



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

THIRD SECTION

CASE OF GÖRGÜLÜ v. GERMANY

(Application no. 74969/01)

FINAL

26/05/2004

JUDGMENT

*This version was rectified in accordance with Rule 81
of the Rules of Court on 24 May 2005*

STRASBOURG

26 February 2004

*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 Görgülü v. Germany,

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

Mr L. CAFLISCH, *President*,
Mr G. RESS,
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 20 March 2003 and 5 February 2004,

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

PROCEDURE

1. The case originated in an application (no. 74969/01) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national of Zaza origin, Kazim Görgülü (“the applicant”), on 18 September 2001.

2. The applicant, who had been granted legal aid, was represented by Ms A. Zeycan, a lawyer practising in Bochum. After admissibility he was also represented by Mr P. Koepfel, a lawyer practising in Munich. The German Government (“the Government”) were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*.

3. The applicant alleged in particular that a court decision refusing him access to and custody of his son violated his right to respect for his family life under Article 8 of the Convention. He also complained about the unfairness of the court proceedings under Article 6 § 1 of the Convention.

4. The application was allocated to the Third 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.

5. By a decision of 20 March 2003, the Court declared the application partly admissible.

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

7. The Turkish Government, having been informed of their right to intervene (Article 36 § 1 of the Convention and Rule 61 § 2 of the Rules of Court), declared that they would not submit any observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Factual background

8. The applicant was born in 1969 and lives in Krostitz, Germany.

9. He is the father of the child Christofer, born out of wedlock on 25 August 1999 in Leipzig.

10. The applicant met the child's mother, (Ms M.) in 1997. In 1998, they planned to get married, but Ms M. cancelled the wedding. Nevertheless, their relationship continued until the beginning of 1999. The applicant found out about Ms M.'s pregnancy in May 1999. According to the applicant, he and Ms M. agreed at that time that the applicant would take care of the child. Subsequently, the applicant inquired after Ms M. and her unborn child on a weekly basis, but was not able to contact her as from July 1999.

11. Directly after birth on 25 August 1999, Ms M. gave Christofer for adoption. The Wittenberg Youth Office (*Jugendamt*), as Christofer's curator (*Amtsvormund*), immediately informed Mr and Ms B., who were registered as prospective adoptive parents and who had previously adopted a child, that Christofer had been given for adoption. They fetched Christofer from hospital four days later and took him home.

12. In October 1999 the applicant heard about Christofer's birth and Ms M.'s giving the child for adoption. In November 1999, he went to the Leipzig Youth Office with the intention of adopting Christofer himself. Since Ms M. had not given any details regarding the paternity, the Youth Office refused to give the applicant any information regarding Christofer.

13. On 30 November 1999 Ms M. accompanied the applicant to the Youth Office and confirmed that he was Christofer's father, whereupon the applicant obtained his son's birth certificate.

14. On 12 January 2000 following an official acknowledgement of paternity and a request for custody rights on 10 January 2000, the applicant initiated paternity proceedings before the Wittenberg District Court.

15. On 20 June 2000 after the applicant had acknowledged paternity a second time on 2 May 2000 and submitted to a medical blood analysis, the Wittenberg District Court confirmed that he was Christofer's father.

16. Since December 1999 the applicant has been married under Islamic law to Ms C, a German national. He lives with his wife and one of her two children.

B. Custody and access proceedings

17. On 10 January 2000 the applicant requested the Wittenberg District Court to transfer custody of Christofer to him.

18. On 30 August 2000 the Wittenberg District Court appointed Ms F. as curator *ad litem* (*Verfahrenspfleger*) to represent Christofer's interests in the custody proceedings.

19. During a hearing held on 25 September 2000 the District Court decided that a meeting between the applicant and Ms C. and Mr and Ms B. should be arranged and that first contacts between the applicant and Christofer should be planned and implemented. On 13 October 2000 the applicant and Ms C. met Mr and Ms B. Up to December, four meetings took place between the applicant and his son in the presence of Christofer's foster parents. Since December 2000 no more meetings have taken place since Christofer was ill and his foster parents considered such meetings to be too much of a burden for a young child.

20. On 11 January 2001 the applicant lodged an application with the Wittenberg District Court in order to obtain access to his son. Ms F. was also appointed curator *ad litem* for the purposes of the access proceedings.

21. On 8 February 2001 the Wittenberg District Court, by way of an interim measure, ordered that the applicant should have access to Christofer on six consecutive Saturdays for first one, later two, then three, and then eight hours.

22. On 16 February 2001, following the Youth Office's appeal, the Naumburg Court of Appeal suspended the execution of the District Court's interim decision pending proceedings before it. The applicant was permitted to see Christofer once a month for two hours in the presence of Mr and Ms B. or a third person.

23. On 9 March 2001 the Wittenberg District Court decided to transfer the sole custody of Christofer to the applicant pursuant to section 1672 (1) of the Civil Code (*Bürgerliches Gesetzbuch*). Based on Ms F.'s observations, on written submissions by and interviews with the parties as well as on a psychological report submitted by a certified pedagogue (pedagogic psychology) of the Sachsen-Anhalt Regional Youth Office (*Landesjugendamt*) dated 30 January 2001, the District Court was convinced that the applicant was willing and able to give Christofer a home and family and that granting the applicant sole custody was in the child's best interest. The District Court recalled that during the meetings between the applicant and Christofer, the child had shown no aversion towards the applicant and had not suffered any harm. Contacts between the applicant and Christofer in general therefore did not pose a threat to the child's well-being. The District Court stated that such contacts could already have taken place much earlier if the competent authorities had not obstinately pursued the adoption proceedings, thereby preventing any contact between

father and child. The District Court found that, should Christofer stay with his foster parents and later find out about his background, he risked being subjected to an identity conflict. Such a conflict would pose a greater threat to the child's well-being than separating him from his foster family after what might eventually amount to two years, in particular with regard to Christofer's stable state of mind. While noting that this decision on custody would not have any instant practical effects, in particular not on the rights of the foster parents, the District Court found it important to adapt Christofer quickly to the new situation. It considered it imperative that the meetings and contacts that had begun to take place in September 2000 should continue, in order to prevent a change of residence from becoming a sudden, incisive break in Christofer's life. It also found that if the child should move in with his father, he should continue to pay frequent visits to his foster family. In similar cases, such visits had led to positive results.

The District Court furthermore mentioned that the Youth Office was represented by the same lawyer who represented Christofer's foster parents in parallel proceedings.

24. On 10 April 2001 the Naumburg Court of Appeal, upon the Youth Office's appeal and a second appeal lodged by Mr and Ms B., revoked the interim decision on access of 8 February 2001. It found that following the Wittenberg District Court's decision granting the applicant custody of Christofer, which included unlimited access, the object of the dispute had disappeared.

25. On 27 April 2001 the Naumburg Court of Appeal, upon the Youth Office's appeal against the District Court's custody decision, decided to suspend the execution of the custody decision until it had decided on the appeal. It also discharged Ms F., Christofer's curator *ad litem*, finding that she had exceeded her authority and was no longer impartial. Ms E., a social worker, was appointed new curator *ad litem*.

26. On 19 June 2001 the Wittenberg District Court, by way of an interim measure, granted the applicant access to his son on three days for two hours respectively and starting the end of June¹ 2001, on every Saturday for eight hours. It ordered Mr and Ms B. to co-operate and obliged them to find substitute dates for any cancelled meeting. As in the custody proceedings, Ms F. was discharged and Ms E. was appointed as new curator *ad litem*.

27. On 20 June¹ 2001 the Naumburg Court of Appeal revoked the District Court's decision of 9 March 2001 and rejected the applicant's request for custody of Christofer. It also suspended the applicant's access to his son until 30 June 2002.

In its decision, the Court of Appeal found that transferring custody to him was not only not in the child's best interest, but even detrimental to his well-being. In this respect it had regard to the psychological report of the

¹ Rectified on 24 May 2005: "July" has been changed to "June".

Sachsen-Anhalt Regional Youth Office, a medical report of a paediatrician dated 19 January 2001 and a report of Ms E. dated 6 June 2001 that it had previously ordered to examine the child's well-being and the housing facilities of both the applicant and the foster parents. It also relied on its own experience in such matters and on its knowledge of the facts.

The Court of Appeal considered that the applicant was in a position to care for Christofer. It noted that he was married to Ms C., a German national, who had already raised two children herself and who would support him. The applicant could also offer other objective assets for raising a child, i.e. a house with a separate room for Christofer. The Court of Appeal was also convinced that although he had never gone to school himself nor completed any higher education, the applicant was, with the assistance of Ms C., able to further Christofer's education.

However, separating the child from his foster family was not in Christofer's best interest, as a deep social and emotional bond had evolved between the child and his foster family. Christofer had lived with Mr and Ms B. for one year and ten months which, in the court's view, constituted an "infinite amount of time" (*"einen unendlichen Zeitraum"*) for a child of Christofer's age. In this situation, a separation from Mr and Ms B. would lead to severe and irreparable psychological damage for the child, especially as he had already experienced the separation from his natural mother, which in itself had been a traumatic event. It would be impossible to convey the necessity of a separation to such a young child, especially as the applicant was a stranger to Christofer.

The Court of Appeal regarded the above reports as sufficient to assess the case before it and therefore found that there was no need for further expert opinions, as there was no reason to expect that they would come to different conclusions in favour of the applicant. It found that any remaining doubts as to this point were to the applicant's detriment (*"zu Lasten des Kindesvaters"*).

Moreover, the Court of Appeal, based on the above-mentioned psychological report and the report of the curator, found that the suspension of access was in Christofer's best interest. Having regard to the unrest and insecurity occasioned by the unresolved legal dispute, any contact with his natural father would be a physical and psychological strain for the child. Suspending access for a certain time would allow Christofer to regain the necessary inner repose and emotional balance.

28. On 31 July 2001 the Federal Constitutional Court, sitting as a panel of three judges, refused to entertain the applicant's constitutional complaint.

C. Subsequent developments

1. Custody and access proceedings

29. Since then, the applicant has initiated new proceedings before the District Court requesting custody and access. On seven different occasions, the applicant attempted to contact Christofer, but these attempts remained unsuccessful due to the refusal to cooperate or absence of Mr and Ms B. Two hearings scheduled for February and July 2003 were cancelled. On 22 July 2003, the District Court appointed Ms E. as curator *ad litem* for both custody and access proceedings. On 28 October 2003 the Naumburg Court of Appeal dismissed the applicant's appeal.

On 30 September 2003 it rejected the applicant's request for an interim decision regarding the right to access due to the tense relationship between the applicant and the foster parents and the unclear legal situation. On 27 November 2003 a first hearing took place before the District Court.

2. Adoption proceedings

30. On 19 January 2001 the Wittenberg District Court received Mr and Ms B.'s request for permission to adopt Christofer. The Wittenberg Youth Office, acting as Christofers legal representative, had previously given its consent to the adoption. On 28 December 2001, following the applicant's refusal to consent to the adoption of Christofer, the District Court decided to replace his missing consent by court order. On 30 October 2002 the Dessau Regional Court dismissed the applicant's request to stay the adoption proceedings pending the outcome of the custody and access proceedings. On 24 July 2003 the Naumburg Court of Appeal granted the applicant's appeal and revoked the Regional Court's decision. Although the Court of Appeal refused to suspend the adoption proceedings pending the proceedings before this Court, it noted that the competent domestic courts were bound to take into account a possible judgment of this Court.

II. RELEVANT DOMESTIC LAW

31. The statutory provisions on custody and access are to be found in the Civil Code.

Section 1626 (1) reads as follows:

“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.”

According to section 1626 a (2), the mother of a child born out of wedlock exercises custody if no other agreement has been reached between the parents. In such a case, provided that the parents have separated not only

temporarily, the father may, with the mother's consent, request that custody of a child be transferred to him entirely or in part pursuant to section 1672 (1). If the mother's custody has been suspended for an indefinite time, as is the case if she consents to the child's adoption (section 1751 (1)), the family court shall transfer custody to the other parent, if this is in the child's best interest (section 1678 (2) in connection with section 1751 (1)).

Pursuant to section 1632 (1), custody includes the right to demand that a child be returned from anyone who unlawfully withholds this child. If parents want to remove their child from a foster family after a lengthy period of time, the family court may order that the child continue to live at the foster home, if and as long as a removal would endanger the child's well-being (section 1632 (4)).

According to section 1684, 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 be exercised in the presence of a third party, such as a Youth Office authority or an association (section 1684 § 4).

Section 1696 postulates that the guardianship and family courts are obliged to amend their decisions, if this is necessary for convincing reasons profoundly linked to the well-being of the child.

32. Proceedings in family matters are governed by the Act on Non-Contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*).

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.

Under section 50, the court shall appoint a curator *ad litem* to represent the under aged child if this is necessary in order to protect the child's interests.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained that the decision of the Naumburg Court of Appeal refusing him custody of and access to his child Christofer, 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.”

34. The Government requested the Court to find no violation of this provision.

A. Whether there was an interference

35. The Court notes that the parties agreed that the decision refusing the applicant custody of and access to his child amounted to an interference with his right to respect for his family life, as guaranteed by Article 8 § 1.

36. Any such interference will constitute a violation of this Article unless it is “in accordance with the law”, pursues an aim or aims that are legitimate under paragraph 2 of Article 8 and can be regarded as “necessary in a democratic society”.

B. Whether the interference was justified

37. The parties did not dispute that the decision at issue had a basis in national law, namely sections 1678 § 2 and 1684 § 4 of the Civil Code, and that it was aimed at protecting the best interests of the child, which is a legitimate aim within the meaning of paragraph 2 of Article 8 (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 20, § 44).

38. It therefore remains to be examined whether the refusal of custody and¹ access can be considered “necessary in a democratic society”.

¹ Rectified on 24 May 2005: “custody and” has been added.

*1. The parties' submissions***(a) The applicant**

39. The applicant submitted that the Naumburg Court of Appeal's decision of 20 June 2001 violated his right to family life by preventing him from living with and having access to his son although his ability and willingness to care for Christofer were not in dispute. He found it incomprehensible that the foster parents' rights were put above his own as Christofer's natural father and maintained that by not taking Christofer's right to know his real family into account, the Court of Appeal had not acted in the child's best interest. The applicant further underlined that to this day, he has had almost no contact with Christofer due to Mr and Ms B's unwillingness to cooperate and that the German courts and authorities were doing nothing to help him. He finally complained that the proceedings before the Naumburg Court of Appeal were not fair.

(b) The Government

40. The Government considered the Court of Appeal's arguments to be reasonable. In particular they found it sensible to attach greater importance to the child's interest in maintaining the parent-child relationship that had developed with his foster parents, than to the applicant's interest in being united with his child. The question of when the amount of time spent living in a family would pose an obstacle to a change in the family situation could not be answered in absolute terms but only in relation to the child's age and the beginning of his life with the foster family. The Government agreed with the Court of Appeal that separating Christofer from his foster family after he had already been separated from his natural mother after childbirth constituted a second rift in his life which could have adverse effects on his further development. Due to the risks that a separation would pose for Christofer's welfare and the fact that nothing indicated that the child's situation would change in the near future, the Court of Appeal was not required to consider whether letting Christofer remain with the foster family temporarily could have reduced the above-mentioned harm to an acceptable level. There was also no need to examine the applicant's abilities to alleviate the mental harm occasioned by a separation from the foster family, as even an ideal parent would not be able to keep the harm caused within reasonable limits.

As regards the suspension of the applicant's right to access, the Government, bearing in mind that decisions to limit a parent's access to his or her child were always subject to a stricter examination, found that this was a necessary measure within the meaning of Article 8 § 2. They agreed with the reasoning of the Court of Appeal in that the conflicts between the foster parents and the applicant had caused disquiet and uncertainty in the

foster family and that this tension was felt by Christofer. A continuation of this situation would have posed a danger for the child's welfare. In particular, given that a parent's right of access to his or her child always presupposed a certain level of cooperation between all the parties concerned and that the lack of such cooperation had been an emotional strain on everybody involved, the Government did not find it unreasonable that the parties be separated for one year in order to calm their emotions.

The Government finally observed that the applicant's interests had been sufficiently taken into account in the decision making-process. The applicant participated in court proceedings, was heard before court in person and was granted legal aid.

2. The Court's assessment

(a) General principles

41. In determining whether the refusal of custody and access 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 *Sahin and Sommerfeld v. Germany* [GC], nos. 30943/96 and 31871/96, § 64 and § 62 respectively, ECHR 2003-VIII, and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V).

42. 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. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards 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 a young child and one or both parents would be effectively curtailed (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII, and *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I).

43. Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (*Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 169, ECHR 2000-VIII, P., *C. and S. v. the United Kingdom*, no. 56547/00, § 117, ECHR 2002-VI).

(b) Application in the present case

i. Custody

44. The Court notes that in the present case, in its decision of 20 June 2001, the Court of Appeal considered that although the applicant was in a position, together with his wife who had already raised two children, to care for Christofer, granting the applicant custody would not be in Christofer's best interest, as a deep social and emotional bond had evolved between the child and his foster family and a separation from the latter would lead to severe and irreparable psychological damage on the part of the child. The Court also notes that in its decision of 9 March 2001, the Wittenberg District Court had, on the contrary, considered it in the best interest of Christofer that his father obtains custody of him.

45. The Court is aware that the fact that the applicant and Christofer have at no time lived together may be of relevance when striking a balance between the conflicting rights and interests of the applicant and the rights of Mr and Ms B. and Christopher. The Court recalls its case-law, which postulates that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed (see *Keegan* cited above p. 19, § 50, and *Kroon and Others v. the Netherlands*, judgment of 20 September 1994, Series A no. 297-C, p. 56, § 32). Article 8 of the Convention thus imposes on every State the obligation to aim at reuniting a natural parent with his or her child (see *K. and T. v. Finland* [GC], no. 25702/94, § 178, ECHR 2001- VII, *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, p. 1008, § 78, and *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no. 130, p. 36, § 81). In this context, the Court also notes that effective respect for family life requires that future relations between parent and child not be determined by the mere passage of time (see, *mutatis mutandis*, *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 69, 24 April 2003, and *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 29, § 65).

46. The Court concedes that an instant separation from Christofer's foster family might have had negative effects on his physical and mental condition. However, bearing in mind that the applicant is Christofer's biological parent and undisputedly willing and able to care for him, the Court is not convinced that the Naumburg Court of Appeal examined all possible solutions to the problem. In particular, that court does not appear to have examined whether it would be viable to unify Christofer and the applicant under circumstances that would minimise the strain put on Christofer. Instead, the Court of Appeal apparently only focussed on the imminent effects which a separation from his foster parents would have on the child, but failed to consider the long-term effects which a permanent separation from his natural father might have on Christofer. The solution envisaged by the District Court, namely to increase and facilitate contacts between the applicant and Christofer, who would at an initial stage continue to live with his foster family, was seemingly not taken into consideration. The Court recalls in this respect that the possibilities of reunification will be progressively diminished and eventually destroyed if the biological father and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur (*K. and T. v. Finland*, cited above, § 179).

47. In the light of the above, the Court finds that there was a violation of Article 8 of the Convention.

ii. Access

48. As regards the suspension of access rights, the Court notes that the Naumburg Court of Appeal based its decision on the physical and psychological strain for the child that any contact with his natural father would mean. The Court of Appeal had thereby regard to the unrest and insecurity occasioned by the unresolved legal dispute and concluded that suspending access for a certain time would allow Christofer to regain the necessary inner repose and emotional balance. The Court observes that until June 2001, the applicant was able to see his child on merely six occasions for several hours at a time. The Court of Appeal's decision rendered any form of family reunion and the establishment of any kind of further family life impossible. In this context, the Court recalls that it is in a child's interest for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances (see *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX, *Johansen*, cited above, pp. 1008-1009, § 78, and *P., C. and S. v. United Kingdom*, cited above, § 118). There is no evidence of such exceptional circumstances in the present case.

49. Thus, the Naumburg Court of Appeal, by revoking all decisions that would have granted the applicant access to his son, did not fulfil the positive obligation imposed by Article 8 to unite father and son. The Court notes that

even after the one year had elapsed in June 2002, the applicant's attempts to obtain access to his son have still not been successful.

50. Accordingly, and bearing in mind the more narrow margin of appreciation as regards restrictions on parental rights of access (see paragraph 42 above), the Court considers that the reasons which the Naumburg Court of Appeal relied on to suspend the applicant's access to his child for one year, were insufficient to justify such a serious interference in the applicant's family life. Notwithstanding the domestic authorities' margin of appreciation, the interference was therefore not proportionate to the legitimate aims pursued.

51. Consequently, there has been a violation of Article 8 of the Convention.

iii. Decision-making process

52. The Court recalls also that, 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; *Buscemi v. Italy*, no. 29569/95, § 58, ECHR 1999-VI, and *Elsholz*, cited above, § 52).

53. The Court notes that the applicant, assisted by counsel, had the opportunity to present his arguments in writing and orally. He was placed in a position enabling him to put forward all arguments in favour of obtaining custody and access rights and he also had access to all relevant information which was relied on by the courts. The Court further notes that the evidential basis for the Court of Appeal's decision included the evidence submitted before the District Court, i.e., the statements of the parties, of the child's natural mother, the observations of Ms F, the first curator *ad litem*, and the psychological report of Ms K. from the *Sachsen-Anhalt* Regional Youth Office from 30 January 2001. The Court of Appeal additionally ordered a report as regards the child's well-being and the applicant's and foster parents' housing facilities which the new curator *ad litem*, Ms E., presented on 6 June 2001.

54. In these circumstances, and bearing in mind that as a general rule it is for the national courts to assess the evidence before them (*Sahin* and *Sommerfeld*, cited above, § 73 and § 71 respectively), 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, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests.

55. Accordingly there has been no violation of Article 8 of the Convention in this respect.

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

56. The applicant complained about the unfairness of the proceedings before the Naumburg Court of Appeal. He relies on Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by an independent and impartial tribunal...”

The applicant criticised the expert reports that the Court of Appeal had relied on. He complained in particular that in the process of preparing her expert opinion, the second curator *ad litem*, Ms E., had not spoken with him directly and had visited his house in his absence. As regards the psychological report submitted by a certified pedagogue, the applicant referred to a critical report submitted by the first curator *ad litem*, Ms F., in answer to this report, in which she gave a detailed account of why the psychological report had not been prepared with the diligence required. He also complained about the allegedly unreasonable dismissal of Ms F., the first curator *ad litem* involved in the proceedings before the District Court.

The applicant further submitted that the counsel representing the Youth Office in the appeal proceedings was at the same time representing Christofer's foster parents in the adoption proceedings, which to his opinion led to a considerable conflict of interests.

57. The Government underlined that the applicant had participated in court proceedings and that his submissions had been accepted and considered by the Court of Appeal. He was heard before court in person and was granted legal aid. Contrary to the applicant's allegations, Ms E., the second curator *ad litem*, met with the applicant before preparing her expert report. As regards the dismissal of Ms F. as curator *ad litem*, the Government maintained that the applicant was barred from regarding this as a violation of his rights, as Ms F. had been appointed to protect Christofer's rights, but not those of the applicant.

As regards the allegations that the legal counsel representing the Youth Office in appeals proceedings also represented the foster parents in other proceedings, the Government submitted that this complaint had not been raised before the Federal Constitutional Court, so that with regard to this matter, the applicant did not exhaust the remedies available under German law. In any event, the legal counsel concerned was representing Christofer in court proceedings, who was legally represented by the Youth Office.

Even if the applicant's allegations were true, the Government failed to see how this could violate his rights under the Convention.

58. The Court reiterates 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 act as a court of appeal and 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, *Elsholz*, cited above, § 66, *M.C. v. Finland* (dec.), no. 28460/95, 25 January 2001). 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, *Hoppe v. Germany*, no. 28422/95, § 61, 5 December 2002, *Buchberger v. Austria*, no. 32899/96, § 49, 20 December 2001, *Nekvedavicius v. Germany* (dec.), no. 46165/99, 19 June 2003).

59. The Court has found above that the applicant was sufficiently involved in the decision-making process for the purposes of Article 8 of the Convention. The Court finds no indication that the procedures or decisions adopted by the domestic courts in this case infringed the fairness requirement at the heart of Article 6 § 1 of the Convention, in particular as the applicant, represented by legal counsel, had the opportunity to challenge the contents of the expert opinions during the court proceedings. As regards the legal representation of the Youth Office and the foster parents by the same counsel, albeit in different proceedings, the Court notes furthermore that in its decision of 9 March 2001 the Wittenberg District Court had already taken notice of and mentioned this double representation. There is no indication that this element had any influence on the German courts' decisions. Moreover, the applicant does not appear to have given weight to this complaint, as he did not raise it before the Federal Constitutional Court.

60. In sum, the Court finds that with regard to the proceedings before the Court of Appeal, there has been no violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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. Damages

62. The applicant requested 18 253, 69 Euros (EUR) in compensation for the loss of child benefits and homeowners' child support (*Baukindergeld*) since Christofer's birth, both of which Mr and Ms B. had received for raising Christofer. With regard to the homeowners' child support, the applicant notes that when building his house, he had had greater expenses as he had included enough space for Christofer. As the applicant only worked part-time and did not take on certain work offers in order to be available for Christofer and the court proceedings also had considerable negative effects on his health and ability to concentrate, he also requested damages for the earnings thus lost (11 572, 93 EUR). The applicant also sought compensation for non-pecuniary damage, pointing to the distress and frustration he had felt as a result of the denial of custody over and access to his child. He left the issue of quantum to the Court's discretion.

63. The Government disputed that the loss of child benefits and homeowners' child support were damages in the above sense, as both were State subsidies paid to families with children in order to cover higher expenses actually caused by one or more children living in a household. As Christofer never lived with the applicant, these costs never arose. According to the Government, the applicant could also not request damages for the loss of earnings, as the decision to work part-time was taken by the applicant in order to be with his son and was thus not inspired by the refusal to grant him custody and access.

64. The Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the

Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (*Scozzari and Giunta*, cited above, § 249). In the case at hand this means making it possible for the applicant to at least have access to his child.

65. As regards pecuniary damage the Court recalls that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (*P., C. and S. v. United Kingdom*, cited above, § 148). It considers that the alleged pecuniary damage was not caused by the violation which has been found. It is of the opinion, however, that the applicant undoubtedly suffered non-pecuniary damage as a result of being separated from his child and also in view of the restrictions on his access rights, which is not sufficiently compensated by the finding of a violation of the Convention. Making an assessment on an equitable basis, as required by Article 41, the Court awards the applicant 15 000 EUR.

B. Costs and expenses

66. The applicant claimed 2 538, 23 EUR for costs and expenses incurred before the German courts and the Court, namely 2 189, 02 EUR for travel expenses to see his lawyers, 302, 68 EUR for mail and telephone costs and 46, 47 EUR for other costs. He submitted a detailed list of the claims.

67. The Government did not comment.

68. The Court reiterates that an award under this head may be made only in so far as the costs and expenses were actually and necessarily incurred in order to avoid, or obtain redress for, the violation found. In particular, no compensation can be awarded for costs and expenses which would have incurred irrespective of whether the proceedings in issue had violated the Convention or not (see, *mutatis mutandis*, *P. C. and S. v. United Kingdom*, cited above, § 148). Moreover, only those fees and expenses which relate to a complaint declared admissible can be awarded (*K.A. v. Finland*, no. 27751/95, 14 January 2003, § 154).

69. The Court notes that the applicant has been granted legal aid before the Court. It further observes that the applicant did not claim any compensation of costs for his legal representation before the domestic courts. In these circumstances, the Court is not called upon to make an award under this head.

70. As regards the requested additional sums, the Court notes that they concern the applicant's own costs and expenses.

The Court has found a violation of Article 8 as regards the denial of custody and access rights, but no violation of Articles 6 and 8 as to the alleged procedural shortcomings. Deciding on an equitable basis, the Court awards the applicant the sum of 1 500 EUR.

C. Default interest

71. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention in respect to the refusal of custody and access rights;
2. *Holds* that there has been no violation of Article 8 of the Convention as to the decision-making process;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
4. *Holds*
 - (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, 15 000 EUR (fifteen thousand euros) in respect of non-pecuniary damage and 1 500 EUR (one thousand five hundred euros) of costs and expenses, plus any tax that may be chargeable ;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 February 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Lucius CAFLISCH
President