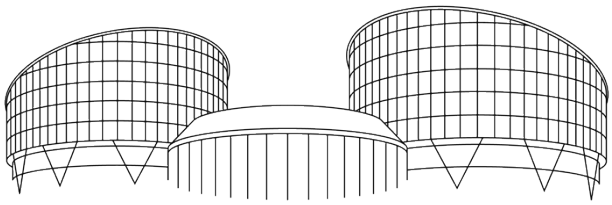

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Applications no. 14833/08 and 15543/08
by Orhan SARICAN
against Germany

The European Court of Human Rights (Fifth Section), sitting on 2 March 2010 as a Chamber composed of:

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above applications lodged on 19 March 2008,

Having regard to the decision of 17 September 2009 to declare the application no. 15543/08 inadmissible,

Having regard to the decision of 13 January 2010 to re-open the proceedings,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Orhan Sarican, is a Turkish national who was born in 1975 and lives in Lippstadt. He was represented before the Court by Ms E. Fronemann, a lawyer practising in Marl.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is the father of a son born out of wedlock on 28 October 2003. In the summer of 2005 the applicant and the mother, who held sole custody over the child, separated. Following the separation, the applicant attacked and threatened the mother and repeatedly violated a restraining order issued against him.

The situation escalated when the mother found a new partner. As from 29 October 2005 the mother prevented the applicant from having further contact with the child. In the beginning of November 2005 the applicant destroyed the front door of the mother's apartment.

On 31 December 2005 the child's mother and her new partner where shot on the street. The child is aware of his mother's death, but not of the circumstances thereof.

Following criminal investigations, one of the applicant's brothers was charged with murder. On 10 November 2006 the Hagen Regional Court (*Landgericht*) acquitted the brother as it could not be established with sufficient certainty that he had committed the crime. Based on the evidence before it, the District Court considered, however, that the crime had been committed either by the applicant, one of his brothers or his brother in law.

Following his mother's death the applicant's son was placed in a children's clinic. Subsequently he was given in the care of a small-scale children's home where he enjoyed regular contacts with his half-sister and maternal grandparents.

On 23 March 2007 the Iserlohn District Court (*Amtsgericht*) refused to award the applicant parental custody. That court considered that it would be contrary to the child's best interests to award custody to the applicant, who remained under the suspicion of having killed the child's mother. The District Court considered that the applicant would not be able adequately to react to the child's grief. It further considered that the applicant would prevent contacts to the child's maternal grandparents and half-sister.

On 19 September 2007 the Hamm Court of Appeal (*Oberlandesgericht*), having heard the applicant, the child and his curator *ad litem*, the Youth-Office, the child's maternal grandparents and the director of the institution in which the child was living, modified the District Court's decision and appointed the lawyer who had previously served as the child's curator as his guardian. The Court of Appeal noted that the child's late mother held sole parental custody under section 1626a § 2 of the Civil Code (see relevant domestic law, below). Referring to the case-law of the Federal Constitutional Court, the Court of Appeal considered that following the mother's death parental custody would under Article 1680 § 2 (2) of the

Civil Code in principle have to be awarded to the child's father, as this generally served the child's best interests. However, this did not apply under the specific circumstances of the present case.

The Court of Appeal firstly considered that the applicant totally lacked understanding for the child's traumatisation which had been caused by his mother's death and the sudden loss of his main attachment figure. According to the court's findings, the applicant was unimpressed by the reports on his son's mental state of health and his needs and had the strong conviction that everything would be well if the child lived with him and his family. During the court hearing, he had declared that the child was "his flesh and blood" and that he was "the only medicine the child needed". The Court of Appeal considered that this attitude and his potential involvement in the mother's death prevented the applicant from offering the child the educational and therapeutic support he needed to overcome his trauma.

The Court of Appeal further considered that the applicant was not able to tolerate the child's attachment to his half-sister and maternal grandparents. He refused contacts to the maternal grandparents and would allow only accompanied visits to the half-sister. However, the contact to these family members, with whom the child enjoyed a strong and enduring emotional relationship, was of utmost importance to the child's welfare. An interruption of or limitation imposed on these contacts would cause a further serious disturbance of the child's well-being

The Court of Appeal finally noted that any emotional bond which might have existed between the applicant and his child, who was twenty months old when his parents separated, had been lost in the course of the massive and violent conflict between his parents and could not be re-established by the sparse contacts, which had taken place since then, as had been demonstrated by the reports on the exercise of contact rights. During his entire stay in the children's home, the child had never asked for his father. This had not changed through the contact visits, during which the applicant had frequently overstepped the boundaries set by his son.

It followed that a guardian had to be appointed. The maternal grandparents, who were in principle able to act as guardians, could not be expected to assume this task because they entertained deep-rooted fears towards the applicant and his family. It followed that an external guardian had to be appointed, who would best be able to ensure contacts with both the child's sister and grandparents and with the applicant.

On 22 October 2007 the applicant lodged a constitutional complaint in which he complained about a violation of his parental rights. He complained, in particular, that the family courts had based their decisions on mere assumptions and had failed sufficiently to examine the facts.

On 12 December 2007 the Federal Constitutional Court refused to accept the applicant's constitutional complaint for adjudication as inadmissible. According to that court, the applicant had failed to substantiate a violation of his parental rights. Insofar as he complained about the Court of Appeal's alleged failure to hear expert opinion, he did not take into account that the courts were not always held to hear expert opinion if they disposed of other, reliable sources of information.

The Federal Constitutional Court further considered that the complaint was unfounded, as the impugned decisions did not violate the applicant's parental rights. The relevant passage reads as follows:

> "On the basis of the principles established by the Federal Constitutional Court, the Court of Appeal has thoroughly established the reasons as to why a transfer of parental custody was not serving the child's welfare, as this was opposed to the concretely established interests of the child.
>
> The Court of Appeal established the facts on the basis of unobjectionable proceedings. It has heard the father, the child and his curator *ad litem*, the Youth-Office, the child's maternal grandparents and the director of the institution in which the child is currently living. These sources of information served as a reliable basis for applying the above-mentioned principles. It was not to be expected that the hearing of expert opinion would have yielded any further results which could have changed the decision taken by the [Court of Appeal's] senate."

B. Relevant domestic law and practice

The relevant provisions of the Civil Code read as follows:

Section 1626a

Parental custody of parents who are not married to each other; declarations of parental custody

"(1) Where the parents, at the date of the birth of the child, are not married to each other, they have joint parental custody if they

declare that they wish to take on parental custody jointly (declarations of parental custody), or

marry each other.

(2) Apart from this, the mother has the parental custody."

Section 1680

Death of a parent or removal of the parental custody

"(1) If the parental custody was held by the parents jointly and if one parent has died, the parental custody is held by the surviving spouse.

(2) Where a parent who, under section 1671 or 1672 (1), had the parental custody alone has died, the family court must transfer the parental custody to the other parent, if this is not inconsistent with the best interests of the child. Where the mother, under section 1626a (2), had sole parental custody, the family court must transfer the parental custody to the father if this serves the best interests of the child."

According to the case-law of the Federal Constitutional Court (decision of 8 December 2005, 1 BvR 364/05), section 1680 § 2 (2) of the Civil Code has to be construed in a way that parental custody must be transferred to the surviving spouse who had factually exercised parental custody over a longer period of time, unless this is inconsistent with the concretely established best interests of the child.

COMPLAINTS

The applicant complained under Article 8 of the Convention about the refusal to award him parental custody over his son. He complained, in particular, that the family courts had failed correctly to weigh the applicant's interests and correctly to establish the facts of the case.

Invoking Article 6 of the Convention, the applicant further complained that the family courts, by basing their decision on the assumption that he had been involved in the killing of the child's mother, had violated his rights to a fair trial and to the presumption of innocence.

THE LAW

1. Alleged violation of Article 8 of the Convention

The applicant complained about the outcome and alleged procedural shortcomings of the proceedings on parental custody. He invoked Article 8 of the Convention, which provides, insofar as relevant:

> "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."

The applicant complained, in particular, that the family courts had failed to examine the long-term effects of the child's permanent separation from his biological father and his ability to raise the child. Furthermore, the Court of Appeal had held the applicant's own statements against him. It was not true that the applicant was opposed to contacts with the child's sister, he was merely afraid of the child being abducted.

The Court observes that the denial of parental custody over his son amounted to an interference with the applicant's right to respect for his family life as guaranteed by Article 8 § 1. Such an interference entails a violation of Article 8 unless it is "in accordance with the law", has an aim or

aims that is or are legitimate under Article 8 § 2 and is "necessary in a democratic society" for the aforesaid aim or aims.

The decision at issue had a basis in national law, namely Article 1680 § 2 (2) of the Civil Code, and was aimed at protecting the best interests of the child, which is a legitimate aim within the meaning of paragraph 2 of Article 8.

In determining whether the refusal to award parental custody 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 Article 8 § 2 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 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 *Sahin* and *Sommerfeld v. Germany* [GC], nos. 30943/96 and 31871/96, § 64 and § 62 respectively, ECHR 2003-VIII, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V; and *Görgülü v. Germany*, no. 74969/01, § 41, 26 February 2004.

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. In particular when deciding on custody, the Court has recognised that the authorities enjoy a wide margin of appreciation (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII, *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I; and *Görgülü*, cited above, § 42).

Turning to the circumstances of the present case, the Court observes that the Hamm Court of Appeal, which partly overruled the first instance court, based its decision to reject the applicant's request for parental custody on three main considerations: Relying on the applicant's own statements during the court proceedings, it firstly esteemed that the applicant completely lacked understanding for the child's mental state of health and his therapeutic needs following his mother's sudden death. The Court of Appeal further considered that the applicant was not willing to allow contact with the maternal grandparents, and would allow only accompanied contact with the child's half sister. According to the Court of Appeal, the maintenance of these contacts was of utmost importance for the child's well-being. The Court of Appeal finally noted that any emotional bond which might have existed between the applicant and his son, who was twenty months of age at the time of his parents' separation, had been lost in the course of the violent conflict between his parents.

The Court cannot find that this assessment is arbitrary or that it did not adequately take the applicant's interests into account. In this respect the Court observes, in particular, that the Court of Appeal, contrary to the District Court, did not base its decision on the assumption that the applicant was involved in the killing of the child's mother, but merely considered that the attitude the applicant had displayed before the Court and his potential involvement in the mother's death prevented him from offering the child the necessary educational and therapeutic support.

In assessing whether the reasons adduced by the domestic courts were also sufficient for the purposes of Article 8 § 2, the Court will notably have to determine whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests.

The Court notes, at the outset, that the applicant, assisted by counsel, was in a position to put forward all his arguments in favour of securing custody rights both personally and in written form.

The Court further notes that the family courts did not consult a psychological expert on the question of distribution of parental custody. However, as a general rule it is for the national courts to assess the evidence before them, including the means to ascertain the relevant facts. It would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of parental custody, but this issue depends on the specific circumstances of the case (see, *mutatis mutandis*, *Sommerfeld*, cited above, § 71 and *Wildgruber (I) v. Germany* (dec.), no. 32817/02, 16 October 2006).

Turning to the circumstances of the instant case, the Court observes that the evidential basis for the Court of Appeal's decision included, further to the applicant's own submissions, the statements of the child, his curator *ad litem*, the Youth-Office, the child's maternal grandparents and the director of the institution in which the child was living. The Court of Appeal further consulted written reports on the visiting contacts between the applicant and his son. The Court considers that the family courts, having had the benefit of direct contact to all persons concerned by the proceedings, were best placed in a position to decide whether the specific circumstances of the case called for the hearing of expert opinion. Having particular regard to the fact that the child's own interests were safeguarded by the appointment of a curator *ad litem*, the Court finds it acceptable that the family courts refrained from hearing expert opinion in the instant case.

In the light of the foregoing, and having regard to the wide margin of appreciation enjoyed by the domestic authorities in custody issues, the Court is satisfied that the denial of parental custody was based on reasons which were not only relevant but also sufficient for the purposes of paragraph 2 of Article 8 and that the decision-making process satisfied the requirements of that provision. It follows that the applicant's complaint

under Article 8 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. Alleged violation of Article 6 of the Convention

The applicant further alleged that the family courts, by basing their decision on the assumption that he had been involved in the mother's death, had violated his right to a fair trial and the presumption of innocence. He relied on Article 6 of the Convention which, insofar as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Court observes, at the outset, that the applicant's complaint does not fall within the ambit of Article 6 § 2 of the Convention, as the impugned decisions did not concern any criminal charge brought out against the applicant. It follows that the applicant's complaint under Article 6 § 2 is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

Insofar as the applicant relies on the right to fair civil proceedings under Article 6 § 1 of the Convention the Court, having addressed the issue of the fairness of the proceedings under Article 8, finds that the applicants submissions do not disclose any appearance of a violation of his Convention rights.

It follows that also this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President