AS TO THE ADMISSIBILITY OF

Application No. 29567/95
by Bernhardt AIGNER
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 November 1995 by Bernhardt AIGNER against Germany and registered on 19 December 1995 under file No. 29567/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1954, is a German national and resident in Augsburg. He is medical practitioner by profession. In the proceedings before the Commission, he is represented by Mr. T. Budde, a lawyer practising in Reutlingen.

A. Particular circumstances of the case

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

The applicant had a relationship with Ms. T.L., a Finnish national, from which a girl, Marjut, was born in 1985. Marjut has Finnish nationality. The applicant recognised his paternity of Marjut.

On 17 August 1990 the applicant and Ms. T.L. had a notary legalise an agreement between them according to which, in case of termination of their relationship, Marjut should live with the applicant. According to the applicant's and her mother's statements, Marjut had been living in their common household in Tübingen since her birth, she had been visiting a German kindergarten and only spoke German. Furthermore, Ms. T.L. was very engaged in her profession, and to pursue a profession was more important to her than to the applicant. The certified document further contained the applicant's request,

addressed to the District Court (Amtsgericht), acting as guardianship court (Vormundschaftsgericht) in Augsburg, the applicant's main place of residence, for Marjut's legitimation (Ehelicherklärung) in accordance with SS. 1723 et seq. of the Civil Code. Ms. T.L., in her position both as Marjut's legal representative and her mother declared her agreement with the said request. According to a final clause of the certified document, the notary informed the applicant and Ms. T.L. about the legal implications of the requested legitimation, inter alia, that Marjut would acquire the position of a legitimate child of the applicant and that Ms. T.L. would lose her right to custody.

On 8 January 1992 the Augsburg District Court, referring to SS. 1723 et seq. of the Civil Code (Bürgerliches Gesetzbuch), granted the applicant's request for Marjut's legitimation. The District Court, having heard the applicant and Marjut, found that they had a natural and loving relationship. Moreover, according to the applicant's statements, he had occasionally taken care of Marjut. The District Court further noted the certified statements according to which the mother was very engaged in her professional activities. According to the District Court, Ms. T.L. had refused to be heard on the matter. The District Court considered that, in these circumstances, the legitimation was in the interest of Marjut's well-being, and that there was no indication of any serious objections.

On 16 January 1992 the Augsburg District Court, upon the request of Ms. T.L., issued a preliminary injunction, according to which the applicant's right to determine Marjut's place of residence was provisionally withdrawn and transferred to Ms. T.L.

In its reasoning the District Court observed that, when deciding upon the applicant's request for Marjut's legitimation, it had assumed that such a decision corresponded to the genuine intentions of both the mother and the father. The Court noted inter alia that the applicant, when presenting Marjut in court on 7 January 1992, had stated that the mother was staying in New York; that Marjut was integrated in Tübingen and that he did not intend to separate her from her mother. However, he had concealed the fact that Ms. T.L. had married Mr. W. on 23 December 1991. On 15 January 1992, when Ms. T.L. had learnt about the legitimation and had reproached him with his conduct, the applicant had called for an ambulance and had had her taken to a psychiatric hospital. When she was released shortly afterwards and returned, Marjut had disappeared. The District Court considered that in these circumstances the applicant's right to custody was likely to be withdrawn and transferred to the mother. While this matter remained to be examined, there was a risk that the applicant might not treat Marjut appropriately which could only be met by the decision taken.

On 20 January 1992 the applicant lodged an appeal (Beschwerde). In these and the following court proceedings the applicant was represented by counsel. Still on 20 January, both parents were heard personally by the District Court. In the evening, the applicant brought Marjut to her mother, Ms. T.L.

On 13 February 1992 the Augsburg Regional Court (Landgericht) dismissed the applicant's appeal (Beschwerde).

The Regional Court, referring to S. 1666a para. 2 and S. 1666 para. 1 of the Civil Code, found that the decision to withdraw, provisionally, the applicant's right to determine Marjut's place of residence was necessary to avert a serious danger for her well-being and that a final decision could not be awaited. The Regional Court confirmed the findings of the first instance court that the applicant's right to custody would most likely be withdrawn and transferred back to Ms. T.L. In this respect, the Regional Court noted the parties' concurring statements that Marjut's centre of life had been in Tübingen. The Regional Court further considered that the applicant, taking into account his professional engagements as a specialist

practising in a hospital, would not be able to take sufficient care of Marjut. Living together with the applicant, who had previously not been concerned with her education, would not be in the interest of Marjut's well-being. The Regional Court found that the relevant facts had been substantiated. No further investigations were required in the preliminary injunction proceedings.

On 9 April 1992 the Bavarian Court of Appeal (Bayerisches Oberstes Landesgericht) dismissed the applicant's further appeal (weitere Beschwerde).

The Court of Appeal, on the basis of the facts underlying the decisions taken by the lower instances, as amended in the proceedings before it, confirmed the lower courts' findings. In this respect, the Court of Appeal considered in particular the events on 15 January 1992. Thus, contrary to his statements in the legitimation proceedings, the applicant had taken Marjut away from home without informing her mother, Ms. T.L. The Court of Appeal found that the applicant had thereby interfered with Ms. T.L.'s rights, namely at least her rights to access and information, even if, in the light of the case-law of the Federal Constitutional Court (Bundesverfassungsgericht), she had lost her right to custody. The taking away of a child from its usual surroundings could amount to an abuse of the right of custody, if it occurred at the wrong time. This had been the case, as Marjut had so far been living with her mother most of the time and as the applicant had enforced his rights immediately after the service of the decision on the legitimation and without consulting Ms. T.L. The sudden taking away and the other events on 15 January 1992 which could not be concealed from the then six-year-old child endangered her well-being.

On 21 December 1993, in the main custody proceedings, the Tübingen District Court, following a hearing on 6 December 1993, withdrew the applicant's right to custody over Marjut and transferred this right to Ms. T.L. The District Court also provisionally withdrew the applicant's right of access to Marjut until the completion of an expert opinion regarding the matter.

In its decision, the District Court summarised the relevant facts regarding the legitimation proceedings, the subsequent events and the course of the preliminary injunction proceedings. The Court also noted that it had heard the parties on 7 May 1992 and at the hearing of 6 December 1993, and that Marjut had been heard on 25 June 1992.

As regards the merits, the District Court found that Ms. T.L.'s request that the right to custody of Marjut be transferred back to her in accordance with S. 1738 para. 2 of the Civil Code was well-founded. In this context, the question whether or not, pursuant to the case-law of the Federal Constitutional Court on the constitutionality of the legal provisions on legitimation, she had fully lost her right to custody or retained it notwithstanding the applicant's simultaneous right to custody could be left open on the ground that in any event the applicant's right to custody had to be withdrawn for abuse in accordance with S. 1666 of the Civil Code.

The District Court found that the applicant had obtained his right to custody of Marjut in an improper way in that he had pursued the legitimation proceedings without Ms. T.L.'s knowledge and behind her back. The request for legitimation had been certified at a time when the parties had a common household and when the applicant, being unemployed, had more intensively taken care of Marjut. According to the report of the Tübingen Youth Office of April 1991, filed in the context of the legitimation proceedings, Ms. T.L. had intended to obtain for Marjut the position of the applicant's legitimate child, and that, in case anything should happen to her, Marjut should live with the applicant. However, she had never thought that the applicant would exercise the right to custody so as to take Marjut away from her. The applicant, who had taken up a new job in Starnberg, had himself stated

at the Youth Office that Marjut would certainly remain in her usual surroundings. Further, in his counsel's written submission of 31 May 1991 it was indicated that Marjut would stay with her mother as long as he and Ms. T.L. were separated and that the applicant was aware of the fact that he could not himself take care of the child. Following her marriage, Ms. T.L. had no longer agreed with Marjut's legitimation and the applicant had been aware of this. The conclusion of the legitimation proceedings without her further participation had taken Ms. T.L. by surprise. While it would have been advisable for her to have informed the District Court in precise terms, her statements that she had not thought that the proceedings would be pursued were conclusive. The applicant however had seized the opportunity of Ms. T.L.'s absence abroad in order to appear, together with Marjut, before the District Court and to obtain, with incomplete submissions and false pretences, the right to custody of Marjut with a view to separating her from her mother, Ms. T.L. Moreover, he had arranged for Ms. T.L.'s admission to a psychiatric hospital in Marjut's presence and had brought Marjut to acquaintances, keeping her whereabouts secret. On the occasion of Marjut's hearing in June 1992, it appeared that these events had had a negative impact on her relationship with the applicant. The course of action taken by the applicant amounted to an abuse of his right to custody which, therefore, had to be withdrawn.

The transfer of the right to custody to Ms. T.L. was in Marjut's best interest: it corresponded both with Marjut's wishes, as expressed upon her hearing in June 1992 and persisting, according to the observations of the Youth Office at the hearing in December 1993, and with the necessity to authorise the person taking care of Marjut to take the daily decisions for the child.

As regards the applicant's request for a right of access to Marjut pursuant to S. 1634 of the Civil Code, the District Court noted that the applicant suffered from the separation from the child and that Ms. T.L. had stated her intentions to establish a regular access. However, Marjut refused to have any contacts with him. The District Court observed that, in the course of Marjut's personal hearing in June 1992, she had expressed such a strong emotional resistance to even seeing the applicant that the applicant's right of access was provisionally suspended, after having heard the parties who had not insisted on a formal decision to that effect. As Ms. T.L. had stated, at the hearing of December 1993, that this resistance on Marjut's part persisted, no decision on the applicant's right of access to Marjut could be taken before the conclusion of the expert opinion regarding this matter. Although Marjut had not been heard by the Court for eighteen months, her renewed hearing had not been necessary as she had meanwhile been examined and questioned by the expert and the expert opinion would soon be available. The provisional withdrawal of the applicant's right of access for such a short period could not be regarded as disproportionate.

On 23 September 1994 the Tübingen Regional Court dismissed the applicant's appeal.

According to the Regional Court, the District Court had correctly based its decisions on both S. 1666 and S. 1738 of the Civil Code. The Regional Court further subscribed to the approach taken by the District Court that the dominant feature was that the applicant had acquired the right to custody in an extremely improper manner. In this respect the Regional Court noted the applicant's own statements in the course of the preparation of the expert opinion of 8 June 1994 that he had known about the relationship between Ms. T.L. and her husband-to-be and had deliberately concealed their marriage from the District Court in the legitimation proceedings, assuming - with good reason - that he would otherwise not obtain the requested decision. He could also foresee that Ms. T.L., who had been on her honeymoon, would strongly react to the loss of her right to custody. While it was true that improper conduct for the purpose of obtaining the right of custody could not,

as such, amount to an abuse of this right, the applicant's insistence on this right with the long-term intention to separate Marjut from her family constituted such an abuse. In any event, the applicant's subsequent conduct, seen as a whole, justified the impugned decision. The Regional Court noted in particular the applicant's arrangements, in Marjut's presence, to have her mother admitted to a psychiatric hospital as well as the subsequent taking away and hiding of Marjut who, separated from her mother, had travelled around with the applicant for several days and had suffered from a serious mental strain. The applicant's lack of consideration for Marjut's mental well-being was also shown by the fact that, after having brought her back to her mother, he had kept part of Marjut's toys in order to demonstrate his legal position. Similar considerations applied to his conduct regarding Marjut's identity papers which, following unsuccessful enforcement proceedings, he had only handed over to the expert appointed by the District Court in February 1994. The Regional Court also considered that the fact that the applicant had repeatedly resorted to criminal charges against Ms. T.L. had further strained the relations between the parents and worried Marjut.

Accordingly, the District Court had correctly withdrawn the applicant's - merely formal - right to custody of Marjut and transferred it to her mother, as Marjut was well integrated in her mother's new family.

As regards the applicant's right of access to Marjut, the Regional Court acceded to the findings of the expert in his opinion of 8 June 1994 according to which a temporary suspension of this right was in the best interest of Marjut who could thereby profit from a stabilisation of the situation. In this respect, the Court observed that the main proceedings regarding the applicant's right of access could be continued following conclusion of the said expert opinion and therefore the effects of the provisional suspension were limited in time. When heard on 23 August 1994, Marjut had herself indicated that she did not wish contacts with the applicant. Such contacts should, however, be envisaged for the future.

On 23 February 1995 the Stuttgart Court of Appeal dismissed the applicant's further appeal.

The Court of Appeal, referring to S. 1666 of the Civil Code, confirmed that the applicant's conduct had amounted to a gross violation of his right to custody of Marjut. The Court of Appeal placed less emphasis on the manner in which the applicant had obtained this right to custody than on his subsequent conduct with a view to separating Marjut from her usual surroundings. The Court of Appeal noted that, according to the psychiatric expert opinion, these events had had such lasting negative consequences for Marjut that psychotherapy treatment still appeared necessary. The events in connection with the decision on legitimation were, therefore, irrelevant and the taking of further evidence in this respect, as requested by the applicant, was not necessary. The Court of Appeal, having regard to the conclusive findings of the expert opinion and Marjut's own statements, also confirmed the provisional suspension of the applicant's right of access to Marjut. The Court of Appeal also considered both the withdrawal of the applicant's right to custody and the provisional suspension of his right of access to Marjut from the constitutional point of view, finding that there was no violation of the applicant's natural rights as a parent under the Basic Law.

However, the Court of Appeal also advised both parents to settle the disputes between them with a view to permitting Marjut to overcome her problems and to take up contacts with the applicant. Such contacts were in Marjut's interest and Ms. T.L., in exercising her right to custody, was obliged to exercise a positive influence on Marjut. Thus both parents should take the necessary steps to render future contacts possible.

On 23 May 1995 the Federal Constitutional Court refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde) on the ground that the conditions for accepting the complaint for a decision on its merits were not met.

In its decision, the Federal Constitutional Court found that the applicant's submissions did not raise any issue of fundamental importance. In particular, the applicant had failed to show that S. 1738 para. 2 of the Civil Code could be objected to under constitutional law or that there were any other fundamental questions regarding the position of the father of a child born out of wedlock. Furthermore, there was no reason to review S. 1711 para. 2 of the Civil Code according to which the father only had a right of access if this was in the interest of the child concerned, as the impugned decisions suspending the applicant's right of access were not based on such a reasoning.

Moreover, according to the Federal Constitutional Court, the acceptance of the applicant's constitutional complaint was not necessary for the protection of his fundamental rights. In particular, the applicant had failed to show in what respect the taking of evidence by the civil courts could be objected to: he had not submitted which allegations he had intended to prove, how he had formulated his request to take further evidence and in which way he had raised this matter in his appeal with the Court of Appeal. Furthermore, there was no indication of a violation of his parental rights. In this respect, the Constitutional Court observed that the impugned decisions served to resolve a dispute between two parents who both enjoyed the protection of the Basic Law (Grundgesetz). In this situation, the guiding principle had to be the well-being of the child. This principle had been respected by the Court of Appeal. The applicant's submissions, which did not deal with the expert opinion to which the Court of Appeal had repeatedly referred, did not disclose any indication that the Court of Appeal's assessment according to which the applicant's conduct had enduring adverse effects on the child's well-being could be objected to from a constitutional point of view.

The decision was served on 30 May 1995.

B. Relevant domestic law

1. Legitimation of a child born out of wedlock

S. 1719 to 1740g of the German Civil Code (Bürgerliches Gesetzbuch) concern the legitimation (Legitimation) of children born out of wedlock. SS. 1719 to 1722 govern the legitimation following the subsequent marriage of their natural parents. SS. 1723 to 1740g concern the legitimation (Ehelicherklärung) upon the request of the father or the child.

According to S. 1723, the competent guardianship court grants the father's request for the legitimation of his child born out of wedlock, if the legitimation is in the child's best interest and if there are no serious reasons against it. The legitimation is only permitted with the consent of the child or, if the child is a minor, the consent of his or her mother; if the father is married, his spouse's consent is also required (S. 1726 para. 1). Exceptions to the requirement of the mother's or the spouse's consent and the conditions for the replacement of their consent by court order are regulated in S. 1726 para. 3 and S. 1727, respectively.

S. 1736 provides that upon legitimation the child acquires the status of a child born in wedlock. The child obtains the father's family name (S. 1737).

S. 1738 para. 1 provides that, upon the legitimation of the

child, the mother loses her right and obligation to exercise custody. According to a decision of the Federal Constitutional Court of 7 May 1991 (1 BvL 32/88-BGBl. I S. 1509), this provision is irreconcilable with Article 6 paras. 2 and 5 of the Basic Law (on the protection of the parental rights in the care and upbringing of children and the equality of opportunities between "illegitimate" and "legitimate" children) to the extent that the mother loses her right and obligation to exercise custody even in cases where the father and the mother live in a common household with the child and both parents' intentions underlying the legitimation are to exercise a joint right to custody, and if such an arrangement is in the best interest of the child.

According to S. 1738 para. 2, the guardianship court may transfer the right to custody back to the mother in case the father's right to custody is terminated or suspended, or if the father's right to custody of the child has been withdrawn.

2. Withdrawal of the right to custody

S. 1666 of the Civil Code provides in particular that, if the physical, mental or psychological well-being of a child is endangered as a consequence of an abuse of the right of custody, or neglect of the child, or a failure of the parents arising through no fault of their own or due to the conduct of a third person, and if the parents are not willing or are unable to avert the danger, the competent guardianship court will order the measures necessary to avert the danger concerned.

According to S. 1666a, measures resulting in a separation of the child from the parental family are only permitted if there are no other means, including public welfare, to avert the danger. The right of custody may only be withdrawn if other measures have proved to be unsuccessful or if it can be assumed that they are not sufficient to avert the danger.

3. Right of access

Pursuant to S. 1634 of the Civil Code, the parent not holding the right to custody is entitled to have access to the child. This right of access may be suspended if such a measure is necessary in the best interest of the child.

COMPLAINTS

1. The applicant complains about the German court decisions to withdraw his right to custody of Marjut and provisionally to suspend his right of access to her. He considers that the courts' assessment according to which he had abused his right to custody is incorrect, and that the withdrawal of his right to custody was disproportionate. He further complains that he has not seen Marjut since 20 January 1992.

He also submits that the fact that he does not have the same legal position towards Marjut as Marjut's mother violates the principle of gender equality.

The applicant invokes Article 12 of the Convention and Article 5 of Protocol No. 7.

2. The applicant further complains under Article 6 of the Convention that the court proceedings were unfair. He submits that the reasoning in the impugned court decisions is erroneous. He further complains that the Regional Court and the Court of Appeal refused his request for the hearing of a witness who could have made statements on the relationship between himself and Marjut as well as on the general family situation.

THE LAW

1. The applicant complains about the German court decisions to withdraw his right to custody of Marjut. He also complains that he has not seen his daughter since January 1992. The applicant invokes Article 12 (Art. 12) of the Convention.

Article 12 (Art. 12) of the Convention secures the fundamental right of a man and a woman to marry and to found a family, subject to the national laws of the Contracting States.

The Commission finds that the applicant's right to respect of his family life lies at the heart of his complaints about the court decisions to withdraw his right to custody of his daughter and the lack of access to her. The Commission therefore finds it appropriate to examine the applicant's complaints under Article 8 (Art. 8) of the Convention.

Article 8 (Art. 8), so far as relevant, provides as follows:

> "1. Everyone has the right to respect for his private and 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 Commission recalls that the notion of "family life" in Article 8 (Art. 8) is not confined solely to marriage-based relationships and may encompass other de facto "family ties" where parties are living together outside marriage. A child born out of such a relationship is ipso iure part of that "family" unit from the moment of his or her birth and by the very fact of it. There thus exists between the child and his or her parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relation has then ended (cf. Eur. Court HR, Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 17-18, para. 44; Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, pp. 55-56, para. 30).

In the present case, the relationship between the applicant and the child's mother lasted for several years after the child's birth in 1985, and they had a common household in 1990 when the applicant's request for the legitimation of Marjut and her mother's agreement were recorded by a notary. Moreover, in January 1992 the German courts granted the applicant's request for the legitimation of Marjut. Their relationship at the relevant time thus had to be regarded as "family life" for the purposes of Article 8 (Art. 8). Accordingly, from the moment of Marjut's birth there existed between the applicant and his daughter a bond amounting to family life.

The Commission finds that the court decisions withdrawing the applicant's right of custody of Marjut, which he had obtained as a consequence of her legitimation, interfered with the applicant's right to respect for his family life under Article 8 para. 1 (Art. 8-1). As regards the applicant's complaint about the lack of access to Marjut, the Commission observes that it is seized with the matter to the extent that the applicant's submissions refer to the German court decisions provisionally to suspend his right of access to Marjut pending completion of an expert opinion which was under preparation for the purposes of a decision on the merits of his access rights. The Commission finds that such a provisional suspension order also interferes with the applicant's right under Article 8 (Art. 8). The Commission therefore has to examine whether such interferences were justified under the terms of paragraph 2 of Article 8 (Art. 8-2).

The Commission finds that the German courts' decisions to withdraw the applicant's right to custody of Marjut and to transfer it to Marjut's mother were taken in accordance with SS. 1666 and 1738 para. 2 of the German Civil Code in the light of the case-law of the Federal Constitutional Court. The provisional suspension of his right of access to Marjut was based on S. 1634 of the Civil Code. The applicant's submissions do not show any clear non-observance of the applicable legal provisions. The interference at issue was, therefore, in accordance with the law within the meaning of Article 8 para. 2 (Art. 8-2).

The Commission further considers that the impugned custody decisions had a legitimate purpose under paragraph 2 of Article 8, (Art. 8-2) namely the protection of the rights of others, namely of the child concerned.

As regards the question whether the interference complained of was "necessary in a democratic society", the Commission recalls that the Contracting States enjoy a certain margin of appreciation in assessing whether such a need for an interference exists, but it goes hand in hand with European supervision (see, Eur. Court HR, Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, p. 15, para. 128; Funke v. France judgment of 25 February 1993, Series A no. 256-A, p. 24, para. 55).

The Commission observes at the outset that the impugned custody and access decisions were taken in the context of a controversy between Marjut's parents with a view to determining the best solution for Marjut's future upbringing and education.

In the present case, the issues before the German courts were whether the applicant had abused his right to custody of Marjut, which he had obtained upon her legitimation in January 1992, and whether it was in the best interest of Marjut to suspend - provisionally - his access to her. The German courts, taking the child's well-being as the guiding principle for their decisions, considered Marjut's personal situation and living conditions, the applicant's conduct in obtaining her legitimation and thereby his right to custody and - as decisive elements - the events on and after 15 January 1992, especially his behaviour towards Marjut's mother in the presence of Marjut as well as the taking away and hiding of Marjut, which had enduring adverse effects on the child's well-being. In their decisions, the courts relied on the statements of both parents as well as of Marjut, and also on the findings of a psychiatric expert opinion. Moreover, the courts carefully balanced the conflicting interests involved and, in particular the Court of Appeal and the Federal Constitutional Court considered in detail whether the withdrawal of the applicant's right to custody and the provisional suspension of his right of access amounted to a breach of his right to respect of his family life, as guaranteed by the Basic Law.

Against this background, the Commission finds that the reasons for the impugned decisions were both relevant and sufficient. Moreover, having regard to the child's personal situation, there is no indication of any disproportion between the decisions taken and the legitimate aim pursued. As regards the applicant's right of access, the Commission further observes that both the Regional Court and the Court of Appeal not only stressed the provisional nature of the suspension, but also drew both parents' attention to the necessity to render future contacts between the applicant and Marjut possible.

Finally, as to the procedural requirements implicit in Article 8 (Art. 8) (cf. Eur. Court HR, Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, p. 33, para. 71), the Commission finds that the applicant, assisted by counsel, 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. Thus, both parents as well as the child concerned were heard by the courts in the custody proceedings and also by the psychiatric expert who prepared an opinion for the purposes of advising the courts in their assessment of the relevant facts.

In these circumstances, the German authorities did not exceed their margin of appreciation when deciding to withdraw the applicant's right to custody of Marjut and to transfer it to her mother. Likewise, the provisional suspension of his right of access until termination of an expert opinion on the issue and the decision in the main proceedings regarding his right of access cannot be objected to. Consequently, there is no appearance of a breach of Article 8 (Art. 8).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains that the impugned decisions amount to discrimination. He invokes Article 5 of Protocol No. 7 (P7-5).

The Commission observes that Protocol No. 7 has not been ratified by the Federal Republic of Germany.

The Commission has examined the applicant's allegation of sexual discrimination under Article 14, in conjunction with Article 8 (Art. 14+8), of the Convention.

The Commission, referring to its above findings under Article 8 (Art. 8) of the Convention, considers that the impugned court decisions were based on a careful examination of the particular circumstances of the instant case. There is nothing in the case-file to disclose any difference of treatment on the ground of sex or of any other status.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

3. As regards the applicant's complaints under Article 6 of the Convention about the alleged unfairness of the custody proceedings, the Commission refers to its above reasoning regarding the procedural requirements implicit in Article 8 (Art. 8).

It is true that the applicant also complains that, in the custody proceedings, the courts did not hear a particular witness who should have made statements as to the good relations between him and Marjut as well as Marjut's personal situation and development in general. However, the Commission notes the findings of the Stuttgart Court of Appeal that, as it placed less emphasis on the manner in which the applicant had obtained his right to custody than on his subsequent conduct with a view to separating Marjut from her usual surroundings, the events in connection with the decision on legitimation were irrelevant and the taking of further evidence in this respect was not necessary. Moreover, the Commission notes that Marjut was heard personally in the court proceedings and a psychiatric expert opinion was prepared on the relevant question as to what effects the applicant's conduct had had upon Marjut. In these circumstances, the applicant has failed to show the relevance of the evidence which could have been obtained by hearing the witness suggested by him.

Accordingly, the Commission finds no indication that the court proceedings were unfair contrary to the requirements of Article 6 para. 1 (Art. 6-1).

This part of the application is, therefore, also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the

Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber