AS TO THE ADMISSIBILITY OF

Application No. 23753/94
by Wolfgang BENZE
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 15 March 1994 by Wolfgang BENZE against Germany and registered on 24 March 1994 under file No. 23753/94;

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 is a German citizen, born in 1938, and living in Munich.

It follows from the applicant's statements and the documents submitted that he married a Bolivian citizen in December 1975 and got divorced on 22 March 1990. According to the divorce judgment of that date, the right to care and custody over the divorced couple's two children, Alexandra born on 29 January 1977 and Gisela born on 19 February 1981, was given to the mother. The judgment furthermore regulated the applicant's right of access to his children. Originally the applicant had the right to have his children visit him for certain hours during two weekends per month.

Subsequently difficulties arose between the applicant on the one hand and his ex-wife and the children on the other hand.

On 11 December 1992 the Family Court (Familiengericht) decided to set aside the then existing visit regulation and to grant the applicant the right to see his daughter Gisela every second Saturday in the month from 10.00 am to 6.00 pm. The applicant's remaining request for a more extensive right of access was rejected.

The applicant appealed and on 13 May 1993 the Munich Court of Appeal (Oberlandesgericht) granted the applicant the right of access to his daughter Gisela

- as from June 1993 onwards every second Saturday in the month from 10.00 am to 6.00 pm and every fourth Saturday in the month from 2.00 pm to 6.00 pm

- in addition, during the summer holidays, from the first Sunday 11.00 am to 6.00 pm on the following Sunday.

With regard to Alexandra the applicant was granted right of access of two hours, one day per month.

In addition, the applicant was ordered not to disturb the relationship between mother and children by inappropriate criticism (unangebrachte Kritik). Furthermore he was ordered to abstain from contacting his children in between the visiting hours except for telephone calls each Wednesday between 6.00 and 8.00 pm.

The Court of Appeal stated that the right of access did not include a right to educate the children, nor to supervise the other parent. Rather it was destined to give to the holder the possibility of observing continuously the development and the well-being of the child and maintain a good relationship of love and affection.

In determining the extent of the right of access, the court did not have to take into consideration the personal interests of the respective parent but exclusively the well-being of the child. In this context the intensity of the relationship of the child with the respective parent had to be taken into account. Of importance was also the relationship between the parents. Limitations of the right of access could be necessary in cases of serious tensions between the parents. Furthermore the wishes of the children themselves had to be taken into account. If a child was opposed to seeing his/her father or mother, it had to be examined whether this attitude was relevant or understandable. If so it would be incompatible with the purpose of the right of access and violate the child's personality right if access were enforced against his/her will.

The court then found that the relationship between children and father was only marginally able to stand up to stress (wenig belastbar) and fragile (brüchig). Both children knew they owed much to their father but rather disapproved of him (lehnen ihn ab ....). The court further found that, contrary to the applicant's allegations, the mother could not be made responsible for the children's attitude with regard to their father. The court stated in this context that it had heard both children separately and both had made conforming statements according to which the only reason for their reluctance was the father's difficult personality. Alexandra had in addition stated that the mother had even encouraged her to visit the father.

The court also noted that the father had a tendency to sharp criticism. He had, for example, stated at a hearing that the court supported the "criminal practices" of the mother.

The court further found that the children were apparently offended by the fact that the father could not control his hostile attitude towards the mother in their presence. He had, for example, stated at a hearing in the presence of Gisela that the mother was a "criminal" and should be kept behind bars for six months.

The court also noted that the children had made reports of corporal punishment which the father repeatedly inflicted upon them.

On the other hand the court admitted that the father was very attached to his children and fully assumed his parental responsibility, in particular he respected his maintenance obligations. The children had a central position in his life. Nevertheless this was not sufficient to grant an extensive right of access. Such an extensive regulation required that both sides were attached to each other. When however a parent was disapproved of by his child or his children, there existed no relationship that had to be protected.

At a hearing before the family court of 15 July 1991 the child Alexandra had emphatically refused further visits while the child Gisela had opted for a restriction (Verkürzung) of the right of access. Although the children had been heard on repeated occasions, their standpoint had not changed.

The court admitted that the will of a child could not be taken into account without examination. The guidelines of such examination were to be found in the Federal Court's jurisprudence. The court then noted that both children were mature for their age and capable of judging the behaviour of their parents and their own relationship with them. Therefore the court considered in agreement with an expert opinion which had been obtained by the lower Family Court that it should be left to the children to decide to what extent they wanted to attach themselves to their parents. It would violate their right to self-determination and their dignity to oblige them to have contacts with one parent against their will. To do this could lead to disturbances in their development. This was also confirmed by the expert opinion.

The court considered that the children's negative attitude vis-à-vis their father was understandable in view of his behaviour towards them, in particular in view of his hostile position with regard to the mother.

In all the circumstances the father's right of access had to be limited in accordance with the wishes of the children.

On 12 July 1993 the Munich District Court (Amtsgericht-Familiengericht) rejected the applicant's request to be granted the right to care and custody over his children. The court referred to the reasons stated in the decision of the Munich Court of Appeal given on 13 May 1993 and stated in addition that the children had unequivocally declared that they wished to remain under the care and custody of their mother. They had confirmed this wish when they were heard by a representative of the social services of the city of Munich on 22 March 1993. There were no circumstances justifying withdrawing the right of care and custody from the mother.

An appeal against this decision was rejected by the Munich Court of Appeal on 28 November 1993. The court at the same time rejected the applicant's request for an injunction (einstweilige Anordnung).

In so far as the applicant had alleged that the mother had turned the children against him and retarded their mental, social and physical development, the court found that these allegations were unproven. On the other hand it followed from the statements of the mother of the children and of the competent youth authorities that the children were well taken care of and that there was no necessity for a change with regard to the right of parental care.

The mother could not be held responsible for the solitary attitude and the underweight state of the child Gisela. Gisela also loved her father but his constant attacks on the mother exposed her to a continuous conflict of loyalty. In this respect the responsibility was with the father. In any event both children had told the court that their food supply was good and abundant. Gisela's underweight state could therefore not have been caused by insufficient food supply.

In addition the nutritional condition of the child Alexandra showed that the children received sufficient food from their mother.

It also followed from a report submitted by the Youth Office on 22 March 1993 that the exercise by the mother of her right to care and custody was unobjectionable.

It was true that there were no direct witnesses therefore the children's own statements were of particular importance. There was no reason to doubt their statements. Consequently there was also no necessity to obtain the expert opinion of a psychologist in family matters.

The applicant's constitutional appeals against the Appellate Court's decisions of 13 May 1993 and of 28 November 1993 were rejected by a panel of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) on 3 November 1993 and on 24 January 1994 respectively. While the latter decision only refers to Sections 93 (a) and (b) of the Federal Constitutional Court Act, it is stated in the decision of 3 November 1993 that there was nothing to show that the Appellate Court had not carefully examined the matter in the course of the proceedings such as to balance both the fundamental rights of the parents and of the children and to come to a decision which would best serve the children's well-being or that this decision was taken in disregard of the European Convention of Human Rights.

COMPLAINTS

The applicant considers it to be immoral to allow one parent to repudiate the other and to oblige the latter at the same time to pay maintenance for the family. He submits that in the proceedings relating to the right to care and custody and to the right of access to his children he was denied a fair hearing while the criminal methods of the mother were persistently disregarded by the courts. He alleges that the expert opinions obtained in his matter were fabricated in order to separate him from his children. He considers that the decisions complained of violate his right to respect of family life as guaranteed by Article 8 para. 1 of the Convention.

THE LAW

The applicant complains about the restrictions of his right of access to his children as well as the refusal of the competent German court to withdraw the right of care and custody over his two children from the mother and to transfer this right to him.

The applicant invokes Article 8 (Art. 8) of the Convention:

> "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 first recalls that the family life of the parents with their children does not cease following the divorce of a married couple (cf. No. 7770/77, Dec. 2.5.78, D.R. 14 p. 175). In the present case the German courts' decisions to give the custody of the applicant's daughters to his former wife and their later refusal to transfer custody to the applicant as well as the limitations of the applicant's right of access to his daughters interfered with his right to family life under Article 8 para. 1 (Art. 8-1) of the Convention. The Commission therefore has to examine whether these interferences were justified under the terms of Article 8 para. 2 (Art. 8-2).

The Commission observes that the decisions complained of were taken in accordance with German law.

The Commission notes the finding of the competent courts that the interests of the applicant's daughters and their future well-being required that their mother should continue to take care of them. The German courts furthermore found that the children had expressed a genuine and justified desire for the limitation of their father's right of access. The courts had heard the children and mother personally and also relied on expert opinion and the report submitted by the Youth Office.

The Commission finds that the decisions of the German courts do not contain any indication that the custody and right of access decisions complained of were not based on due consideration of the interests and the well-being of the children. The applicant has criticized these decisions but has not shown that relevant evidence was disregarded by the German courts to the detriment of his daughters or his own rights.

Consequently, the interferences with the applicant's right to family life were justified under Article 8 para. 2 (Art. 8-2) of the Convention in that they can reasonably be considered as necessary for the protection of the health and well-being of the applicant's daughters.

It follows that the application is 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.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)