CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application No. 29565/95
by Pascal HOLDRY
against Germany

Commented [Note1]: Please check if public or not. If not, put initials only. Name and, in capital letters, surname ; corporative name in capital letters ; no translation of collective names.

Commented [Note2]: First letter in capital letters plus the article according to normal speech.

The European Court of Human Rights (Fourth Section) sitting on 12 January 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr G. Ress,
Mr L. Caflisch,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mrs N. Vajić,
Mr J. Hedigan, *Judges*,

with Mr V. Berger, S*ection Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 December 1995 by Pascal HOLDRY against Germany and registered on 12 December 1995 under file No. 29565/95;

Commented [Note3]: In small letters.

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1957, is a French national and resident in Triel-sur-Seine. He is a technician by profession. In the proceedings before the Court, he is represented by Me N. Creuzillet, a lawyer practising in Paris.

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

In 1986 the applicant married a German national in France, and two children were born in wedlock in 1986 and 1989.

Apparently in 1992, the applicant's wife separated from the applicant and returned to Germany with the two children. She instituted divorce proceedings with the Memmingen District Court (*Amtsgericht*). Moreover, divorce proceedings were instituted with the Versailles *tribunal de grande instance*. In March 1993 the Memmingen District Court granted the applicant's claim under the Hague Convention on the Civil Aspects of International Child Abduction (*Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung*) that the children be returned to France. Upon appeals lodged by the competent Youth Office and the applicant's wife, his claims was dismissed by the Augsburg Civil Sections (*Zivilsenate*) of the Munich Court of Appeal (*Oberlandesgericht*) in May 1993. In June 1993 the Memmingen District Court granted the applicant's wife custody of the children pending the spouses' separation. However, in July 1993 the Versailles Regional Court decided that the children should live at the applicant's place of residence. In March 1994 the Versailles *tribunal de grande instance* granted the applicant custody of the children.

In July 1994 the applicant applied with the Memmingen District Court for a right of access (*Umgangsrecht*) to his children in August 1994 and during the Christmas holidays, as well as a regular access during these holiday periods, which he intended to spend with them in France. He also requested information about his children. He further applied for an interim injunction.

In these court proceedings, both spouses were represented by counsel.

On 4 August 1994 the Memmingen District Court dismissed the applicant's request for an interim injunction. The defendant had accepted his right to information.

On 23 November 1994 the Memmingen District Court dismissed the applicant's request for access. The court observed that the applicant wished to spend holidays with his children in France, while the defendant, suggesting supervised visits, objected to uncontrolled access. The court considered that, despite his assurances, there was a real risk that the applicant would not return the children at the end of the holidays and thereby create a danger for their well-being. In this respect, the court had regard to the course of the spouses' separation and divorce proceedings. Having regard to an expert opinion prepared in the context of the custody proceedings, it noted that the children had a very good relationship with their mother and that they were fully integrated at their place of residence. Moreover, given the legal situation in France, the applicant's assurances that he would return the children at the end of the holidays were not sufficient. In this respect, the court noted that he was not prepared to accept that the children were living with the defendant and that she had custody.

On 12 April 1995 the Munich Court of Appeal dismissed the applicant's appeal. The court, referring to section 1634 of the Civil Code (*Bürgerliches Gesetzbuch*), confirmed that granting the applicant a right of access including the right to take the children to France was - for the time being - contrary to the children's well-being. The court noted that the applicant had expressly stated that he did not apply for access to his children in Germany; and that this matter was not, therefore, at issue in the proceedings.

Under section 1634 of the Civil Code, the parent not holding 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.

In this respect, the Court of Appeal noted that the children, when questioned by a single judge in March 1995, had indicated that they were only prepared to visit the applicant in France if accompanied by their mother. They feared to loose the security of their mother's presence. According to a psychological expert opinion of February 1993, separating the children from their mother entailed a risk for their well-being.

On 13 June 1995 the Federal Constitutional Court (*Bundesverfassungsgericht*) refused to entertain the applicant's constitutional complaint (*Verfassungsbeschwerde*). The Constitutional Court considered that the constitutional complaint raised no issue of fundamental importance. In particular, the impugned court decisions did not disclose any discrimination against the applicant, but was reasoned by the risk that the applicant might separate the children from their mother. Moreover, the applicant had not been generally refused a right of access, but only in the concrete circumstances and having regard to the children's well-being. The possibility to visit the children in Germany was not excluded. The decision was served upon the applicant's counsel on 20 June 1995.

Meanwhile, on 9 May 1995 the Versailles *tribunal de grande instance*, in a default judgment, had granted divorce. It had further decided that both parents had joint custody of the children and that the children should live with their mother. As regards access, it decided that, in case of disagreement between the parents, the applicant had a right of access to the children during all short school holidays and half of the summer holidays.

COMPLAINTS

The applicant complains that the German court decisions dismissing his request for access amount to a violation of his right of respect for his family life under Article 8 of the Convention.

THE LAW

The applicant complains about German court decisions refusing his request for access to his children during school holidays. He invokes Article 8 of the Convention.

This provision, 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 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 Court recalls that the family life of parents with their children does not cease to exist following the separation of the parents or the divorce of a married couple (the Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, p. 14, § 21).

The Court finds that the German court decisions dismissing the applicant's request for access to the children interfered with the applicant's right under Article 8. The Court therefore has to examine whether such interference was justified under the terms of paragraph 2 of Article 8.

The Court notes that the decisions on access to the children were based on section 1634 of the Civil Code. The interference at issue was, therefore, in accordance with the law within the meaning of Article 8 § 2.

The Court further considers that the impugned decisions had a legitimate purpose under paragraph 2 of Article 8, namely the protection of the rights of others, namely the well-being of the children concerned.

As regards the question whether the interference complained of was "necessary in a democratic society", the Court 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 (*cf.* the Berrehab judgment, *op. cit.*, p. 15, § 128; the Funke v. France judgment of 25 February 1993, Series A no. 256-A, p. 24, § 55).

The Court observes at the outset that the impugned access decisions were taken in the context of a controversy between the children's parents with a view to determining the best solution for the children pending the spouses' divorce proceedings.

The German courts, taking the children's well-being as the guiding principle for their decisions, considered the children's personal situation, the spouses' conduct in the course of their separation and divorce proceedings. In their decisions, the courts relied on the statements of both parents as well as of the children, and also on psychological expertise. Moreover, the courts carefully balanced the conflicting interests involved.

Against this background, the Court finds that the reasons for the impugned decisions were both relevant and sufficient. Moreover, having regard to the children's situation, there is no indication of any disproportion between the decisions taken and the legitimate aim pursued. In particular, the District Court noted that its decision concerned access pending the divorce proceedings which included a possibility to take the children to France, as requested by the applicant. The Court of Appeal noted that the applicant had expressly stated that he did not apply for exercising his right of access in Germany.

Finally, as to the procedural requirements implicit in Article 8 (*cf.* the Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, p. 33, § 71), the Court finds that the applicant, assisted by counsel, was involved in the decision-making process on his request for access to a degree sufficient to provide him with the requisite protection of his interests. In

particular, the children were heard in the court proceedings and psychological expertise was taken into account.

In these circumstances, the German authorities did not exceed their margin of appreciation when dismissing the applicant's request for access. Consequently, there is no appearance of a breach of Article 8.

The application is, therefore, manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Matti Pellonpää
President