



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

THIRD SECTION

CASE OF HOPPE v. GERMANY

(Application no. 28422/95)

JUDGMENT

STRASBOURG

5 December 2002

This judgment is final but it may be subject to editorial revision.

In the case of Hoppe v. Germany,

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

Mr I. CABRAL BARRETO, *President*,

Mr L. CAFLISCH,

Mr P. KÜRIS,

Mr B. ZUPANČIČ,

Mr J. HEDIGAN,

Mrs M. TSATSA-NIKOLOVSKA,

Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 14 November 2002,

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

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), by Peter Hoppe, a German national (“the applicant”), on 27 July 1995 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 28422/95) against the Federal Republic of Germany lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention by the applicant on 27 July 1995.

3. The applicant alleged, in particular, that the German court decisions concerning his right of access to his daughter and the awarding of parental authority breached his right to respect for his family life, that he was denied a fair hearing in the relevant proceedings and that he had been subjected to discrimination. He invoked Articles 6, 8 and 14 of the Convention.

4. The Commission declared the application partly admissible on 14 January 1998. In its report of 10 September 1999 (former Article 31 of the Convention) [*Note by the Registry*. Copies of the report are obtainable from the Registry], it expressed the opinion that there had been no violation of Article 8 of the Convention (sixteen votes to ten), no violation of Article 6 § 1 of the Convention (nineteen votes to seven) and no violation of Article 14 in conjunction with Article 8 of the Convention (unanimously).

5. Before the Court the applicant was represented by Mr P. Koepfel, a lawyer practising in Munich (Germany). 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.

6. On 8 December 1999 the panel of the Grand Chamber determined that the case should be decided by a Chamber (Rule 100 § 1 of the Rules of Court). 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. Mr G. Ress, the judge elected in respect of Germany, who had taken part in the Commission's examination of the case, withdrew from sitting in the Chamber (Rule 28). The Government were accordingly invited to indicate whether they wished to appoint an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). As the Government did not reply within thirty days, they were presumed to have waived their right of appointment (Rule 29 § 2). The President of the Chamber designated Mr L. Caflisch, judge elected in respect of Liechtenstein.

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

8. After consulting the Agent of the Government and the applicants' lawyer, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

9. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1957 and lives in Herne. In April 1990 a daughter, Svenja, was born to the applicant and his wife. In December 1992 the applicant and his wife separated. Svenja stayed with her mother. In 1994 the applicant's wife instituted divorce proceedings before the Wuppertal District Court (*Amtsgericht*). She requested that parental authority over Svenja be granted to her. The applicant applied for joint parental authority. Furthermore, the applicant requested that his right of access to Svenja be determined by a decision of the court. In these and the related proceedings, both spouses were represented by counsel.

A. The applicant's right of access

11. On 19 October 1994 the Wuppertal District Court, following hearings on 22 June and 17 October 1994, decided that, pursuant to Article 1634 of the Civil Code (*Bürgerliches Gesetzbuch*) (see paragraph 31 below), the applicant was entitled to see Svenja every second Saturday as well as on St Stephens day, Easter Monday and Whit Monday.

12. The District Court reaffirmed the principle that to maintain personal relations between a father and his child, subject to the best interests of the child, was a decisive factor when determining the right of access. Against this background, the District Court considered that the applicant's previous and extensive rights of access had, at least for the time being, to be reduced to visits once per fortnight. All the experts heard in the proceedings, i.e. the psychological expert (report of 14 June 1994), the therapeutic pedagogue and a social worker of the Barmen Diaconate Institution (*Diakonisches Werk*), gave evidence that the four-year old child was exposed to a conflict of loyalty, which she experienced as a strong pressure, and that she could not cope with this situation. While it was true that Svenja was fond of the applicant and would be in a position to see him without fear if her parents managed to create an atmosphere which took the pressure off her, they had not been able to do so. The frequency of visits requested by the applicant could not, for the time being, be handled by Svenja. Although the applicant was aware of his daughter's problems, he was incapable of accepting restrictions on access and did not show concern for the child's psychological health. Svenja's mother had not yet managed to give Svenja such a feeling of security as to permit her to visit the applicant without feelings of fear. Svenja therefore needed the intervals of two weeks as times of rest in her mother's household.

13. On 4 November 1994 the applicant lodged an appeal with the Düsseldorf Court of Appeal (*Oberlandesgericht*).

14. On 24 November 1994 the Court of Appeal informed the parties of its intention to decide in a written procedure. The applicant stated his preference for an oral hearing.

15. On 9 March 1995 the Düsseldorf Court of Appeal, after having granted the parties legal aid, amended the District Court's decision, increasing the applicant's right of access by ruling that every first visiting weekend per month the applicant was entitled to see Svenja from Saturday morning until Sunday evening. The remainder of his appeal was dismissed.

16. The Court of Appeal confirmed the findings of the District Court according to which a regular visit every second week best suited the child's welfare. In so deciding, the Court of Appeal had particular regard to the impact of the parents' difficult relations which were in conflict with the best interests of the child; the parents were not yet in a position to have a calm

and objective discussion on questions relating to the right of access. On 21 February 1995 an attempt at organising a dialogue between the parents at the Parents' Counselling Service (*Elternberatungsstelle*) of the local Youth Office (*Jugendamt*) had failed. As long as there was no agreement between the parents, any visit was an emotional strain for the child. The applicant's right of access had therefore to be assessed in the context of the continuing conflict between the parents.

17. The Court of Appeal further found that the regular visits decided upon by the District Court best suited both the applicant's wishes and the child's welfare. The exercise of the right of access had functioned well since October 1994. In particular, the child had calmed down and her sleep was no longer troubled. The Court of Appeal, in agreement with the parties, further considered the report, dated 19 January 1995, of a social worker of the Elberfeld Diaconate Institution which had been obtained in the context of parallel proceedings concerning the exercise of parental authority. According to this report, no abnormality in Svenja's behaviour had been observed. The Court of Appeal found that this encouraging development did not yet permit a significant extension of the applicant's right of access. However, taking a cautious approach, the visit on the first weekend of every month could be extended to include one overnight stay. Having regard to the psychological expert's opinion of 14 June 1994, the objections previously raised by Svenja's mother were no longer valid. Should Svenja experience any problems, her mother would have to see to it that the child would consider the visits with an overnight stay as a usual matter. Any further contacts, such as overnight stays between every Wednesday and Thursday, routine telephone conversations and common holidays, were not yet possible, but could be envisaged in case the decision on access would prove successful.

18. The applicant referred the case to the Federal Constitutional Court (*Bundesverfassungsgericht*). On 13 June 1995 a panel of three judges of that Court refused to entertain the applicant's constitutional complaint (*Verfassungsbeschwerde*).

19. The Federal Constitutional Court considered that the applicant's complaint did not raise any issue of fundamental importance. In accordance with the case-law of that Court, both the right of access of a parent not entitled to parental authority and the right to exercise parental authority granted to the other parent were protected by the right to respect for family life under the Basic Law (*Grundgesetz*). The possibility, pursuant to Article 1634 § 2 of the Civil Code (see paragraph 31 below), to limit or exclude the right of access, if it was necessary for the child's welfare, guaranteed an adequate protection of the child's constitutional rights and ensured that the courts' decisions in the matter were governed by the child's best interests.

20. Furthermore, the Federal Constitutional Court found that the decision of the Court of Appeal did not disclose any fundamentally flawed views on parental rights. Thus, the Court of Appeal had considered the child's welfare. The reasoned decision that the visits could only gradually be extended could not be objected to from a constitutional point of view. Furthermore, there was no indication that the procedural requirements were not met. In particular, the applicant had not shown that, following the failure of a conversation between the former spouses at the Parents Counselling Service, the Court of Appeal was prevented from reaching the conclusion that a fresh hearing would not permit any new findings.

21. On 3 April 1996 the Wuppertal District Court granted the applicant, at his request, an increased right of access in that he was now entitled to see his daughter every second weekend between Saturday morning and Sunday evening and also for a period of two weeks of summer holidays. The District Court observed that the right of access such as that presently granted to the applicant enabled him to be sufficiently informed about Svenja's well-being and to have contacts with her, and also satisfied his daughter's need to be with her father.

On the appeal of the child's mother, the Düsseldorf Court of Appeal amended this decision on 28 June 1996. It revoked the arrangement concerning the summer holidays but extended the applicant's visiting right to every weekend, after having heard the then six-year old Svenja, her parents and a representative of the Wuppertal Youth Office.

B. The proceedings concerning parental authority

22. On 24 October 1994 the Wuppertal District Court, following an oral hearing on 17 October 1994, granted the parents' divorce on the ground of the breakdown of the marriage and awarded the mother, pursuant to Article 1671 of the Civil Code (see paragraph 32 below), parental authority over Svenja.

23. The District Court found that the issue of parental authority had been determined on the basis of what was in the best interest of the child. Having regard to the statements of the psychological expert in the proceedings concerning the applicant's right of access, the District Court noted that Svenja's mother educated and looked after her daughter in an atmosphere of love and understanding and took an intense interest in ensuring her well-being. According to the District Court, the conditions for the joint exercise of parental authority, requested by the applicant, were not met. In particular, the parents' relations with each other regarding Svenja, as well as their relations with Svenja, were not free of conflict. The applicant was not ready to accept that Svenja's living situation had changed following her parents' separation. As a four-year-old child, she needed a stable life without being torn between different apartments and different styles of education. The

Court noted that, notwithstanding the applicant's interest in Svenja's well-being, he failed to see that his wishes obstructed Svenja's psychological development.

24. On 12 December 1994 the applicant lodged an appeal with the Düsseldorf Court of Appeal.

25. On 15 December 1994 the Court of Appeal requested Svenja's mother as well as the competent Youth Office to comment on the applicant's submissions on appeal. On 19 January 1995 the Elberfeld Diaconate Institution, upon the instructions of the competent Youth Office, submitted a report. The report contained arguments in favour of granting the applicant increased access rights. The parties were given the opportunity to comment upon that report in writing. The applicant stated his preference for an oral hearing.

26. On 9 March 1995 the Düsseldorf Court of Appeal refused to grant the applicant free legal aid and dismissed his appeal.

27. The Court of Appeal observed that the mutual willingness of the parents to co-operate, namely to continue of their own will to bear common responsibility for their child, was an essential condition for a reasonable joint exercise of parental authority. It was obvious that the joint exercise of parental authority by disagreeing parents would be a source of ongoing litigation which, as experience had shown, was detrimental to the child. In the present case the parents, in particular the child's mother, did not accept a sharing of responsibilities. In the proceedings regarding the applicant's right of access, which had been pending since March 1993, the parents had continuously had major disagreements, and the attempt at a dialogue in the framework of the Parents' Counselling Service had finally failed in February 1995. Therefore, if parental authority could solely be exercised by one of the parents, it had to be awarded to the child's mother for the reasons set out in the District Court's judgment. The applicant had not raised any serious objections to the reasoning set out in that judgment.

28. The Court of Appeal also considered that an oral hearing with the parties was not necessary, the relevant facts resulting clearly from the case-file.

29. On 13 June 1995 a panel of three judges of the Federal Constitutional Court refused to entertain the applicant's constitutional complaint.

30. The Federal Constitutional Court considered that the applicant's complaint did not raise any issue of fundamental importance. It recalled that when courts had to decide on the attribution of parental authority following the parents' divorce, they had to balance the positions of both parents without encroaching upon the parental priority in educational matters. In such cases, the courts were not, therefore, subject to the strict conditions in respect of interfering with parental rights. The legislator and, in application of the relevant legal provisions, the courts were entitled to transfer the main

responsibility for the education of a child to one parent if the conditions for the joint exercise of parental authority were not met. Furthermore, according to the Federal Constitutional Court, the Court of Appeal's view that the conditions for ordering the joint exercise of parental authority were not met in the instant case could not be objected to from a constitutional point of view. Moreover, there was nothing to show that the Court of Appeal should have conducted further inquiries.

II. RELEVANT DOMESTIC LAW

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

31. 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 (Court's translation):

Article 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 Article 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*.”

32. Article 1671 §§ 1 and 2 of the Civil Code (Court's translation) provide as follows:

“1. If the parents divorce, the family court decides to which of the parents parental authority over a common child should be awarded.

2. The court makes that determination on the basis of the best interests of the child; consideration shall be given to the child's ties, especially to his or her parents and brothers and sisters.”

B. Legislation on family matters currently in force

33. The statutory provisions on parental authority and access are to be found in the Civil Code (*Bürgerliches Gesetzbuch*). 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 (*Bundesgesetzblatt-BGBl*) 1997, p. 2942), which came into force on 1 July 1998.

34. Article 1626 § 1 reads as follows (Court's translation):

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

35. Exclusive parental authority now represents the exception to the rule of joint exercise of parental authority. Article 1671 (Court's translation) provides:

“Where parents exercising joint parental authority are separated not merely temporarily, each parent may make an application to the family court to be awarded sole parental authority or part of sole parental authority.

The application shall be allowed where

1. the other parent agrees, unless the child has completed the age of fourteen and objects to such sharing or
2. it may be expected that the withdrawal of joint parental authority and its transfer to the petitioner is in the best interests of the child.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicant complained that the German court decisions and the proceedings determining his right of access to his daughter, granting parental authority over his daughter to his former wife and thereby rejecting his request for the joint exercise of parental authority, amounted to a breach of Article 8 § 1 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. Arguments before the Court

1. The applicant

37. The applicant argued that the courts arbitrarily reduced his right of access. As a result of the conduct of the child's mother and the court decisions in the present case, he had been deprived for almost one year of any contact with his daughter. The courts should have made the child's mother aware of her obligation of offering some form of co-operation in raising their child despite the fact that the couple were no longer together. In his opinion, the obstructing of contact by the child's mother should be considered as a dereliction of her primary duty to protect the child's rights, in particular on account of the child's right to a meaningful relationship with both parents. In his submissions, the restriction and almost complete suspension of his right of access constituted a breach of Article 8 of the Convention.

38. As to the decision awarding parental authority over his daughter to the child's mother, the applicant submitted that the parents should have been able to continue, despite their separation, to exercise parental authority jointly. As long as he exercised or tried to exercise his right of access against the will of the child's mother, the conflicts to which the child was exposed affected her in the same way or even more than if joint exercise of parental authority had been granted. The courts failed to take into account the unwillingness of the child's mother to agree to any form of co-operation to the detriment of the other parent and contrary to the best interests of the child. By revoking the joint exercise of parental authority and awarding the sole parental authority to the child's mother, the courts favoured the breakdown of his contacts with his daughter and thus violated Article 8 of the Convention.

39. The applicant further submitted that in both proceedings - those concerning his right of access as well as those concerning parental authority - he had not been sufficiently involved in the decision-making process. In particular, when taking decisions of such an importance, the Court of Appeal should have decided after an oral hearing with the parties and the experts.

2. The Government

40. The Government submitted that the decisions limiting the applicant's right of access were taken in accordance with German law and were necessary, in a democratic society, for the protection of the child's well-being. After having heard the parents, a psychological expert and a social worker, the District Court restricted the applicant's access not only on account of the mother's refusal, but also because of the applicant's conduct. In this respect, the District Court had regard in particular to the strained

relations between the parents which exposed Svenja to a conflict of loyalty. The Court of Appeal could base its decision on the first-instance files, amended by the report of the Elberfeld Diaconate Institution and the parents' written submissions, which confirmed the continuing conflict between them. In the absence of relevant new facts, the Court of Appeal was not required to hold a hearing.

41. The Government further submitted that the interference with the applicant's right to respect for his family life was justified under paragraph 2 of Article 8. In a situation of conflict between the parents, the competent courts could not decide that parental authority be jointly exercised by them, but had to award parental authority to one parent. In the present case, the daughter had been living with her mother since the separation of her parents and, for reasons of continuity, parental authority had to be granted to her. Moreover, on the whole, both parents had been sufficiently involved in the decision-making process. In their view, no hearing before the Court of Appeal appeared necessary, as the main consideration had been that the strained relations between the parents did not permit joint custody.

3. The Commission

42. The Commission considered that, in the circumstances of the present case and in view of the margin of appreciation left to the Contracting States as to the necessity of a given measure, the imposition by the courts of their views as to the best interests of the child was supported by "relevant" as well as "sufficient" reasons. The interference was therefore, in the Commission's view, proportionate to the legitimate aim pursued. The Commission added that where, as in the present case, there was a serious conflict between the interests of the child and those of one of the parents which could only be resolved to the disadvantage of one of them, the interests of the child must prevail under Article 8 of the Convention.

43. Regarding the procedural requirements implied in Article 8 of the Convention to ensure effective respect for family life, the Commission considered that the Court of Appeal could base its decisions on the first-instance files, amended by the report of the Elberfeld Diaconate Institution and the parents' written submissions, which confirmed the continuing conflict between them, and that no hearing before the Court of Appeal appeared to be necessary. In addition, the Commission found that the matter had been determined with special diligence, since the decisions of the Court of Appeal were given on 9 March 1995, that is, not even five months following the hearings before the Wuppertal District Court on 17 October 1994. In these circumstances the Commission was satisfied that the procedural requirements implicit in Article 8 of the Convention were complied with and that the applicant was involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests.

B. The Court's assessment

1. Whether there was an interference with the applicant's right to respect for his family life under Article 8 of the Convention

44. 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 measures deriving from domestic law which hinder such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, amongst others, *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). The impugned measures, namely, the German courts' decisions reducing the applicant's right of access to his daughter and awarding exclusive parental authority to the child's mother, amounted to an interference with the applicant's right to respect for his family life as guaranteed by paragraph 1 of Article 8 of the Convention. This is not in dispute between the parties.

45. Such an interference 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”.

2. Whether the interference was justified

a. “In accordance with the law”

46. The relevant decisions had a basis in national law, namely, Article 1634 §§ 1 and 2 and Article 1671 of the Civil Code as in force at the relevant time.

b. Legitimate aim

47. The Court is satisfied that the contested measures were aimed at protecting the “health or morals” and the “rights and freedoms” of the applicant's daughter and thus pursued legitimate aims within the meaning of paragraph 2 of Article 8.

c. “Necessary in a democratic society”

48. 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 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 margin of appreciation (see *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55; and *Elsholz v. Germany* cited above, § 48).

49. 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 striking such a balance, 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 (see *Elsholz v. Germany* cited above, § 50; and *T.P. and K.M. v. the United Kingdom*, no. 28945/95, § 71, ECHR-...).

50. In the present case the Court finds that the domestic courts carefully considered the questions of access and of awarding parental authority. They confirmed that in principle, for a harmonious development, a child must have contact with both parents, to the extent that this was consistent with the best interests of the child. Thus, it was clear that maximum contact was not an unlimited objective, and that it had to be curtailed wherever the child's welfare required it. Accordingly, the domestic courts found that where, as in the present case, a conflict appeared to exist between the parents, it would not be in the best interests of the child to increase the applicant's access rights or to award joint parental authority. They had regard in this respect, not only to the fact that the child's mother was opposed to any access by the applicant, but also to the applicant's insistence on the recognition of his rights and to his disregard for the child's psychological health (see paragraphs 12 and 23 above). When giving its decisions on access and parental authority, the District Court relied on expert reports and on the evidence given by the parents at hearings and was thus in a better position than the European judges to strike a fair balance between the competing interests involved. Furthermore, the judgments given by the District Court had been upheld by the Court of Appeal (see paragraphs 15 to 17 as well as 26 and 27 above).

51. In the light of the foregoing, and having regard to the assessment of the child's best interests made by the domestic courts, the Court is satisfied that the contested decisions were based on reasons which were not only relevant but also sufficient for the purposes of paragraph 2 of Article 8. It considers that, when reducing the applicant's rights of access and awarding the parental authority to the child's mother, the national authorities acted within the margin of appreciation afforded to them in such matters.

52. Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests

safeguarded by Article 8. The Court must therefore determine whether, having regard to the 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 *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).

53. The Court notes that, in particular in the first-instance proceedings, the applicant, assisted by counsel, had the opportunity to present his arguments in writing and orally. As regards both sets of appeal proceedings before the Düsseldorf Court of Appeal, the Court notes that, contrary to the wishes expressed by the applicant, no hearings were held. It is true that the Court of Appeal considered, *inter alia* on the basis of a further report of 19 January 1995 prepared by the Elberfeld Diaconate Institution, recent factual developments. However, the applicant was given the possibility of putting forward any views in writing which in his opinion would be decisive for the outcome of the proceedings. Furthermore, the report of 19 January 1995 was only one among a number of elements in the assessment of the case. The Court considers therefore that the Court of Appeal could base its decisions on the first-instance files, amended by the report of the Elberfeld Diaconate Institution and the parents' written submissions which confirmed the existence of ongoing litigation between them, and that no hearing before the Court of Appeal appeared necessary.

54. In addition, the Court recalls that in cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter. In the present case the Court considers that the matter was decided with special diligence, on the basis of the necessary material, since the decisions of the Court of Appeal were given on 9 March 1995, that is, less than five months following the hearing before the Wuppertal District Court on 17 October 1994.

55. In these circumstances the Court is satisfied that the procedural requirements implicit in Article 8 of the Convention were complied with and that the applicant was involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests.

56. Accordingly, there has been no violation of Article 8 of the Convention in the present case.

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

57. The applicant complained that the proceedings before the Wuppertal District Court and the Düsseldorf Court of Appeal did not meet the requirements 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. ...”

A. Arguments before the Court

1. The applicant

58. The applicant complained in particular that the courts did not fully establish the relevant facts necessary for a decision on the questions of access and of awarding parental authority, and that they erroneously assessed the evidence adduced by the experts. He further complained that there had been no hearing before the Court of Appeal, although he had applied for such a hearing and a new expert report had been submitted to the Court of Appeal. He also contended that the Court of Appeal failed to make use of all the possibilities at its disposal with a view to ordering a less drastic measure than completely revoking his parental authority over his daughter. According to the applicant, the Court of Appeal equally failed to remind the child's mother of the importance of the child's contacts with both parents.

2. The Government

59. The Government contended that in the proceedings concerning the applicant's right of access to his daughter, there were no relevant new facts requiring the Court of Appeal to hold a hearing. As to the proceedings concerning the exercise of parental authority, the Government submitted that no hearing before the Court of Appeal appeared necessary, as the main consideration had been that the strained relations between the parents did not permit joint custody.

3. The Commission

60. The Commission found no indication that a hearing could have added anything of relevance to the matters to be decided by the Court of Appeal. It therefore considered that in the specific circumstances of the present case, the appeal lodged by the applicant did not raise any questions

of fact or law which could not adequately be resolved on the basis of the various elements at the disposal of the Court of Appeal.

B. The Court's assessment

61. The Court re-iterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the undertakings of the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Furthermore, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, p. 32, § 33). However, the Court must ascertain whether, taken as a whole, the proceedings, including the way in which the evidence was dealt with, were fair within the meaning of Article 6 § 1 of the Convention. The Court recalls in this respect that the difference between the purposes pursued by the safeguards afforded by Article 6 § 1 and Article 8, respectively, may justify an examination of the same set of facts under both Articles (*McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91).

62. The Court recalls further that Article 6 § 1 requires in principle that a hearing be held. The question therefore arises whether a departure from this principle could, in the circumstances of the case, be justified at the appeal stage.

63. The manner in which Article 6 of the Convention applies to proceedings before courts of appeal depends on the special features of the domestic proceedings viewed as a whole. Even where the court of appeal has jurisdiction both over the facts and in law, Article 6 does not always require a right to a public hearing, irrespective of the nature of the issues to be decided. The publicity requirement is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to a trial within a reasonable time and the related need for an expeditious handling of the courts' case-load, which must be taken into account in determining the necessity of public hearings in the proceedings subsequent to the trial at first-instance level. Provided a public hearing has been held at first instance, the absence of a hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue (see, for example, *Helmerts v. Sweden*, judgment of 29 October 1991, Series A no. 212-A, p. 16, § 36; and *Jan-Åke Andersson v. Sweden*, judgment of 29 October 1991, Series A no. 212-B, pp. 44-46, § 23 and §§ 27-29).

64. The Court notes that hearings had been held at first instance. The Wuppertal District Court took into account the opinions of a psychological

expert, a therapeutic pedagogue and a social worker of the Barmen Diaconate Institution. The decisions of the Düsseldorf Court of Appeal, which was competent as to both the facts and the law, were based on the files of the first-instance proceedings, the parties' new written submissions and a new report of 19 January 1995 prepared by the Diaconate Institution, as well as the parties' written comments. The main question raised by the applicant's appeal concerned the strained relations between the parents and the child's well-being. The Court shares the Commission's view that a hearing would not have added anything of relevance to the matters the Court of Appeal had to decide. It therefore finds that in the circumstances of the present case the appeal lodged by the applicant did not raise any questions of fact or law which could not be resolved adequately on the basis of the various elements at the disposal of the Court of Appeal. The Court further notes that the applicant was legally represented throughout the proceedings and had ample opportunity to submit arguments as he saw fit.

65. Accordingly, viewing the domestic judicial proceedings as a whole, the Court finds no breach of Article 6 § 1 of the Convention as regards the alleged unfairness of the proceedings and the lack of an oral hearing before the Düsseldorf Court of Appeal.

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

66. The applicant further complained that he had been a victim of discriminatory treatment in breach of Article 14 of the Convention taken in conjunction with Article 8. He submitted in particular that the German courts, in requiring a common proposal of the parents to be granted the joint exercise of parental authority, discriminate against one of the divorced spouses. 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.”

67. The Commission found nothing in the case-file to substantiate this allegation, which was contested by the Government.

68. The Court shares the view of the Commission and therefore finds no breach of Article 14, taken together with Article 8.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 8 of the Convention;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been no violation of Article 14 of the Convention in conjunction with Article 8.

Done in English, and notified in writing on 5 December 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President