AS TO THE ADMISSIBILITY OF

Application No. 26376/95
by Catherine Irene LAYLLE
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 4 September 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
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 29 November 1994 by Catherine Irene LAYLLE against Germany and registered on 1 February 1995 under file No. 26376/95;

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 10 October, 30 November 1995 and 8 February 1996 and the observations in reply submitted by the applicant on 7 December 1995, 13 February, 3 April and 3 May 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant has British and French nationality and lives in London. The facts of the application, as submitted by the parties, may be summarised as follows.

The particular facts of the case

The applicant married a German citizen in 1984. Two children were born, in 1985 and 1987. The couple lived in London until after the birth of the first child, when they moved to Germany. In 1992, the marriage broke down. By a notarised agreement between the husband and the applicant, it was agreed that the children would live with their mother in London, continue their education at the French lycee, and that most of their holidays would be spent in Germany with the father.

The father failed to return the children to their mother after the summer holidays in 1994. On 30 August 1994, on the applicant's originating summons, the High Court in London made an ex parte order

under the Child Abduction and Custody Act 1985. The order provided that the children were made wards of court, and that they were to be placed in the interim care and control of the mother. The order also declared that the retention of the children outside England and Wales was wrongful pursuant to Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction ("the Child Abduction Convention", which has been incorporated into English law). The wardship was later lifted.

The applicant began proceedings in Germany to secure the return of her children under the Child Abduction Convention. On 19 September 1994 the children were heard by the Verden District Court (Amtsgericht) in the presence of a member on the local Youth Office (Jugendamt), but not in the presence of the parents. On 20 September 1994, after hearing both parents and a member of the Youth Office, and after considering an expert report presented by the father, the District Court ordered the applicant's husband to surrender the two children to the applicant so that they could return to the United Kingdom. The court recited the father's claims that return of the children would entail the risk of psychological damage to the children, and the applicant's claims that the children had been living with her for over two years and that to return them would be in their interest and would not entail any psychological damage. The court referred to Article 12 of the Child Abduction Convention, found that there was no serious risk of psychological damage to the children within the meaning of Article 13 of that Convention and that the children's expressed wish not to be returned was not relevant because of their lack of years, and ordered the return of the children. The court also referred to the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children.

According to the applicant, the father then arranged for the children to be taken away from the court and examined, over a considerable period of time, by a child psychologist.

The father and the Youth Office appealed.

It appears that on 30 September 1994 a further ex parte order of the High Court in London declared that the father's retention of the children was a wrongful retention within the meaning of Article 3 of the Child Abduction Convention.

On 20 October 1994 the Celle Court of Appeal (Oberlandesgericht) quashed the order of 20 September 1994 and refused the applicant's request for return of the children. The applicant was present and was represented by two lawyers. In the absence of the children's parents and the Youth Office representative, the Court of Appeal heard the children by way of a personal conversation lasting some 45 minutes. The children repeated their wish to remain with their father. The Court informed the parties of the outcome of the conversation with the children, and gave them the opportunity to comment.

The Celle court accepted that the conditions for the application of the Child Abduction Convention were met, and referred expressly to Article 3. It noted that the children had stated before the District Court that they preferred to stay with their father, and that they had repeated this wish before the Court of Appeal. It also noted that its function was not to determine what was in the children's best interests, but rather (pursuant the Child Abduction Convention) to bring about the status quo ante unless Article 13 of that Convention applied. It pointed out that there was no fixed age-limit below which children's views could not be considered, and found that the children, then 7 and 9 years of age, were of such an age and degree of maturity that it was appropriate to take account of their views.

The court continued:

"A. ... pushed his mother away with his hands (at the beginning of the hearing). To begin with he sat crying on one of the back rows of seats ... After he had received evasive answers to his spontaneous questions whether he now had to go back to his mother, he hid his face in his ... arms and remained sobbing in this position ... He was told that on this day only the question of a provisional return would be decided, whilst the decision on his and his brother's custody would only be considered in future custody proceedings. At this, A. became calm, but immediately asked for how long he would have to go back to his mother, if at all. He did not accept the objection that he might be better off with his mother on educational grounds, at least until the question of custody has been decided, as he had a negative stands vis-à-vis the circumstances of his life in London hitherto ("weil er den Umständen seines bisherigen Lebens in London in jeder Hinsicht ablehnend gegenübersteht") ... He gave as a reason for his decision that he wanted to live with his father ... that he was after all German. ... He considered [the English] had a different character, but could not explain that concept. It became clear, however, from his description of various circumstances which obviously upset him.

"He confirmed again that he has no friends in school, and, apart from his brother, he is the only German there and is insulted and teased as a "Nazi"...

"... He explained that he talks English with his classmates. He said that he generally gets up at 7.00 a.m. or 7.30 a.m., by which time his mother has already left. Breakfast is made by the nurse, who brings him ... to school at about 8.30 a.m., and picks him up again in the late afternoon. The mother comes home at about 6.00 p.m., but usually does not stay very long, but generally leaves the house again in the evening ... The children speak French with their mother and English with the nurse ...

"[In connection with the relationships within the family before the parents separated, A.] remembers that he lived in the Schlüterstraße in Hamburg ... He did not accept the comparison between the French school in Hamburg and that in London, in particular because the school in Hamburg is attended by many German children, while in the school in London there were no other German children. A. reproached his mother ... that she is never there, and only has time for the children at the weekend ... The children seem to know very little about running around ... table games, trips and other activities. On the other hand, A. clearly brightened up when talking about the school ... which he now attends. He stressed particularly that in the short time since school began he has made friends with several children, and he reports enthusiastically about his father's house which is on its own in the woods ... and his games with his new friends.

"On the basis of its extensive and intensive discussion with A., the Court is convinced that this boy suffers from severe pressure. He is convinced that his mother "simply took" him and his brother. ... He obviously thinks in German and, to be understood, has to "translate" ... His whole social environment is, from his point of view, dominated by foreign languages, as German is not spoken at home or in school ... With regard to other socio-cultural differences, in particular the considerable effort needed at school and the corresponding lack of [recreational facilities], A.'s refusal to return to his mother is perfectly understandable. So far as can be established in the framework of these proceedings ..., this refusal is not based on a sudden idea or a passing mood, as often happens with younger children, nor is it based on "emotional influences" from the [father] or on the continuing holiday mood, as the holidays ended

almost two months ago ... The members of the Court cannot be said to have no personal experience in this area, as they are all grandfathers or fathers of children of just this age. ... It would be an act of violence not to take account of A's refusal.

"The same applies mutatis mutandis for the brother. C. cannot express himself as clearly as his brother because of his age. But he also refuses expressly and firmly to return to his mother ... Even with the nurse he was only able to speak English ..."

In her constitutional appeal, which she made in her own name and her sons', the applicant alleged violation of Articles 6 paras. 2 and 3 and Article 2 para. 1 together with Article 1 of the Basic Law (family rights and the right to dignity and development of the person), and of the principles of fairness and of the rule of law. She emphasised in particular that the Court of Appeal had decided the appeal on the basis of its own impression of the children's evidence, without undertaking any enquiries (such as independent reports) which could establish whether - especially as the children had been in close contact with a child psychologist employed by the father - the children were of an age that their opinion should be taken into account.

The Constitutional Court (Bundesverfassungsgericht) declined to deal with the applicant's constitutional complaint on 9 March 1995. It recalled that the assessment of facts and the interpretation of ordinary law was a matter for the specialist courts, and it found no indication that the Court of Appeal's decision involved a fundamentally wrong consideration of the importance of the parents' rights or the children's rights. The Court saw no problems of constitutional law arising from the fact that the judges decided the case on the basis of their own findings, rather than calling for any further investigations.

Substantive access proceedings are apparently still pending before the German courts; the applicant did not pursue an appeal in custody proceedings.

Relevant law and practice

Convention on the Civil Aspects of International Child Abduction

Article 3

"The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. ..."

Article 12

"Where a child has been wrongfully removed or retained in terms of Article 3 ..., the authority concerned shall order the return of the child forthwith."

Article 13

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes

that -
...
(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

COMPLAINTS

The applicant alleges a violation of Articles 6, 8 and 14 of the Convention. She alleges that the decision of the Celle Court of Appeal was arbitrary in that inter alia the court took its decision on the basis of its own interrogation of two children aged 7 and 9, she was not heard at all, no reference was made to the fact that she had not seen the boys for over four months by the time of the decision and so they must have been influenced by the father, and that the children were too young for the case to be wholly decided on their own statements.

She also alleges that the local Youth Office is partial and is ignoring the damage to her children, and that she has not been able to visit the children properly whilst the proceedings were pending.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 November 1994 and registered on 1 February 1995.

On 4 July 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 10 October 1995, with an addition on 30 November 1995. The applicant replied on 7 December 1995, and the Government commented on that reply on 8 February 1996. On 13 February 1996 the applicant commented on the Government's paper of 30 November 1995. She made still further submissions on 3 April 1996 and 3 May 1996.

On 23 January 1996 the Commission granted the applicant legal aid.

THE LAW

1. The applicant alleges violation of Article 6 (Art. 6) of the Convention. She complains that the Celle Court of Appeal was biased, that its decision was arbitrary, and the proceedings before it were unfair.

Article 6 para. 1 (Art. 6-1) of the Convention provides, so far as relevant, as follows.

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

The Government submit that it is not clear whether Article 6 (Art. 6) applies to the proceedings at issue in the application before the Commission, as the only question to be determined was the application under the Child Abduction Convention, which aimed at restoring the status quo ante in terms of the law on custody and access, rather than determining substantive (civil) custody or access rights. They underline that at the hearing before the Celle Court of Appeal, the applicant was present in person, and was represented by two lawyers, who made submissions on the merits of the case. The Government see no indication whatever of any lack of impartiality on the part of the court, and underline that the proceedings were conducted strictly in accordance with the relevant provisions of domestic law. They note that the mere fact that there are lawyers and doctors among the relatives of the children's father is not sufficient to indicate bias, even in a relatively small town like Verden, and in any event, the Verden decision was favourable to the applicant, and it was the Celle Court which found against her.

The applicant considers that Article 6 (Art. 6) of the Convention applies because the Child Abduction Convention concerns civil aspects of child abduction. In connection with the hearing before the Celle Court of Appeal, she claims that by solely hearing the children, without an interpreter, the court denied her rights. She claims that, in any event, the proceedings were not properly conducted because children of 7 and 9 are far too young to be heard by a court, and because they were accompanied by a psychologist chosen by the father and had been subjected to undue influence by the father all summer. The applicant also considers that the Court of Appeal was not impartial because it took into account a report from the Verden Youth Office which had not put questions to her, and because a member of the Youth Office expressed the opinion that the children should remain in Germany, at least for the interim.

The Commission first notes that the present application is limited to questions arising in connection with the proceedings under the Child Abduction Convention, as it is only in that respect that the applicant has put her complaints to the Federal Constitutional Court.

The Commission next notes that the applicant had a right in German law to go to the courts and to allege a violation of the Child Abduction Convention, and that the result of such proceedings could have been conclusive for the question of where the children were to live. Moreover, the proceedings were clearly to determine a dispute as to the interpretation of that convention. The Commission is not, however required to decide whether that right was "civil" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, as even if it was, the complaint is in any event inadmissible for the following reasons.

As to compliance with Article 6 (Art. 6) of the proceedings in the present case, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see eg. No. 458/59, X v Belgium, Dec. 29.3.60, Yearbook 3 pp.222, 236; No. 5258/71, X v Sweden, Dec. 8.2.73, Collection 43 pp.71, 77; No. 7987/77, X v Austria, Dec. 13.12.79, D.R. 18 pp. 31, 45; No. 19890/92, Ziegler v. Switzerland, Dec. 3.5.93, D.R. 74 p. 234).

As to the specific points raised by the applicant in connection with Article 6 (Art. 6) of the Convention, the Commission notes that the applicant was present and represented at the hearing before the

Court of Appeal on 20 October 1994, and there is no indication that she requested, through the lawyers, to be able to address the court herself.

The decision by the Court of Appeal to hear the children in the absence of the parties cannot of itself violate the applicant's right to a fair hearing under Article 6 (Art. 6) of the Convention: in hearing the children in a setting less formal than a court room in the presence of all the parties, the Court of Appeal was attempting to obtain the children's views on where they wished to live in circumstances most likely to give rise to a true picture of their opinions. The Court of Appeal then informed the parties of the outcome, and gave the opportunity to comment.

The applicant also complains that the children were too young for their views to be taken into consideration by the court, and that the proceedings were therefore unfair. However, the procedural rules to be applied are, in the first place, a matter for the domestic authorities; the Convention's concern is rather with the use made of that evidence. In the context of the present case, it was perfectly natural for the Court of Appeal to wish to hear the views of the children (as the Verden court had also done), and the Commission does not accept that to base a decision on the - wholly relevant - views of children can of itself violate Article 6 (Art. 6) of the Convention.

Finally in the context of Article 6 (Art. 6), the applicant complains generally of bias on the part of all those involved: the Celle Court of Appeal, the Youth Office and the psychologist allegedly employed by the father. It suffices for the Commission to note that in the present case the Youth Office exercised a solely advisory function concerned with child and juvenile welfare, and it did not take any decision affecting the applicant's rights; and that any psychologist employed by the father similarly took no decisions which affected the applicant's rights. The Commission finds no reason to question the impartiality of Court of Appeal, either in the way with which it dealt with the evidence from these sources, or in the way it approached the case generally.

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.

2. The applicant alleges a violation of Article 8 (Art. 8) of the Convention in connection with the refusal of the German courts to return her children to her after their wrongful retention by their father.

Article 8 (Art. 8) of the Convention provides, so far as relevant, as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government express doubt as to whether a decision to return a child under the Child Abduction Convention can at all constitute an interference with family life, but consider that even if it can, any interference in the present case was justified. They point out that the proceedings were conducted in accordance with the relevant provisions of the domestic legislation, and that the aim of both the

Child Abduction Convention and the courts - to serve the best interests of the child - was clearly legitimate.

As to the proportionality of any interference, the Government underline that the Child Abduction Convention does not set up an absolute rule requiring children who have been wrongfully retained to be returned: rather, it permits of exceptions to the general rule, allowing account to be taken of the child's best interests in a particular case. They add that the courts went to considerable lengths to establish whether the children's wishes should be taken into account, and what those wishes were, and point to a number of decisions of the English courts which lay great importance on the opinion of young children. They consider that the Court of Appeal correctly and sufficiently substantiated why it was that the children's expression of their wishes reflected those wishes, and was based on a thought process sustained by a certain degree of maturity, not simply on a childish mood. As to the absence of expert reports, the Government note that the decisions in the case were taken on the basis of a full hearing of the children, and conformed with the relevant domestic procedural requirements. They point out that the family panels in the Courts of Appeal are composed of judges with many years' experience in family cases. They underline that the Youth Office is an independent advisory body with a particular expertise in youth matters. It is required to protect children against dangers to their best interests; any tension between the applicant and the Youth Office arose because the applicant did not comply with the terms of an access agreement, and tried to photograph an official.

The applicant does not agree with the Government. She complains about the behaviour of her husband and the courts in the custody and access proceedings and, with particular reference to the proceedings under the Child Abduction Convention, considers that it was impossible to establish the real wishes of the children in the present case because they had been separated from their normal surroundings for such a length of time. She also considers that it is not appropriate for a court to decide under Article 13 of the Child Abduction Convention unless it has had the benefit of reports from the Central Authority and other authorities referred to in the third paragraph of Article 13 of that Convention. She claims that the Celle court should have laid more weight on the decisions of the High Court in London that the retention of the children was wrongful.

The applicant notes that the term "the well-being of the child" is not a term which is used as such in the preamble to the Child Abduction Convention, which stresses the importance of immediate return of children who have been wrongfully retained. She concludes that because the Celle court was in effect taking a custody decision when it should have been taking a decision under the Child Abduction Convention, the interference had no legitimate aim.

Finally, in connection with the proportionality of the interference with any legitimate aim, the applicant does not accept that it is possible to decide under the Child Abduction Convention purely on the basis of the subjective feelings of children aged 7 and 9. She points out that any child will answer questions on the basis of short-term considerations, and its well-being may not be best served by those considerations. She also points out that the Celle court made no allowance for the fact that the children had been brought up in a tri-lingual background, and that it failed to give due consideration to the points militating in favour of return of the children such as their success in school in England, and the need to maintain relations with people even when they insult (she refers to the incident where A said that he was teased as a "Nazi").

The Commission considers that, on the basis of the intention and wording of the Child Abduction Convention and the wrongful retention of the children by their father, the applicant could reasonably expect

that the children would be returned to her, and that custody and access proceedings (if any were necessary) would then take place in England. The decisions of the German courts not to order the children's return can therefore be regarded as an interference with her right to respect for her family life. The interference was, however, in accordance with the law as the German courts were applying the domestic legislation which, itself, derived from an international convention designed to assist in the resolution of problems of precisely the type raised in present application. The aim of the interference was to implement the Child Abduction Convention, and thereby attain the most appropriate balance between the interests of the children and, secondarily, the respective parents. The interference therefore pursued the legitimate aim of protecting the "rights and freedoms of others".

As to the necessity for this interference, the Commission recalls that the review of the Convention organs is not limited to ascertaining whether a respondent State has exercised its discretion reasonably, carefully and in good faith. In addition, in exercising their supervisory jurisdiction, they must look at the case as a whole, and must determine whether the reasons adduced to justify the interferences at issue are "relevant and sufficient" (see Eur. Court HR, Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, p. 32, para. 68). In a case such as the present, the Commission must also bear in mind that the interference at issue concerned a conflict not between a State which has deprived a parent of custody and the parent, but rather between two parents who were arguing over the custody of their children. It is not unreasonable for the State to set up criteria relating to the well-being of the children when deciding how to determine such matters. Indeed, in a different type of dispute between parents over custody, the European Court of Human Rights has noted that Article 5 of Protocol No. 7 (P7-5) (not ratified by Germany, but not pleaded in the case at issue) makes it clear that as regards parental rights, the interests of the children are paramount (Eur. Court HR, Hoffmann v. Austria judgment of 23 June 1993, Series A no. 255-C, p. 59, para. 35).

Applying these criteria to the facts of the present case, the Commission first notes that the Child Abduction Convention clearly and unambiguously permits, by the second paragraph of its Article 13, a refusal to order the return of a child where the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. The Commission cannot therefore share the applicant's objection that taking account of the views of the child is tantamount to taking a custody decision which is outside the scope of the Child Abduction Convention.

It is not clear whether the provisions of the third paragraph of Article 13 of the Child Abduction Convention require, as the applicant claims, the obtention of information from the relevant Central Authority or other competent authority when a decision is being taken under the second paragraph, whether that paragraph only applies in connection with the first paragraph, or whether it only applies where such information has been received. However, the Commission is not required to determine this question because, in any event, the applicant did not refer to the third paragraph of Article 13 during the proceedings before the Celle Court of Appeal, nor in her constitutional complaint. She has therefore not exhausted domestic remedies in this respect.

The Commission next notes that the Court of Appeal decided the case on the basis of the statements of the children, having found that they were of an age and maturity at which it was appropriate to take account of their views. The Commission agrees with the applicant to the extent that if a court were to base a decision on the views of children who were palpably unable to form and articulate an opinion as to their wishes, the "necessity" for such a decision may not be readily apparent. The Commission in the present case can certainly not exclude

that children of the age of 7 and 9 may be capable of holding and expressing firm and coherent views on where they wish to live, and finds nothing in the decision of the Court of Appeal which could indicate that the views of the boys in the present case were not genuine and tenable.

Finally, the Commission recalls the limited nature of the exercises undertaken both by the Celle Court of Appeal and by itself. The Celle Court of Appeal was only deciding whether to return the children to the applicant under the Child Abduction Convention. It took no decision whatever as to custody and access, and none of the subsequent proceedings are before the Commission. The Commission itself exercises a supervisory jurisdiction over the domestic decisions, but that jurisdiction is not intended to be primary in the sense that the Commission substitutes its opinion for that of the domestic authorities.

In the light of these considerations, the Commission finds that the reasons given by the Celle Court of Appeal for its decision of 20 October 1994 were "relevant and sufficient" within the meaning ascribed to that phrase by the case-law of the Convention organs. The interference with the applicant's right to respect for her family life can therefore be regarded as "necessary in a democratic society ... for the protection of the rights and freedoms of others".

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.

3. The applicant alleges a violation of Article 14 of the Convention, taken with Articles 6 and 8 (Art. 14+6+8) of the Convention. Article 14 (Art. 14) provides as follows:

> "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 Commission notes that the applicant did not refer to Article 3 of the Basic Law (equality before the law) in her application to the Federal Constitutional Court, and it is therefore not clear whether she has exhausted domestic remedies in connection with her allegations of discrimination.

However, even if the applicant could be said to have raised a complaint of discrimination in substance before the Federal Constitutional Court, the allegation of a violation of Article 14 (Art. 14) of the Convention would nevertheless be inadmissible as the Commission has found no indication in the documents submitted by the parties that the authorities behaved in any way discriminatorily against the applicant in the enjoyment of her Convention rights.

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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber