludes that the national authorities overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 8

46. The applicant further complained that he had been a victim of discriminatory treatment in breach of Article 14 of the Convention read in conjunction with Article 8. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

47. The applicant refers to the difficulties in proving that contacts with the natural father are in the child's interest. He further submits that section 63a of the Act on Non-Contentious Proceedings, as in force at the material time, excluded a further appeal after the first appeal against the refusal of access had failed.

48. The Government maintained that neither the statutory regulations on the right of access to children born out of wedlock in themselves, nor their application in the particular case, discriminated against the applicant in the enjoyment of his right to respect for his family life.

The Government recalled the Commission's decisions according to which the provisions of section 1711 of the Civil Code did not entail any discrimination contrary to Article 14 (application no. 9588/81, decision of 15 March 1984; application no. 9530/81, decision of 14 May 1984, both unpublished). The consideration that fathers of children born out of wedlock often were not interested in contacts with their children and might leave a non-marital family at any time, and that it was normally in the child's interest to entrust the mother with custody and access, still applied, even if the number of non-marital families had increased. Section 1711 § 2 of the

Civil Code struck a reasonable balance between the competing interests involved in all these cases.

In this context, the Government observed that the amended Law on Family Matters did not alter this assessment.

49. The Court has held in an earlier case that it was not necessary to consider whether the former German legislation as such, namely, section 1711 § 2 of the Civil Code, made an unjustifiable distinction between fathers of children born out of wedlock and divorced fathers, such as to be discriminatory within the meaning of Article 14, since the application of this provision in the case in question did not appear to have led to a different approach than would have ensued in the case of a divorced couple (see *Elsholz v. Germany* cited above, § 59).

50. The Court notes that in the present case, both the District Court and the Regional Court expressly stated that access could only be granted if in the interest of the child, as required under section 1711 of the Civil Code in force at the relevant time. Without having recourse to psychological expertise, they relied on the statements made by the child in court and concluded that access would have to be enforced against her will and could not, therefore, be in her interest.

51. The approach taken by the German courts in the present case reflects the underlying legislation which put fathers of children born out of wedlock in a different, less favourable position than divorced fathers. Unlike the latter, natural fathers had no right of access to their children and the mother's refusal of access could only be overridden by a court when access was "in the interest of the child". Under such rules and circumstances, there was evidently a heavy burden of proof on the side of a father of a child born out of wedlock. The crucial point is that the courts did not regard contacts between child and natural father *prima facie* as in the child's interest, a court decision granting access being the exception to the general statutory rule that the mother determined the child's relations with the father. Even if the District Court's decision contains the formulation that there was a risk to the child's mental and psychological well-being if she had to take up contact with the applicant against her wish, the mother's initial prohibition of further contacts and her influence on the child remained decisive. Accordingly, there is sufficient reason to conclude that the applicant as a natural father was treated less favourably than a divorced father in proceedings to suspend his existing right of access.

52. In this context, the Court has also considered the applicant's argument as to a procedural difference, namely, the exclusion of a further appeal under the Act on Non-Contentious Proceedings in the version in force at the relevant time.

53. For the purposes of Article 14 a difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship

of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 37, ECHR 2000-X).

54. According to the Court's case-law, very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention (see the *Camp and Bourimi v. the Netherlands* cited above, § 38).

55. In the present case, the Court is not persuaded by the Government's arguments, which are based on general considerations that fathers of children born out of wedlock lack interest in contacts with their children and might leave a non-marital relationship at any time.

56. Such considerations did not apply in the applicant's case. He had acknowledged paternity and had in fact been living with the mother at the child's birth in 1981. Their relationship only broke several years later when the child was more than five years old. More important, he had continued to show concrete interest in contacts with her for sincere motives.

57. As the Government rightly pointed out, the number of non-marital families had increased. When deciding the applicant's case, the Regional Court stated the urgent need for a legislative reform. Complaints challenging the constitutionality of this legislation were pending with the Federal Constitutional Court. The amended Law on Family Matters eventually entered into force in July 1998.

The Court wishes to make it clear that these amendments cannot in themselves be taken as demonstrating that the previous rules were contrary to the Convention. They do however show that the aim of the legislation in question, namely the protection of the interests of children and their parents, could also have been achieved without distinction on the ground of birth (see, *mutatis mutandis*, the *Inze v. Austria* judgment of 28 October 1987, Series A no. 126, p. 18, § 44).

58. The Court therefore concludes that there was a breach of Article 14 of the Convention, taken together with Article 8.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

59. The applicant alleged that he had been the victim of a violation of Article 6 § 1 of the Convention, the relevant part of which reads:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

60. The applicant referred to the lack of an expert opinion and generally criticised the alleged inefficiency of the court proceedings in arranging

contacts with his child. He further stated the procedural difference resulting from section 63a of the Act on Non-Contentious Proceedings, namely the exclusion of the right to challenge the first appeal decision.

61. The Government submitted that the course of the proceedings before the competent courts, in particular the taking of evidence before the Rostock District Court could not be objected to. Moreover, the absence of a further appeal did not disclose any appearance of a breach of Article 6 § 1.

62. The Court recalls that the taking and evaluation of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Elsholz v. Germany* cited above, § 66).

63. The Court had first regard to its findings with respect to Article 8 (see paragraphs 44-45 above), in particular to the lack of a psychological expert opinion.

64. Moreover, the Court reiterates that Article 6 § 1 does not compel the States to set up courts of appeal or of cassation. Nevertheless, where such courts exist, the guarantees contained in Article 6 must be complied with, *inter alia* by ensuring effective access to the courts so that litigants may obtain a decision relating to their "civil rights and obligations" (see, *mutatis mutandis*, the *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11 pp. 13-14, § 25, and *Kudla v. Poland* (GC), no. 30210/96, § 122, ECHR 2000-XI; see also *García Manibardo v. Spain*, no. 38695/97, § 39, ECHR 2000-II).

65. The Court notes that in proceedings concerning a natural father's access to his child born out of wedlock, the general right of a further appeal against a first appeal decision, as provided in section 63 of the Act on Non-Contentious Proceedings, was excluded by operation of law, namely, by section 63a of that Act as in force at the material time (see paragraph 28 above). Having regard to its findings under Article 14 of the Convention (see paragraphs 50 and 56 above), the Court concludes that this limitation on the applicant's right of access to a court was not compatible with Article 6 § 1.

66. In these circumstances, the Court finds that the proceedings, taken as a whole, did not satisfy the requirements of Article 6 § 1. There has thus been a breach of this provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant sought 65,000 German marks (DEM) in compensation for non-pecuniary damage, pointing to the distress he had felt as a result of the separation from his child since 1986.

69. The Government did not comment.

70. The Court considers that the applicant undoubtedly sustained non-pecuniary damage. While it cannot be said on the evidence that the applicant would probably have been granted access to his child had the violations of Articles 6, 8 and 14 of the Convention not occurred, at least he lost the opportunity to ensure his interests in the access proceedings. The Court has found that the applicant was the victim of procedural defects in these proceedings as well as of discrimination, both aspects being intimately related to the interference with one of the most fundamental rights, namely, that of respect for family life. The Court further notes that since 1986 the applicant has no longer seen his child. It can reasonably be presumed that those circumstances taken as a whole have caused the applicant substantial suffering.

71. The Court thus concludes that the applicant suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. None of the factors cited above lends itself to precise quantification. Making an assessment on an equitable basis, as required by Article 41, the Court awards the applicant DEM 55,000.

B. Costs and expenses

72. The applicant further estimated his expenditure in the domestic proceedings at DEM 5,000 for costs and expenses before the German courts. He submitted that receipts were no longer available.

73. If the Court finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see the *Hertel v. Switzerland* judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63). In the instant case, having regard to the subject-matter of the proceedings before the German courts and what was at stake in them, the applicant is entitled to request payment of the costs and expenses incurred before these

courts to the extent that these costs and expenses are shown to have been actually and necessarily incurred and are reasonable as to quantum (cf., *mutatis mutandis*, *Elsholz v. Germany* cited above, § 73).

74. The applicant, who had been granted legal aid, did not claim additional costs and expenses incurred in the proceedings before the Convention organs. In the absence of any receipts or other supporting documents, the Court is not persuaded that the applicant incurred costs and expenses in the estimated amount. Deciding on an equitable basis, the Court awards him the sum of DEM 2,500.

C. Default interest

75. According to the information available to the Court, the statutory rate of interest applicable in Germany at the date of adoption of the present judgment is 8,62 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been a violation of Article 8 of the Convention;
2. *Holds* by five votes to two that there has been a violation of Article 14 of the Convention, taken together with Article 8;
3. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* by five votes to two
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention;
 - (i) 55,000 (fifty five thousand) German marks in respect of non-pecuniary damage;
 - (ii) 2,500 (two thousand five hundred) German marks in respect of costs and expenses, together with any value-added tax that may be chargeable;
 - (b) that simple interest at an annual rate of 8,62 % shall be payable from the expiry of the above-mentioned three months until settlement;
5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 11 October 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Antonio PASTOR RIDRUEJO
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mrs Vajić and the dissenting opinion of Mr Pellonpää are annexed to this judgment.

A.P.R.
V.B.

PARTLY DISSENTING OPINION OF JUDGE VAJIĆ

1. Unfortunately, I am unable to share the opinion of the majority that there has been a violation of Article 8 in the present case.

In addition, in view of the Court's judgment in *Elsholz v. Germany* (cited in paragraph 38 of the present judgment) I am unable to share the opinion of the majority as to the violation of Article 8 in conjunction with Article 14 of the Convention.

Concerning both violations I agree with the views which Judge Pellonpää has expressed in his dissenting opinion.

2. I have with some hesitation voted with the majority in favour of a finding that the applicant's rights under Article 6 of the Convention were violated in the present case.

I see considerable force in the view of Judge Pellonpää that the problem that raises Section 63a of the Act on Non-Contentious Proceedings, as in force at the relevant time (see paragraph 28) is one of discrimination rather than access to court and could therefore have been dealt with under Article 6 read in conjunction with Article 14.

I accept, however, that the problem can also be looked at as one of unreasonable limitation on access to court. In other words, the exclusion of a general right of a further appeal by operation of law (in the version of the law in force at the relevant time), limited the applicant's right of access to court to such an extent that it amounted to a violation of Article 6 of the Convention.

DISSENTING OPINION OF JUDGE PELLONPÄÄ

I am unable to subscribe to the opinion of the Chamber that there has been a violation of Article 8, both read alone and in conjunction with Article 14.

I agree with the general principles put forward in paragraph 38 of the Judgment, namely that “it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned “ and that “the Court’s task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues...” Application of these principles to the circumstances of the present case, however, in my view should not lead to the finding of a violation.

The majority has based the violation of Article 8 on the ground that, in the proceedings concerning the the applicant’s second request for a right of access, “the District Court should not have been satisfied with hearing only the child as to her wishes on the matter without having at its disposal psychological expert evidence in order to evaluate the child’s seemingly firm wishes” (paragraph 43). In the Court’s view, “ the German courts’ failure to order a psychological report on the possibilities of establishing contact between child and the applicant reveals an insufficient involvement of the applicant in the decision-making process” (paragraph 44). There appears to be no other major criticism of the domestic proceedings.

This is not surprising, as the proceedings *prima facie* appear to have been in full conformity with the procedural requirements of Article 8 (and even with the requirements of Article 6 which, as a rule, are stricter). Thus, in connection with the first request for visiting arrangements, the competent Judge heard the child twice. After the second hearing (24 June 1992), in which also the applicant and the court appointed psychological expert also participated, the applicant withdrew his request.

In connection with second set of proceedings the District Court Judge again heard the child (15 February 1994), now thirteen years of age, who expressed her firm wish not to see the applicant. In addition, the Court held a hearing with the applicant and the child’s mother (26 April 1994). The Court in addition took into account comments filed by the Rostock Youth Office both in connection with these proceedings and the first set of proceedings, as well as the psychological expert opinion filed in the first proceedings two years earlier. No new expert opinion was ordered by the court.

In June 1994 the Rostock Regional Court dismissed the applicant's appeal against the District Court's decision.

I respectfully disagree with the majority's conclusion that the German courts' failure to seek a fresh expert opinion in the second set of the proceedings violated Article 8 of the Convention. Considering that the child had by that time reached the relatively mature age of 13 - a fact duly emphasized by both the District Court and the Regional Court -, the District Court could legitimately rely on the direct impressions received from the meeting with her, as well as on all the other evidence available. There seems to be nothing indicating why the Regional Court should have departed from the assessment made by the District Court. For the European Court of Human Rights to say in these circumstances that the national court should have sought new expert advice (which not even the applicant had apparently requested it to seek), runs counter to the above-mentioned principle "that the Court's task is not to substitute itself for the domestic authorities". In the circumstances of the present case the conclusion that "the national authorities overstepped their margin of appreciation" (paragraph 45) amounts to leaving practically no margin of appreciation at all to the domestic courts which, after all, are in a much better position than this Court to make the type of sensitive decisions as the one at issue here.

I also disagree with the conclusion that there has been a violation of Article 14, in conjunction with Article 8. The Chamber attempts to make a distinction between this case and the case of *Elsholz v. Germany* (cited in paragraph 38 of the present judgment), in which the application of Section 1711 § 2 of the Civil Code "did not appear to have led to a different approach than would have ensued in the case of a divorced couple" (paragraph 49 of the present judgment).

I am not convinced by the alleged distinguishing features. In paragraph 50 it is emphasized "that, in the present case, both the District Court and the Regional Court expressly stated that access could only be granted if in the interest of the child ..." In so far as this appears to be given as a distinguishing element, I note that similar statements are also to be found in the decisions of the District Court and Regional Court in the *Elsholz* case (see paragraphs 13 and 18 of the *Elsholz* judgment). According to paragraph 51 of the present judgment the "crucial point is that the courts did not regard contacts between child and natural father *prima facie* as in the child's interest, a court decision granting access being the exception to the general statutory rule that the mother determined the child's relations with the father." I fail to see that the approach of the domestic courts on this point was in any relevant manner different in *Elsholz*, in which the District Court stated that the provisions "concerning the father's right to personal

contact with his child born out of wedlock ... was conceived of as an exemption clause which had to be construed strictly” (paragraph 13 of the *Elsholz* judgment).

In the *Elsholz* case the Court, when coming to its conclusion of a non-violation of Article 14 emphasized that the “risk of the child’s welfare was ... the paramount consideration” (paragraph 60) in the national decisions. Therefore it could not “be said ... that a divorced father would have been treated more favourably” (paragraph 61). The interests of the child, however, seem to have been a paramount consideration in the present case as well. The District Court, for example, strongly emphasized that her mental and psychological well-being would be endangered if there was any forced contact between her and the applicant (see paragraph 17).

Although there may have been some differences between the domestic court decisions in the two cases, those differences in my view were not of such a nature as to justify a violation in one and a non-violation in the other. Like in *Elsholz*, the present applicant has not shown that, in a parallel situation, a divorced father would have been treated more favourably.

I have also voted against the violation of Article 6. I do recognize that Section 63a of the Act on Non-Contentious Proceedings, as in force at the relevant time (see paragraph 28), was problematic from the point of view of the Convention. In my view the problem was, however, one of discrimination rather than access to court to be analysed under Article 6 alone. Therefore, I would have been able to vote for a violation of Article 6 read in conjunction with Article 14. Indeed, the situation is almost a classic example of discrimination as envisaged in the *locus classicus* on the subject, the Belgian Linguistic case (judgment of 23 July 1968, Series A, no 6), in which the Court stated :

“to recall a further example [of discrimination].... Article 6 does not compel States to institute a system of appeal courts. A State which does set up such Courts consequently goes beyond its obligations under Article 6. However, it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions” (p. 33).