AS TO THE ADMISSIBILITY OF

Application No. 25735/94
by Egbert ELSHOLZ
against Germany

The European Commission of Human Rights sitting in private on 30 June 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

Mr. H.C. KRÜGER, Secretary to the Commission.

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

Having regard to the application introduced on 31 October 1994 by Egbert ELSHOLZ against Germany and registered on 21 November 1994 under file No. 25735/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 21 June 1996 and the observations in reply submitted by the applicant on 18 September 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1947, is a German national. When lodging his application he was living in Erkrath; he later moved to Hamburg. He is represented by Mr. P. Koppel, a lawyer practising in Munich.

A. The particular circumstances of the case

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

The applicant is the father of the child Carsten N., born out of wedlock on 30 December 1986. In a document dated 9 January 1987 he acknowledged paternity and undertook to pay maintenance. He regularly pays maintenance. Between November 1985 and June 1988 the applicant lived with Carsten's mother Monika I.-N., her elder son Christian I. and their common son Carsten. In summer 1988 Ms. I.-N., together with the two children, moved out of their flat. After their separation, the applicant continued to see his son regularly until July 1991. On several occasions, he also spent his holidays with Carsten, Christian and their mother, Ms. I.-N. Subsequently, no more visits took place.

According to the applicant, Ms. I.-N. prohibited him from having access to Carsten because he had reproached her with neglecting Carsten who had broken his arm in an accident and because he had refused to continue paying more maintenance than due from him. The Government dispute the applicant's affirmations and submit that Ms. I.-N. had indicated that she had discontinued the contacts between the applicant and Carsten for the sole reason that Carsten did not wish to have further contacts with the applicant.

The applicant attempted to resume contact with Carsten in the form of visits with the assistance of the Erkrath Youth Office (Jugendamt), acting as mediator. When questioned by an official of the Youth Office at his home in December 1991, Carsten stated that he did not wish to have contacts with the applicant.

In August 1992 the applicant applied to the Mettmann District Court (Amtsgericht) for a decision granting him a right to visit (Umgangsregelung) Carsten on every first Saturday per month, between 1 p.m. and 6 p.m.

On 4 December 1992 the District Court (Amtsgericht) dismissed the applicant's request. The Court observed that S. 1711 para. 2 of the Civil Code (Bürgerliches Gesetzbuch), concerning the contact between a father and a child born out of wedlock, was an exceptional provision and therefore was to be interpreted in a narrowly restrictive way. Thus, the competent court should order such contacts only if this was advantageous and beneficial for the child's well-being. According to the court's findings these conditions were not met in the applicant's case. The Court noted that the child had been heard and had stated that it did not wish to see the father who, according to the child, was bad and had beaten his mother repeatedly. The mother likewise had strong objections to him which she communicated to the child so that the child had no possibility of building up an unbiased relationship with his father. Consequently contacts with the father would not further the child's well-being.

On 8 September 1993 the applicant applied to the District Court for an order requiring the child's mother to consent to family therapy being received by the applicant and the child and, after contacts between them had been successfully resumed, determine his visiting rights.

In its submissions of 24 September 1993 the Erkrath Youth Office recommended that the Court should obtain a psychological expert opinion

on the question of opening contact visits.

On 17 December 1993 the District Court dismissed the applicant's renewed request for visiting rights, dated 8 September 1993.

The Court referred to its prior decision of 4 December 1992 and found that the conditions under S. 1711 of the Civil Code were not met. The Court noted that the applicant's relationship with the child's mother was so strained that the enforcement of visiting rights could not be envisaged as this would not be in the interest of the child's well-being. The child knew about his mother's objections to the applicant and had adopted them. If Carsten were to be with the applicant against his mother's will, this would put him into a loyalty conflict which he could not cope with and which would therefore affect his well-being. The Court added that it was irrelevant which of the parents was responsible for the tensions. What counted alone was that important tensions existed and that there was a risk that any further contacts would affect the child's undisturbed development in the remainder of his family. On the basis of two long talks with the child the court concluded that his development would be endangered if he had to take up contacts with his father contrary to the will of his mother.

In view of these findings under S. 1711 of the Civil Code, the Court regarded it as unnecessary to obtain an expert opinion. It pointed out that it was not the task of a court-appointed expert to give advice to the parents as to how best to manage their separation. Such advice could be obtained by them on a voluntary basis from a private expert or the Youth Office.

On 13 January 1994 the applicant, represented by counsel, lodged an appeal against the first instance decision, requesting that that decision be quashed, that an expert opinion be obtained on the question of visiting contacts between him and of the child and the child's true wishes in this respect and that the applicant's visiting rights be determined accordingly.

On 21 January 1994 the Wuppertal Regional Court (Landgericht), without hearing the applicant, the child and his mother, dismissed the applicant's appeal (Beschwerde).

In its decision, the Court first stated that there were doubts as to the admissibility of the applicant's appeal as he had informed the first instance court by letter of 12 January 1994 that he respected that court's decision and requested help in order to reach a friendly settlement. Furthermore, his request at first instance did not fully coincide with his motions as stated in his appeal submissions.

The Court, however, left open the question of whether or not the appeal was inadmissible and decided that in any event the applicant's request for visiting rights had to be dismissed as it was not in the interests of the child's well-being. It was not sufficient that such contacts were compatible with the child's well-being, rather they had to be advantageous and beneficial (nützlich und förderlich) and necessary for the child's equilibrium (seelisch notwendig). The question as to whether these conditions were satisfied or not had to be decided from the viewpoint of the child's situation and taking into account all circumstances in the individual case at issue. Inter alia, it had to be considered for what reasons the father wished contacts with the child, i.e. whether he had real emotional motives or was motivated by other factors. In this context the relationship of the parents also had to be taken into account.

The Court concluded, in accordance with the decisions appealed against, that in view of the tensions between the parents which had negative effects on the child as was confirmed by the hearing of the child on 8 December 1993 and 9 November 1992, it was not in the child's

interest to have contact with his father and even less so because these contacts had in fact been interrupted for about two and a half years. It did not matter who was responsible for the breakup of the community life. What mattered was that in view of the present situation contacts between father and child would negatively affect the latter. This conclusion, so the Court considered, was obvious and therefore there existed no necessity to obtain a psychological expert opinion. Moreover, S. 1711 para. 2 of the Civil Code did not provide for psychological therapy to prepare a child for contacts with his or her father.

The Regional Court finally observed that there had been no necessity to hear the parents and the child again as there was no indication that any findings which would be more favourable for the applicant could result from such a hearing.

On 19 April 1994 a panel of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) refused to entertain the applicant's constitutional complaint (Verfassungsbeschwerde). According to the Federal Constitutional Court, the complaint did not raise any issues of a general character affecting the observance of the Constitution. In particular the question as to whether S. 1711 of the Civil Code was compatible with the right to family life as guaranteed by Article 6 para. 2 of the Basic Law did not arise as the ordinary courts had based the denial of the applicant's request for visiting rights not only on the reason that such a right would not serve the child's well-being but on the much stronger reason that it was incompatible with the child's well-being. Furthermore, the right to a fair hearing was not violated by the fact that the applicant had not been heard personally and that his request to obtain an expert opinion had been rejected. This decision was served on 6 May 1994.

B. Relevant domestic law

I. The right of custody over children born out of wedlock is regulated in SS. 1705 to 1711 of the Civil Code.

S. 1711 of the Civil Code reads as follows:

(Translation)

> "(1) The person having custody and care of the child shall determine contact arrangements with the father. S. 1634, para. 1, sentence 2 applies by analogy.
>
> (2) If it is in the child's interests to have personal contact with the father, the Guardianship Court can decide that the father has a right to personal contact. S. 1634 para. 2 applies by analogy. The Guardianship Court can change its decision at any time.
>
> (3) The right to request information about the child's personal circumstances is set out in S. 1634 para. 3.
>
> (4) Where appropriate, the Youth Office shall mediate between the father and the person having custody and care."

II. With regard to children whose parents are or have been married the question of personal contacts with the parent who does not have the right to care and custody is regulated in S. 1634 of the Civil Code, which reads as follows:

(Translation)

> "(1) A parent not having custody and care has the right to personal contact with the child. The parent not having custody and care and the parent having custody and care must not do

anything that harms the child's relationship with others or seriously interferes with the child's upbringing.

(2) The Family Court can determine the scope of that right and can prescribe more specific rules for the exercise thereof, including vis-à-vis third parties; as long as no decision is made, the right under S. 1632 para. 2 of the parent not having custody and care may be exercised throughout the period of contact. The Family Court can restrict or suspend that right if such a measure is necessary for the child's welfare.

(3) A parent not having custody and care who has a legitimate interest in requesting information about the child's personal circumstances may request such information from the person having custody and care in so far as it is in keeping with the child's interests to communicate it. The Guardianship Court shall rule on any dispute as to the right to information.

(4) Where both parents have custody and care and are not separated merely temporarily, the foregoing provisions shall apply, mutatis mutandis."

III. The Government Bill of 28 February 1996 on the reform of the law on family matters, which is in the legislative process, envisages a uniform regulation of access in respect of children born in or out of wedlock. Each parent is supposed to have a right of access to the child, irrespective of whether the parents were married or not. This right may be limited or excluded if the competent court finds that such a measure is necessary in the interest of the child's well-being.

COMPLAINTS

1. The applicant complains under Articles 8 and 14 of the Convention about the refusal of contact with his son Carsten. He considers that the regulation in S. 1711 of the Civil Code on contacts between father and child born out of wedlock discriminates against the father in comparison to the regulation in S. 1634 of the Civil Code relating to contacts between a father and his legitimate child.

2. He further complains under Articles 6 and 8 of the Convention that the courts took their decisions without obtaining an expert opinion although this had been recommended by the competent Youth Office. Moreover, the appellate court took its decision without hearing the parties and the child. He submits that in cases like his the authorities have a positive obligation to find out ex officio whether or not the father's request to see his child is justified. If the court does not fully examine the matter ex officio it falls in the last resort to the mother to determine the issue. If she is of bad faith she can always pretend, or even see to it, that her relationship with the father is strained in order to avoid any further contacts between him and the child.

3. He finally complains under Article 6 of the Convention about the length of the proceedings and the fact that the result of this lengthy procedure, namely that he has not seen his child for a substantial period of time, is being held against him.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 31 October 1994 and registered on 21 November 1994.

On 9 November 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 21 June 1996. The applicant replied on 18 September 1996.

THE LAW

1. The applicant complains that the German court decisions dismissing his request for access to his son Carsten amount to a breach of his right to respect for his family life, as guaranteed under Article 8 para. 1 (Art. 8-1) of the Convention.

Article 8 (Art. 8) reads 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 the rights and freedoms of others."

The Government consider that the application is manifestly ill-founded.

The Government submit that the statutory regulations on the right of access of fathers to their children born out of wedlock do not as such amount to an interference with the rights under Article 8 para. 1 (Art. 8-1). However, they concede that the German court decisions in the applicant's case which were based on this legislation amount to an interference with the applicant's right under Article 8 para. 1 (Art. 8-1). In particular, referring to the case-law (Eur. Court HR, Marckx v. Belgium judgment of 13 June 1979, Series A no. 30 and Keegan v. Ireland judgment of 26 May 1994, Series A no. 290), they submit that the relationship between the applicant and his son Carsten constitutes family life within the meaning of Article 8 para. 1 (Art. 8-1).

The Government, having regard to the criteria established in the Court's case-law regarding positive obligations inherent in an effective respect for family life and regarding the justification for interference under Article 8 para. 2 (Art. 8-2) (Marckx judgment, loc. cit.; Johnston v. Ireland judgment of 18 December 1986, Series A no. 112; Keegan judgment, loc. cit.), maintain that the regulations enacted by the German legislator in order to take account of the particular situation of children born out of wedlock fall within the margin of appreciation granted to the Contracting States.

The Government consider in particular that the German court decisions in question were in accordance with German law and served to protect the interests of the applicant's child. Moreover, the interference complained of was necessary in a democratic society within the meaning of Article 8 para. 2 (Art. 8-2). In this respect, the Government submit that the principle guiding the German courts was the child's well-being. Thus, the refusal of a right of access which could only be implemented by means of compulsion was proportionate to the aim pursued. In reaching this conclusion, the District Court relied upon the personal impression after having heard the child. There was no possibility under German law to require the parties to undergo family therapy with a view to creating the conditions for rights of access contacts and it could not be in a child's best interest to have compulsory mediation regarding the conflicts between the parents.

The applicant submits that, in the light of the recent case-law on questions relating to the position of children born out of wedlock and their parents, Article 8 para. 1 (Art. 8-1) should be understood as guaranteeing a general right of access of both parents to their children, which may only be restricted under the conditions set out in paragraph 2 of Article 8 (Art. 8-2).

The Commission considers, in the light of the parties' submissions, that the applicant's complaint under Article 8 (Art. 8) of the Convention about the refusal of access to his son Carsten raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Commission concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant further complains that the provision of S. 1711 of the Civil Code on contacts between father and child born out of wedlock discriminate against the father by comparison with the provisions of S. 1634 of the Civil Code relating to contacts between a father and his legitimate child. He relies on Article 14, in conjunction with Article 8 (Art. 14+8), of the Convention.

Article 14 (Art. 14) provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government maintain that neither the statutory regulation of the right of access to children born out of wedlock in itself, nor its application in the applicant's case discriminated against the applicant in the enjoyment of his right to respect for his family life.

The Government recall the Commission's earlier decisions according to which the provisions of S. 1711 do not entail any discrimination contrary to Article 14 (Art. 14) (No. 9588/81, Dec. 15.3.84; No. 9530/81, Dec. 14.5.84; both unpublished). The considerations that fathers of children born out of wedlock often do not have any interest in contacts with them and may leave a non-marital family at any time, and that it is normally in the child's interest to vest the mother with the right of custody and access, still apply, even if the number of non-marital families has increased. S. 1711 para. 2 of the Civil Code strikes a reasonable balance between the competing interests involved in all these cases. In this context the Government observe that the Bill of 28 February 1996 does not alter this assessment. Moreover, in the applicant's case, the courts considered that granting a right of access was not in his son's interest and his situation was, therefore, comparable to the position of a father following divorce.

The applicant disputes the Government's affirmations.

The Commission considers, in the light of the parties' submissions, that the applicant's complaint under Article 14 (Art. 14) of the Convention that the refusal of access to his son Carsten amounts to discrimination also raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Commission concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

3. The applicant further complains under Articles 6 and 8 (Art. 6, 8) of the Convention about the alleged unfairness of the proceedings in question, in particular about the courts' failure to take expert psychological advice and about the lack of a hearing before the Regional Court.

Article 6 para. 1 (Art. 6-1), as far as relevant, provides as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Government submit that the applicant had been heard at first instance and that his right to a hearing by the Regional Court was satisfied in that this Court took cognisance of his written appeal submissions. Moreover, the courts had a discretion in assessing what evidence offered by the parties to civil proceedings was crucial for a decision. In the present case, there were no special circumstances which would have warranted an expert opinion to clarify the question whether the applicant's access to Carsten was in the interest of the child. Furthermore, taking into account that the District Court had questioned Carsten only one month prior to the Regional Court decision and that there was a detailed note on this hearing in the file, the Regional Court was not required to hear Carsten again.

The applicant contends that the refusal of an expert opinion and the absence of a hearing by the Regional Court deprived him of the opportunity of showing that the refusal of access was contrary to his son's interests.

The Commission considers, in the light of the parties' submissions, that the applicant's complaints about the alleged unfairness of the German court proceedings are closely related to his above complaints under Article 8 and 14 (Art. 8, 14) of the Convention about the decisions refusing his request for access to his son, and the determination of these issues should also depend on an examination of the merits of the application. The Commission concludes, therefore, that this aspect of the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

4. The applicant finally complains under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the proceedings relating to his request for access to his son.

The Government submit that the applicant's request for access was decided within a reasonable time. The applicant disputes this view.

The Commission finds that the period to be taken into consideration started on 8 September 1993 when the applicant lodged his request for access with the Mettmann District Court. It ended on 6 May 1994 when the Federal Constitutional Court's decision of 19 April 1994 was served upon the applicant. It thus lasted for about seven months.

The reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment (cf. Eur. Court HR, Caesarean v. Italy judgment of 12 October 1992, Series A no. 245-B, p. 26, para. 17).

The Commission finds that the applicant's case related to family matters and therefore required to be handled with particular diligence. It came before courts at three levels and was terminated within seven months. Considering all circumstances, this length cannot be regarded as excessive.

The Commission therefore finds that the applicant's submissions as to the length of the proceedings do not disclose any appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

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.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints about the refusal of access to his son Carsten and about the fairness of the proceedings concerned,

DECLARES INADMISSIBLE the remainder of the application.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission