AS TO THE ADMISSIBILITY OF

Application No. 29760/96
by Kurt LIEBESKIND
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 6 December 1995 by Kurt LIEBESKIND against Germany and registered on 8 January 1996 under file No. 29760/96;

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 1946, is a German national and resident in Erfurt. He is an engineer by profession. In the proceedings before the Commission, he is represented by Mr. G. Rixe, a lawyer practising in Bielefeld.

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

In 1990 the divorce of the applicant's marriage was pronounced by the Erfurt District Court (Bezirksgericht) and the right to custody over the spouses' daughter Daniela, born in wedlock in November 1978, was awarded to her mother. No decision was taken as to the applicant's right to have access to Daniela. On 12 September 1990 the Erfurt Court of Appeal (Bezirksgericht, now: Oberlandesgericht) dismissed the applicant's appeal (Berufung).

On 14 March 1991 the applicant, represented by counsel, applied for a judicial decision on his right of access to Daniela. His request was received by the Erfurt District Court on 20 March 1991.

On 22 August 1991 the District Court held a hearing in camera in the presence of the parties. The Court informed the parties that it

intended to render a decision at the end of the day, but that they were not required to be present at the pronouncement. The District Court than dismissed the applicant's request for access to Daniela, pursuant to S. 1634 of the Civil Code (Bürgerliches Gesetzbuch). According to this provision, the parent not holding the right to custody is entitled to have access to the child; however, this right may be suspended if such a measure is necessary in the best interest of the child. The Court relied on submissions of the competent Youth Office (Jugendamt) as well as the hearing of both Daniela's mother and the applicant on the question of implementing contacts between him and Daniela. Moreover, the Court took into account Daniela's own statements on the occasion of a hearing by the Court. The District Court concluded that contacts between the applicant and Daniela were not in the child's interests as Daniela seriously objected to seeing the applicant. According to the records, the District Court pronounced the decision in a public hearing at the end of the day in the absence of the parties.

On 14 May 1992 the applicant instituted new proceedings before the Erfurt District Court, requesting that the right to custody over Daniela be transferred to him.

On 26 May 1992 the Erfurt Court of Appeal granted the applicant leave to appeal out of time and dismissed his appeal on the merits. The Court confirmed the findings of the first instance court. The Court considered in particular that there was no room for a court decision ordering a right of access in a situation as in the applicant's case where Daniela seriously refused such an access and the applicant had himself stated that he did not wish forcibly to implement a right of access. The Court set out in detail that Daniela's reasoning as to her refusal to see the applicant for the time being was conclusive and serious. As regards the applicant's subsidiary request that family therapy should be ordered the Court found that, in the context of custody and access proceedings, parents and children could not be forced to undergo such a therapy. His further subsidiary request to appoint a supplementary guardian to determine Daniela's place of residence (Anordnung einer Pflegschaft zur Aufenthalts-bestimmung) was rejected for lack of competence as a second instance court. The Court also observed that there were no reasons for suggesting measures regarding the right of custody. The decision was served upon the applicant on 16 June 1992.

The applicant lodged a further appeal (weitere Beschwerde) with the Federal Court of Justice (Bundesgerichtshof).

In the second set of proceedings pending before the Erfurt District Court, the applicant eventually amended his request, claiming again a determination of his right of access. The proceedings were thereupon suspended on 31 March 1993 in order to await the outcome of the proceedings before the Federal Court of Justice.

On 27 October 1993 the Federal Court of Justice, upon the applicant's further appeal, quashed the Court of Appeal's decision and sent the case back to it. The Court of Justice considered that the Court of Appeal had erroneously assumed that the applicant had abandoned his request for a judicial decision on his right of access to Daniela. Moreover, Daniela's refusal to have contacts with the applicant did not dispense the Court from taking a decision on the applicant's right of access, even if it were to limit or temporarily suspend the applicant's right. The failure to render a court decision and thus leaving the matter unsettled, was unreasonable. The Federal Court of Justice also set legal guidelines as to the further proceedings. It confirmed in particular the refusal of family therapy.

On 9 February 1994, in the second set of proceedings instituted in May 1992, the Erfurt District Court held a hearing in camera in the presence of the parties. The Court fixed the hearing date for the

pronouncement of its decision for 2 March 1994. In its decision of 2 March 1994 the Erfurt District Court dismissed the applicant's respective requests for access to Daniela, for the appointment of a supplementary guardian to determine her place of residence as well as his subsidiary requests for a transfer of the right of custody. As regards the applicant's right of access, the Court noted that following the decision of the Federal Court of Justice of 27 October 1993 the proceedings on this matter were again pending before the Court of Appeal. Accordingly, it had no competence to decide on the applicant's renewed requests. Moreover, any decision on the appointment of a supplementary guardian presupposed a decision to withdraw the right of custody exercised by Daniela's mother as far as the right to determine Daniela's place of residence. However, the applicant had failed to show any reasons which could justify such a measure. Furthermore, there was nothing to show that a transfer of the right of custody to the applicant would be in Daniela's interest. According to the records, the District Court pronounced the decision in a public hearing in the absence of the parties.

On 10 November 1994 the Jena (Thüringen) Court of Appeal, examining the resumed proceedings as well as the applicant's appeal against the decision of 2 March 1994, held a hearing in camera. In accordance with S. 170 of the Court Organisation Act, proceedings concerning family and child care matters are conducted in camera. Daniela was heard prior to the hearing by two of the three judges. Both the applicant and Daniela's mother appeared in person, assisted by their respective counsel. According to the trial record, the relevant factual and legal issues were discussed in detail. The parties were given the possibility to file further submissions before 1 December 1994. The Court further indicated that it would serve its decision on the parties.

On 21 March 1995 the Jena (Thüringen) Court of Appeal quashed the decisions of 22 August 1991 and 2 March 1994 and decided to exclude the applicant's right of access to Daniela. It dismissed the remainder of the applicant's requests. Having regard to all circumstances, the Court of Appeal found that any access as requested by the applicant would endanger Daniela's mental development. The Court of Appeal considered that, for several years, Daniela had seriously refused contacts with the applicant. In this respect, the Court of Appeal had regard to the results of a hearing of Daniela, by two of the three judges, on 10 November 1994. Considering the explanations of the then 16-year-old Daniela as to her reasons for disapproving of the applicant and her self-assertive and independent personality, her position had to be respected in order to avoid serious repercussions on her further development. Enforcing the applicant's right to access would also run counter Daniela's constitutional right to respect for her personality. No other, more lenient measure could be envisaged in the circumstances. Finally, a limitation in time was not appropriate, having regard to Daniela's majority in two years. As regards the applicant's further request to order the measures with a view to preparing for contacts with Daniela, the Court of Appeal confirmed that no measures of family therapy could be enforced.

The decision was served on the applicant on 18 April 1995.

On 13 June 1995 the Federal Constitutional Court (Bundes-verfassungsgericht) refused to entertain the applicant's constitutional complaint (Verfassungsbeschwerde).

The Federal Constitutional Court found that the applicant's submissions did not raise any constitutional questions of fundamental importance. The constitutional questions regarding decisions on a parent's right of access to his or her child were settled in the jurisprudence of the Federal Constitutional Court. As regards the applicant's complaint about the lack of public pronouncement of the decisions taken in the access and custody proceedings, the Federal

Constitutional Court observed that, assuming that the principle of the rule of law (Rechtsstaatsprinzip) included a right to public hearing and pronouncement of decisions, limitations were possible in the interests of the parties to the proceedings. Moreover, the applicant's complaint about the length of the proceedings did not raise any new questions.

Moreover, the acceptance of the applicant's constitutional complaint for adjudication was not required for the purpose of implementing his constitutional rights. In particular, there was no indication that the competent civil courts had disregarded the applicant's right to respect for his family life and the principles established in the jurisprudence of the Federal Constitutional Court. The Court of Appeal's reasoning that Daniela's express wishes had to be taken into account and that a decision granting the applicant access against her will would violate her personality rights, was conclusive and could not be objected to from a constitutional point of view. The principle that access and custody proceedings were held in camera and that decisions were not pronounced publicly served the protection of the parties to such proceedings against a publication of mostly very personal matters. Finally, the length of the proceedings had not violated the principle of the rule of law. The Federal Constitutional Court, bearing in mind that in access and custody proceedings, the lapse of time considerably limited the legal protection afforded, found that the length of the proceedings in the present case had been due to the problems following the German unification and the applicant's own conduct. The Court did not accept the applicant's argument that the competent courts had caused the length by rendering wrong decisions.

The decision was received on 22 June 1995.

COMPLAINTS

1. The applicant complains about the German court decisions to suspend his right of access to Daniela. He invokes Article 8, taken individually and in conjunction with Article 14, of the Convention. He considers in particular that S. 1634 of the Civil Code is not sufficiently precise to serve as a legal basis for the interference in question. Moreover, according to the applicant, there were no sufficient reasons to justify the suspension of his right of access. He also submits that the courts did not duly take his arguments into account and failed to balance the competing interests at stake. Moreover, they should not have decided on his requests without having taken expert advice. The Court of Appeal, when hearing Daniela, also failed duly to discuss her opinions and attitude with a view to influencing her position. In any event, only two of the three judges had participated in hearing Daniela.

2. The applicant also complains under Article 8 that the German authorities failed to take the necessary steps to ensure his right of access to Daniela on the occasion of his divorce and the award of the right to custody over Daniela to her mother.

3. The applicant further complains under Article 6 of the Convention that the German court decisions in the access and custody proceedings at issue were not pronounced publicly.

4. The applicant further complains under Articles 6 and 8 of the Convention about the length of the above proceedings.

5. The applicant raises the above complaints in his own name and on behalf of Daniela.

THE LAW

1. The applicant has filed the application in his own as well as in his daughter's name.

In principle only a parent who has the custody over his or her child is able to introduce an application under Article 25 (Art. 25) of the Convention on behalf of the child (No. 12246/86, Dec. 13.7.87, D.R. 53, p. 225). In the present case, the right to custody over the applicant's daughter was awarded to his former wife. The Commission also observes that Daniela has meanwhile attained her majority. In any event, the Commission is not required to decide whether or not the applicant, when lodging his application, was able to bring his complaints also on behalf of his daughter, as the application is inadmissible for the following reasons.

2. The Commission has first examined the applicant's complaints, in respect of the court decisions on his right of access to Daniela, under Article 8 (Art. 8) of the Convention.

Article 8 (Art. 8), 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 the 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 Commission recalls that the family life of the parents with their children does not cease following the divorce of a married couple (cf. Eur. Court HR, Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, p. 14, para. 21).

The Commission finds that the decision to suspend the applicant's right of access to his daughter Daniela interfered with his right to family life under Article 8 para. 1 (Art. 8-1) of the Convention. The Commission therefore has to examine whether this interference was justified under the terms of Article 8 para. 2 (Art. 8-2).

The Commission finds that the decision in question was taken in accordance with S. 1634 of the German Civil Code. The applicant's submissions do not show that this legal basis was not adequately accessible or that it was not formulated with sufficient clarity. The interference at issue was, therefore, in accordance with the law within the meaning of Article 8 para. 2 (Art. 8-2).

The Commission further considers that the impugned custody decisions had a legitimate purpose under paragraph 2 of Article 8, (Art. 8-2) namely the protection of the rights of the child concerned.

As regards the question whether the interference complained of was "necessary in a democratic society", the Commission 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. Eur. Court HR, Berrehab judgment, loc. cit., p. 15, para. 28; Funke v. France judgment of 25 February 1993, Series A no. 256-A, p. 24, para. 55).

The Commission observes at the outset that the impugned decision was taken in court proceedings brought by the applicant following the spouses' divorce and award of the right of custody to Daniela's mother in 1990.

The Commission notes that the competent courts initially considered that no judicial determination of the applicant's right of access was called for in the circumstances of the present case. In this respect, they considered that Daniela had refused to see the applicant, who had stated that he did not intend forcibly to implement

his right of access. These decisions were quashed by the Federal Court of Justice on the ground that the applicant's requests for a determination of his right of access could not merely be dismissed without taking any express decision whether or not he was entitled to have access to his daughter. The Jena Court of Appeal, having due regard to the guidelines given by the Federal Court of Justice in the preceding appeal proceedings, decided that the suspension of the applicant's right of access was in the best interest of Daniela, sixteen years old at the relevant time. In this respect, the Court of Appeal had in particular regard to the explanations given by Daniela at a hearing by two of the three judges. In this respect, the Commission considers that the absence of one of the judges at the questioning concerned does not call into question the diligence of the Court in establishing the relevant facts. The Court of Appeal, in its decision, carefully analysed her statements and her personality. Weighing all circumstances, it concluded that it was her serious intention to refuse any contacts with the applicant. As regards the applicant's argument that no expert opinion was ordered on these matters, the Commission notes that, while he requested the appointment of an expert in the context of his application for a family therapy, the applicant failed to show that he requested the taking of expert evidence to establish the wishes of his daughter Daniela, the seriousness thereof or any other related issue. Moreover, his submissions do not disclose any reasons to conclude that the Court of Appeal was not in a position to evaluate the statements of the then sixteen-year-old girl.

Against this background, the reasons for the impugned decision were both relevant and sufficient.

As to the procedural requirements implicit in Article 8 (Art. 8) (cf. Eur. Court HR, Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, p. 33, para. 71), the Commission finds that the applicant, assisted by counsel, was involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests.

In these circumstances, the German authorities did not exceed their margin of appreciation when deciding to suspend the applicant's right of access to Daniela. Consequently, there is no appearance of a breach of Article 8 (Art. 8).

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. With regard to the above issue, the applicant also invokes Article 14, taken in conjunction with Article 8 (Art. 8).

The Commission, referring to its above findings under Article 8 (Art. 8) of the Convention, considers that the impugned court decisions were based on a careful examination of the particular circumstances of the instant case. There is nothing in the case-file to disclose any difference of treatment on the ground of sex or of any other status.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

3. The applicant further complains under Article 8 (Art. 8) that following his divorce and the transfer of the right to custody over Daniela to her mother, the German authorities failed to take the appropriate steps to ensure his future access to Daniela.

The Commission notes that, in the context of the divorce proceedings, the applicant did not request a decision determining his right of access to Daniela, but only did so in March 1991. Even assuming compliance with Article 26 (Art. 26) of the Convention, the

applicant's submissions on this point do not disclose any lack of respect for his family life on the part of the German authorities.

It follows that this aspect of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

4. The applicant further complains under Article 6 para. 1 (Art. 6-1) that the competent civil courts, except for the Federal Court of Justice, did not deliver their decisions in public hearings.

According to Article 6 para. 1 (Art. 6-1), second sentence, judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Commission observes that both the decisions of the Erfurt District Court of 22 August 1991 and 2 March 1994, respectively, were, according to the records, pronounced at a public hearing, the parties having been informed in advance. The Court of Appeal's decision of 26 May 1992 was served upon the parties. The applicant did not raise the complaint about the absence of public pronouncement of this decision in his appeal to the Federal Court of Justice. In any event, following the Federal Court's decision to set aside - for other reasons - the appellate court's decision and to send the case back to the Court of Appeal, the applicant can no longer complain to be the victim, within the meaning of Article 25 (Art. 25), of a violation of this procedural right under Article 6 para. 1 (Art. 6-1).

As regards the Court of Appeal's decision in the resumed proceedings, dated 21 March 1994, the Commission notes that the applicant did not lodge a further appeal with the Federal Court of Justice, complaining about the absence of a public pronouncement. However, he addressed the matter in his constitutional complaint. The Federal Constitutional Court considered that the principle that access and custody proceedings were held in camera and that decisions were not pronounced publicly served the protection of the parties to such proceedings against the publicity of usually very personal matters.

Assuming compliance with Article 26 (Art. 26), the Commission recalls that the public character of proceedings is a principle of fundamental importance to these proceedings (Eur. Court HR, Pretto and others v. Italy judgment of 8 December 1983, Series A no. 71, p. 11, paras. 21-22; Axen v. Germany judgment of 8 December 1983; Series A no. 72, p. 12, paras. 25-26). However, Article 6 para. 1 (Art. 6-1), second sentence allows for derogations from this principle, inter alia if justified by the need to protect the private lives of the parties. In the present case, the proceedings were, as they concerned a child care matter, conducted in camera in accordance with S. 170 of the Court Organisation Act. The Commission considers that the proceedings in question related to private matters regarding the family relations and the personality of the then sixteen-year-old Daniela. The Court of Appeal's decision set out in detail the statements made by Daniela and its considerations regarding her personal development. In these circumstances, the absence of publicity served the purposes of protecting the interests of the parties in the family dispute and in particular the interests of the child.

The Commission finds that the applicant, being aware of the non-public character of the proceedings and also informed, at the hearing before the Court of Appeal, that its decision would be merely served upon the parties, failed to request its public pronouncement. Accordingly, the absence of a public pronouncement of the decision in

question does not infringe the applicant's rights under Article 6 para. 1 (Art. 6-1).

This part of the application is, therefore, also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

5. The applicant finally complains under Article 6 (Art. 6) about the length of the proceedings in question.

The Commission finds that the proceedings in question started in March 1991 when the applicant applied for a judicial determination of his right of access to Daniela. They terminated on 22 June 1995 when the Federal Constitutional Court's decision of 13 June was served upon the applicant. The proceedings thus lasted about four years and three months.

The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the parties and of the authorities concerned and what is at stake in the litigation. In this instance, the circumstances call for a global assessment (cf. Eur. Court HR, Bock v. Germany judgment of 29 March 1989, Series A no. 150, p. 18, para. 38; Vernillo v. Italy judgment of 20 February 1991, Series A no. 198, p. 12, para. 30; Salerno v. Italy judgment of 12 October 1992, Series A no. 245-D, p. 55, para. 19).

The Commission observes that, at the first stage of the proceedings, the Erfurt District Court rendered its decision on the applicant's request on 22 August 1991, i.e. within five months. The Erfurt Court of Appeal decided upon the applicant's appeal, having granted him leave to appeal out of time, within nine months. Meanwhile, the applicant had also instituted new proceedings at first instance regarding custody and access. The proceedings before the Federal Court of Justice lasted one year and five months. In the resumed appeal proceedings, which extended to the applicant's appeal against the first instance decision taken in his second set of proceedings, the Court of Appeal decided within one year. The Federal Constitutional Court proceedings lasted less than two months.

In these circumstances, the Commission, finds that, taking into account the factual and legal questions at issue, no important delays are imputable to the German courts at the various stages of the proceedings.

As regards the applicant's argument as to the allegedly erroneous court decisions, the Commission recalls that an error by a court leading to a delay in the proceedings brought about by the need for appeal proceedings to correct the error may, in combination with other factors, be taken into account in the determination of the reasonableness of the relevant period pursuant to Article 6 para. 1 (Art. 6-1) (cf. Bock judgment, loc. cit., p. 21, para. 44). However, in the present case, the applicant's appeals were decided within due time.

In sum, the Commission, regard being had to the diligence required in cases concerning child matters, finds no indication that, in the applicant's case, the German court proceedings exceeded a "reasonable time" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that the applicant's complaint about the length of the proceedings is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

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