AS TO THE ADMISSIBILITY OF

Application No. 26568/95
by Haci Mehmet KARAKUZEY
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
I. BÉKÉS
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 7 February 1995 by Haci Mehmet KARAKUZEY against Germany and registered on 22 February 1995 under file No. 26568/95;

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 1961, is a Turkish national, residing in Göppingen. In the proceedings before the Commission he is represented by Mr. M. Garbach, a lawyer practising in Weilheim.

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

On 4 December 1991 the Weilheim District Court (Amtsgericht) granted an order of dissolution of the applicant's marriage and transferred the right of custody over the spouses' daughter, born in wedlock in 1986, to her mother. The court noted that the applicant had agreed to the transfer of custody which was, for the time being, in the best interests of the child.

According to the applicant's submissions, his daughter had initially been educated according to Islamic belief. It appears that, following their divorce, his former wife decided to have the child's religious education changed and, in June 1992, had her baptised according to Roman-Catholic faith. Thereupon, the applicant stopped his maintenance payments.

On 16 December 1992 the Weilheim District Court ordered the

applicant to pay maintenance of DM 472,50 per month to his daughter. The court noted that the change of his daughter's religion did not affect her maintenance claim.

On 11 June 1993 the Weilheim District Court gave a decision relating to the applicant's right to access to his daughter. It found that he was entitled to see her every third weekend from Friday evening until Sunday evening and for three weeks during the summer holidays. It appears that the applicant could not exercise this right. He submits that his daughter, allegedly influenced by her mother, refused any contact with him. On 25 January 1994 the District Court decided that both parties would have to pay a fine of up to DM 1,000 should they further defy its decision as to the applicant's right of access.

On 11 August 1993 the applicant requested free legal aid for the purpose of appealing against the decision of 16 December 1992 on the ground that he had no obligation to pay his daughter maintenance. He submitted in particular that his daughter refused any contact with him. Further she had been baptised and had become a member of the Roman-Catholic church. He had lost his right to educate her according to his beliefs. According to Islamic belief a child which left this faith was non-existent. Therefore, an obligation to pay her maintenance violated his freedom of religion. Although she had been influenced by her mother, his daughter had lost her right to maintenance on account of her conduct.

On 19 November 1993 the Weilheim District Court refused the applicant's request for free legal aid. It found that the appeal he intended to bring lacked sufficient prospects of success. In particular, the change of his daughter's religion did not affect his obligation to pay maintenance.

On 18 February 1994 the Munich Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal against this decision.

On 8 March 1994 the Weilheim District Court convicted the applicant of breaching his obligation to pay maintenance. It sentenced him to six months imprisonment suspended on probation. The Court noted that the applicant had stopped his maintenance payments in November 1992, upon learning that this daughter had been baptised and had become a Roman-Catholic. However, he knew that he was not entitled to do so. The court found in particular that the change of his daughter's religion did not dispense the applicant from his obligation to pay her maintenance. This change had been brought about by the applicant's former wife, who had lawfully exercised her right to custody which included the determination of the child's religion. As regards the applicant's submissions that his conviction violated his human rights, the court noted that his own right to exercise his religion was not affected and that his right to determine his daughter's religion had been restricted by the transfer of custody to his former wife.

On 6 June 1994 the applicant lodged an appeal on points of law (Revision) against this decision. He argued that his right to freedom of religion had been violated in that he had lost all influence over his daughter's religious education by reason of the fact that the right to custody had been awarded to her mother. In particular, his right to determine his daughter's religion had been violated, as her religion had been changed by her mother without his being consulted. According to Islamic belief such a conduct constituted an insult which would oblige the father to expel mother and child from his family. In case of such a gross violation of his freedom of religion any obligation to pay maintenance had to be excluded. The financial interest of the mother and the child had to be regarded as less important, in particular as the maintenance of the child could be guaranteed by public authorities or, eventually, with the help of the Roman-Catholic church. Moreover, his daughter, influenced by her mother, had refused any contact with him. As she had been alienated from him, it was

against his dignity to be degraded to a mere funder. His right to access and his feelings had to be put above the financial interest of the child. For these reasons, the legal provisions concerning custody and maintenance as well as the contested judgment were unconstitutional.

On 8 August 1994 the Bavarian Court of Appeal dismissed the applicant's appeal on points of law.

On 17 August 1994 the Federal Constitutional Court (Bundesverfassungsgericht) refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde) as regards the refusal of free legal aid for appealing against the decision obliging him to pay maintenance.

On 25 September 1994 the Federal Constitutional Court refused to admit the applicant's constitutional complaint as regards the decisions concerning his conviction for breaching his obligation to pay maintenance.

COMPLAINTS

The applicant complains about the change of his daughter's religion and about the court decisions obliging him to pay maintenance to her despite the fact that she refuses contact with him and is brought up in Roman-Catholic faith. He submits in particular that the transfer of custody to his divorced wife, which enabled her to have his daughter's religion changed without consulting him, violates the principle of equality between the spouses and his right to freedom of religion. Further, he considers that the court decisions are discriminatory in that they reduced his relationship with his daughter to the payment of maintenance. The applicant invokes Article 5 of Protocol No. 7 as well as Articles 9 and 14 of the Convention.

THE LAW

1. The applicant complains about the change of his daughter's religion and about the court decisions obliging him to pay maintenance to her despite the fact that she refuses contact with him and is brought up in Roman-Catholic faith. He invokes Article 5 of Protocol No. 7 (P7-5) as well as Articles 9 and 14 (Art. 9, 14) of the Convention.

2. Article 26 (Art. 26) of the Convention provides that "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken." The obligation to exhaust domestic remedies requires use of those remedies that are available and sufficient. The remedy must be effective, that is capable of rectifying directly the situation complained of (cf. No. 18079/91, Dec. 4.12.91, D.R. 72 p. 263).

In the present case the question arises whether the applicant has exhausted the remedies available to him under German law. In particular, the Commission notes that the applicant did not appeal against the decision of 16 December 1992, by which the Weilheim District Court ordered him to pay maintenance to his daughter. The related criminal proceedings cannot be considered as an effective remedy as regards his grievances relating to the change of his daughter's religion or her refusal to see him. However, the Commission does not need to examine whether an effective remedy was available to the applicant, or, in case there was none, whether he has complied with the six-months' time-limit, as his application is inadmissible for the following reasons.

3. As far as the applicant invokes the right to equality between the spouses as guaranteed by Article 5 of Protocol No. 7 (P7-5), the Commission notes that Germany has not ratified the said Protocol.

It follows that this part of the application is incompatible ratione personae within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The Commission has examined the applicant's complaint under Article 9 (Art. 9) of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.
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> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The applicant submits in particular that, as a consequence of the transfer of custody to his divorced wife, he could no longer determine his daughter's religion.

The Commission recalls that it has previously found with regard to Article 2 of Protocol No. 1 (P1-2) of the Convention, that in a case where custody is awarded to one parent after divorce, the right of parents to ensure the education of their children in accordance with their religion and their philosophical convictions, which is an integral part of the right to custody, may not be exercised by the parent from whom custody has been withdrawn (cf. No. 7911/77, Dec. 12.12.97, D.R. 12 p. 192).

The Commission considers that Article 2 of Protocol No. 1 (P1-2) contains the more specific provision as regards a parent's right to determine his child's religious education. It follows that, in this regard, the applicant's complaint does not raise an issue under Article 9 (Art. 9) of the Convention.

Further, the applicant can be understood to complain that his obligation to pay maintenance, despite the fact that his daughter is not raised in Islamic faith, violates his freedom of religion.

The Commission recalls that Article 9 (Art. 9) primarily protects the sphere of personal beliefs and religious creeds, but does not cover every act which is motivated by religion or belief. In protecting the said personal sphere, Article 9 (Art. 9) does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief, for instance by refusing to pay certain taxes because part of the revenue so raised may be applied for military expenditure (cf. No. 10358/83, Dec. 15.12.83, D.R. 37 pp. 142, 147).

In the present case, the German courts ordered the applicant to pay his daughter maintenance and convicted him of having breached his obligation to do so. They stated that the said obligation was not affected by the change of his daughter's religion.

The Commission finds that the obligation of a parent to pay maintenance to his child who is living with the other parent applies generally and has no specific conscientious implications in itself. Article 9 (Art. 9) does not confer on the applicant a right to refuse, on the basis of his religious beliefs, to abide by the court decisions at issue. The Commission, therefore, finds that there has been no interference with the applicant's right to freedom of religion as

guaranteed by Article 9 para. 1 (Art. 9-1) 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.

5. Finally, examining the application under Article 14 taken together with Article 9 (Art. 14+9) of the Convention, the Commission finds that the applicant failed to substantiate his complaint. In particular there is nothing in the file to show that the was discriminated against on the ground of his religion or any other personal status.

It follows that this part of the application is also 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 THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber