CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

## THIRD SECTION

## DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 11057/02
by Cornelia and Josef HAASE
against Germany

The European Court of Human Rights (Third Section), sitting on 23 January 2003 as a Chamber composed of

Mr I. CABRAL BARRETO, President,
Mr G. RESS,
Mr L. CAFLISH,
Mr P. KŪRIS,
Mr B. ZUPANČIČ,
Mrs M. TSTSA-NIKOLOVSKA,
Mr K. TRAJA, judges,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 6 March 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

## THE FACTS

The applicants, Mrs Cornelia and Mr Josef Haase, are German nationals, who were born in 1968 and 1967 respectively and live in Altenberge (Germany). They are represented before the Court by Mr Peter Koeppel, a lawyer practising in Munich.

## A. The circumstances of the case

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

Mrs Haase is the mother of eleven children. Seven children were born while she was married to M. In 1993 she divorced. The Münster District Court (*Amtsgericht*) afforded parental rights over the four older children to the father and over the three younger children, T., born in 1990, and the twins L. and N., born in 1992, to the mother. The Münster Youth Office appealed against the decision, but withdrew the appeal later. The mother moved with the three children to her present husband, Mr Haase.

The applicants have been married since December 1994. Mrs Haase gave birth to A. in 1995, to S. in 1998 and to M. in 2000. The youngest daughter L. was born on 11 December 2001.

Mrs Haase applied to the Münster Youth Office (*Amt für Kinder, Jugendliche und Familien - KSD*) for family aid. In order to be granted the aid, the applicants agreed that their family situation be assessed by a psychological expert. In July 2001 the Municipal Social Service instructed G. to draw up an expert report. The expert met Mrs Haase and three of her children on 26 September and 11, 15 and 22 October 2001 at the applicants' house.

Being of the opinion that the questions put to the children by the expert were irrelevant for the purposes of family aid and having regard to the expert's objection to Mrs Haase attending the meetings with the children's teachers, the applicants refused to co–operate with the expert any longer.

On 17 December 2001 the expert submitted his report to the Münster Youth Office. The report noted that the deficiencies in the children's care and the home conditions risked jeopardising their development seriously. There was a damaging cycle of events with the applicants being unreasonably harsh with their children on repeated occasions and having beaten them. Any further contact between the children and the applicants would have to be avoided.

On the same day the Youth Office applied to the Münster District Court for an interim injunction (*einstweilige Anordnung*) withdrawing the applicants' parental rights over the seven children.

On 17 December 2001 the Münster District Court, without hearing the parents or their children, issued an interim injunction withdrawing the applicants' parental rights over their four children and those of Mrs Haase over her three children born during her first marriage. The applicants were ordered to promptly hand over the children to the Münster Youth Office. The officer in charge of the enforcement of the decision was authorised to fetch the children, if necessary, by using force. The District Court considered that, according to the expert opinion, there were strong

indications that as a result of the parents' inability to give their children satisfactory care and education, and also as a result of an abusive exercise of the parental authority, they had jeopardised the physical, mental and psychological well-being of all of the children to an extent that the separation of the children from their parents appeared to be the only possible solution to protect the children. The District Court referred to the relevant provisions of the Civil Code (Articles 1666 and 1666a - see the section on the relevant Domestic Law below).

By a decision of 18 December 2001 the Münster District Court completed its decision of 17 December 2001 prohibiting all access between the applicants and their children and the three children of the first marriage, L., N. and T. The whereabouts of the children were not to be communicated to the applicants. The District Court further prohibited all access between the four other children of the first marriage and Mrs Haase. She was also forbidden to approach nearer than 500 m to the children's residence and their schools. The District Court considered that the expert opinion was sufficient evidence to show that the separation of the parents from their children was necessary for the protection of the children. It had further been shown that the parents would object and try by all means to exercise pressure upon the children. In order to avoid stress to the children, these measures were necessary in the best interests of the children. The parents were insistently requested to realise their own deficiencies in respect of the care and the physical and psychological well-being of the children and in particular with the clearly expressed need of the children for a change of their situation. The parents were invited to accept - at least for the time being - the measures taken and to contribute as far as possible to a pacification of the general situation. This was only possible if the parents accepted the present situation. The approach of the Youth Office met in part the expressly stated wishes of the children. The District Court concluded that the at present inevitable measures were proportional to the urgent needs and the objective interests of all of the children.

The children were taken from the applicants on the same day. The youngest daughter was taken from the hospital.

In a letter of 18 December 2001 Dr W., gynaecologist and head physician at the *Johannesstift* hospital in Münster, complained to the Münster District Court of the conduct of the authorities. He stated that, according to a telephone call of 17 December 2001, the six children of Mrs Haase as well as the new born child in the hospital should be taken from their mother without her knowledge. His patient was to be informed of the measure after her child had been taken from the nursery. The staff was asked to take the child downstairs to the hospital's entrance and to hand it to a taxi.

He, as the head physician, and the medical hospital staff was surprised and shocked by the short term information and considered this conduct as

an affront in respect of both Mrs Haase and the medical staff. Since 1992 Mrs Haase had been taken care of by the medical staff of the hospital. She had always given the impression of a highly responsible person. She came regularly to the preventive medical check-ups during her pregnancy. When she was accompanied by her children, the children behaved well, were friendly and well–educated. There were no signs that they were in any way neglected or ill-treated.

On 19 December 2001 the Youth Office informed the applicants that the children were granted financial assistance in an amount of 4,000 EUR per month and that the parents had to contribute to these fees according to their financial means.

On 19 December 2001 the applicants appealed against the decision of the District Court of 17 December 2001. They submitted that it was difficult to understand that in the context of family aid an expert opinion on the parents' ability to bring up their children had been drawn up and that they were not informed about this opinion. The contested decision was unexpected and was given at a moment when Mrs Haase was in a critical state of health, having given birth to her daughter a week before. They proposed witnesses who could confirm that the children had not been ill-treated, but were educated with love and understanding.

On 7 January 2002 the District Court hold a hearing in the applicants' presence.

On 1 March 2002 the Hamm Court of Appeal dismissed the applicants' appeal. The Court found that in the light of the request to revoke the applicants' parental rights and having regard to the expert opinion the impugned measure was justified. The expert had concluded that the basic needs of the children were not satisfied and that patterns of violence and a permanent shortcoming in all the matters determined the children's day to day life. It was thus necessary to put an end to the risk to which the well-being of the children seemed to be exposed. The District Court had ordered a new expert opinion which should be submitted by the middle of April 2002. The applicants' appeal could therefore be dismissed without holding a hearing. It was against the best interests of the children to take them out of the new environment in which they were building up new contacts, and to restore them to their former family, there being the risk that they be taken in a new environment again shortly afterwards.

On 4 April 2002 the Federal Constitutional Court, sitting in a panel of three judges, dismissed the applicants' request for an interim injunction.

The Federal Constitutional Court found that the applicants' constitutional complaint was neither inadmissible nor manifestly ill-founded. There were doubts in particular whether the courts had breached the applicants' right to a fair hearing and their right to respect of their family life. However, if an interim injunction would be issued and if later the constitutional complaint had to be dismissed, the children had again to be taken from the applicants

and be placed somewhere else. Having regard to the fact that the expert opinion was to be drawn up in the middle of April 2002, the applicants could rather be expected to await the outcome of the main proceedings than having the children take the risk by separating them another time from their parents. It had to be assumed that the competent courts would conduct the main proceedings speedily having regard to the time element in these matters.

On 19 April 2002 the Münster District Court appointed a lawyer of the Münster Bar to protect the interests of the children. It instructed the already appointed experts to submit the results obtained so far of their investigations before being discharged from any further expert activity. It appointed a new expert, Mrs K., with a view to determining whether separating the children from the family was the only way of eliminating all danger for the children.

On 11 June 2002 K interviewed the applicants at their home. The interview lasted for six hours.

On 21 June 2002 the Federal Constitutional Court, sitting as a panel of three judges, set aside the decisions of the Hamm Court of Appeal of 1 March 2002 and the Münster District Court of 17 December 2001 and referred the case back to the Münster District Court.

Insofar as the applicants complained about the decisions of the Münster District Court of 18 December 2001 and 7 January 2002, the constitutional complaint was inadmissible, since the applicants had failed to appeal against these decisions, in accordance with Section 19 of the Act on Non-Contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit - FGG*).

Insofar as the constitutional complaint was admissible, the Federal Constitutional Court considered that, in accordance with the principles established in its case-law, the decisions of the Münster District Court and the Court of Appeal violated Article 6 § 2 first sentence of the basic Law, taken together with Article 6 § 3 (see the section of the Relevant Domestic Law below).

There were serious doubts whether the courts had respected the importance of parental rights when giving their decisions and whether they had sufficiently taken into account the principle of proportionality. The question of whether the evidence established that there was a risk of harm to the children had not adequately been considered. The District Court and the Court of Appeal merely referred to the report of the Youth Office and the expert opinion. It did not result from their decisions whether the expert's conclusions were based on reliable facts. An assessment of the applicants' submissions and considerations as to the possibility to order alternative measures, that would not have required the total revocation of parental rights, were missing. Both the Court of Appeal and the District Court failed to hear the children or to provide the persons taking part in the proceedings the opportunity to be heard.

The measures which had been ordered led to a drastic change of the living conditions of all the persons concerned and constituted an interference with the parental rights of a particular high intensity. However, no inquiries had been made, be it by telephone, before taking the decision. No reasons were given justifying the urgency of the matter.

The Family Court had no information on the possible effects of its decision, since the Youth Office and the expert had not commented on this issue. When examining the advantages and disadvantages of a family measure, it was, however, relevant to consider that a separation of the children from their parents could jeopardise the development of the children, in particular in their first years of life.

The courts failed further to clarify the contradiction between the findings in the expert opinion according to which the applicants were not ready to co-operate and the fact that Mrs Haase herself had asked to be granted educational assistance. Furthermore there was no indication whether and to what extent the applicants had refused any contact or help offered by the Youth Office and it was not clear which "specific measures granting assistance" (*einzelne Jugendhilfemaßnahmen*) had been carried out in the past and why they were not successful.

The District Court should have first clarified the questions which arose and in the meantime could have taken alternative provisional measures if there was serious reason to believe that the welfare of the children was at risk.

According to the Federal Constitutional Court, it could not be excluded that, prior to the termination of the proceedings on the merits, which had to be dealt with by priority, the District Court would issue another urgency decision. If so, the District Court was directed to examine carefully whether, in the light of the evidence obtained in the meantime, the continued separation of the children from the applicants was still justified and whether a repeated change of the children's place of residence would be in their best interests. If the District Court found that the present situation were to be maintained, it would have to consider whether the applicants should be granted a right of access, if appropriate restricted or subject to conditions, and whether, by observing strictly the principle of proportionality, the effects of such a decision should be limited in time.

On 24 June 2002 the Münster District Court set down for hearing on 1 July 2002 the request of the Münster Youth Office of 17 December 2001 to provisionally revoke the parental rights of the applicants over the children. It transferred to the Youth Office the right to decide where the children should live (*Aufenthaltsbestimmungsrecht*). The District Court found that the best interests of the children required not to change the present situation before a decision on the merits was given on the request of the Youth Office. The District Court considered that its decision of 18 December 2001 prohibiting the applicants all to the children access was

still relevant, since it had not been set aside by the Federal Constitutional Court.

By an interim injunction of 1 July 2002, the Münster District Court provisionally transferred the custody (*Personensorge*) over the children to the Münster Youth Office. The District Court confirmed its decision of 18 December 2001. The expert was instructed to complete her report. She was requested to comment in particular on the questions as to whether, in the best interest of the children, it was necessary to maintain the access prohibition, as to whether to grant the children access to the elder children, M., S., R. and A., and if adequate, in which way such contact could be arranged while keeping the children's place of residence secret.

The District Court relied notably on the findings of the expert G. that the separation of the applicants from their children had to be maintained. The applicants were incapable of bringing up their children because of their own basic and irreparable educational deficiencies and their abuse of parental authority. The children were emotionally disturbed and presented unusual patterns of behaviour. They had been beaten and locked up. Furthermore the four elder children of the first marriage had approved the separation of the younger children from their mother and had refused any contact with her. The sole purpose of Mrs Haase giving a positive impression of herself was to obtain support from others. However, any such support was foredoomed.

The District Court noted that K. had not yet produced the requested expert opinion. However, confirming the findings of the expert G., she had stated at the hearing of 1 July 2002 that there was no alternative to separating the children from the applicants. According to her, Mrs Haase had never shown willing to call her own behaviour into question. She satisfied exclusively her own needs and refused to accept educational assistance with a view to reducing her own deficiencies. In fact, she had admitted not having undergone a therapy in 1994. K. found that G.'s expert opinion could not be objected to.

The District Court considered that the numerous written testimony statements submitted by the applicants, according to which the children had not been beaten or ill-treated, did not constitute sufficient evidence in their favour. Harm, such as verbal cruelty, could also be of a psychological nature. The statement made by L. that she wished to return to the applicants, did not reflect her real intention, but resulted from a conflict of loyalty.

The District Court further compared the situation described in an expert report drawn up in 1993 to the present situation: Mrs Haase was always well-dressed while her husband looked tired and worn out. It concluded that Mrs Haase was not aware of her problems. She aggravated with each new pregnancy the emotional deficiencies of the children. This had been confirmed by K. after a discussion with the applicants on 11 June 2002.

The District Court affirmed that its decision of 17 December 2001 was based on its experience in cases where coercive measures had to be taken.

Had the parents been warned of the requested measure, they would have offered resistance, as was shown by their own and the excessive reaction of the media in this case. An enforcement of the court decisions with the intervention of the authorities and the police things would have been contrary to the best interests of the children.

On 16 July 2002 the applicants appealed against this decision to the Hamm Court of Appeal.

On 20 August 2002 the applicants challenged K. for bias. They complained that she intentionally delayed the preparation of her expert report with a view to separating the children from their parents for a longer period. She could not be relied upon to act in the best interests of the children. Without having seen them, she had recommended, at the hearing before the District Court of 1 July 2002, that they be separated from the applicants. Her unfriendly conduct vis-à-vis the applicants, when interviewing them at their home on 11 June 2002, and the reference to old files dating from Mrs Haase's divorce confirmed the view that she was not impartial.

On 18 September 2002 the applicants challenged the judge at the Münster District Court, W., for bias. They referred to previous decisions given by that judge in favour of the Youth Office, even if they were in contrast to expert recommendations.

On 23 September 2002 the judge declared himself not to be partial.

On 30 September 2002 the applicants lawyer again challenged W. and K. for bias.

On 7 October 2002 the Münster District Court dismissed the challenge on the ground that the applicants' allegations were unsubstantiated.

## B. Relevant domestic law

Article 6 of the Basic Law (*Grundgesetz*) reads as follows:

> "...
>
> (2) Care and upbringing of children are the natural right of the parents and a duty primarily incumbent on them. The state watches over the performance of this duty.
>
> (3) Separation of children from the family against the will of the persons entitled to bring them up may take place only pursuant to a law, if those so entitled fail in their duty or if the children are otherwise threatened with neglect.
>
> ..."

Article 1666 of the Civil Code (*Bürgerliches Gesetzbuch*) lays down that the guardianship courts are under an obligation to order necessary measures if a child's welfare is jeopardised (*Gefährdung des Kindeswohls*).

The first sub-paragraph of Article 1666a provides that measures intended to separate a child from its family are permissible only if it is not possible

for the authorities to take any other measure to avoid jeopardising the child's welfare.

The second sub-paragraph of Article 1666a provides:

> "Full [parental] responsibility may only be withdrawn if other measures have proved ineffective or have to be regarded as insufficient to remove the danger [Die gesamte Personensorge darf nur entzogen werden, wenn andere Maßnahmen erfolglos geblieben sind oder wenn anzunehmen ist, dass sie zur Abwendung der Gefahr nicht ausreichen]."

## COMPLAINTS

The applicants complain under Article 8 of the Convention that the withdrawal of their parental rights, the separation from the children and the prohibition of all contact with them infringed their right to respect for their family life. In the proceedings before the Münster District Court they have not been involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests. They submit that the decisions of the Münster District Court and the Hamm Court of Appeal are based on an unacceptable opinion drawn up by the G, expert of the Welfare Office. There were no substantiated reasons justifying the withdrawal of their parental rights and the taking away of the children, in particular as far as the youngest daughter, born on 11 December 2001, is concerned. The expert has never seen this child. In this context, the applicants invoke also Article 6 of the Convention.

## THE LAW

The applicants complain that the suspension of their parental responsibility for their four children and the three children of Mrs Haase's first marriage and the prohibition of access to all the children 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 for the protection of the rights and freedoms of others."

They also complain that they have not had a fair hearing within the meaning of Article 6 § 1 of the Convention, the relevant part of which reads:

> "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. ..."

In their observations the Government ask the Court to declare the application inadmissible as the applicants have failed to exhaust domestic remedies, as required by Article 35 of the Convention. They refer to the decision of the Federal Constitutional Court of 21 June 2002 by which the applicants' constitutional complaint against the decisions of the Münster District Court of 18 December 2001 and 7 January 2002 were declared inadmissible for an informality.

As far as the applicants complain of the decision of the Münster District Court of 17 December 2001 and the decision of the Hamm Court of Appeal of 1 March 2002, the Government contend that the application is manifestly ill-founded, since the contested decisions have been set aside by the Federal Constitutional Court. In respect of any new decision of the Münster District Court, the applicants have first to make proper use of the available redress through lodging an appeal with the Hamm Court of Appeal and, if necessary, again a constitutional complaint with the Federal Constitutional Court.

The applicants submit that the situation complained of has not changed and that they are not required to pursue any further remedy in order to comply with the obligation to exhaust domestic remedies. They are still separated from their children. The proceedings are far from being terminated, contrary to the assumption of the Federal Constitutional Court in its decision of 4 April 2002 that the courts would exercise exceptional diligence in respect of the time factor in such cases. The applicants further submit that they do not understand why the case had not been referred to a different District Court. The same judge who had given the contested decisions in December 2001 issued again an interlocutory order on 1 July 2002 by which he confirmed his previous decisions. As a result, the children are exposed to serious psychological harm. The Court of Appeal has not yet fixed a hearing or given a decision on their appeal. According to the applicants, the lapse of time risks to lead to a *de facto* determination of the issues.

The Court recalls that the obligation to exhaust domestic remedies is limited to making use of remedies which can provide effective and sufficient redress (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of judgments and Decisions* 1998-VI, p. 2431, § 71).

The Court observes that, despite the decision of the Federal Constitutional Court of 22 June 2002, the situation of the applicants and the children concerned has not changed. Having regard to the drastic measure of separating the applicants from their children and the important time-factor in these matters, the Court finds that in the present case the question of whether or not the applicants have exhausted domestic remedies within the

meaning of Article 35 § 1 of the Convention is so closely related to the substantive issues of the application that it cannot be determined separately.

The Court has examined the applicants' complaints and the submissions of the parties. It finds that serious questions of fact and law arise, which are of such complexity that their determination should depend on an examination of the merits. The application cannot, therefore, be regarded as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

*Declares* the application admissible, without prejudging the merits of the case.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President