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

Applications no. 38282/97 and no. 68891/01
by Werner PETERSEN
against Germany

The European Court of Human Rights (Third Section), sitting on 12 January 2006 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mrs R. JAEGER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application no. 38282/97 introduced with the European Commission of Human Rights on 25 August 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the application no. 68891/01 lodged with the Court on 19 April 2001,

Having deliberated, decides as follows:

THE FACTS

The applicant is a German national, born in 1947 and living in Neustadt. He is represented before the Court by Mr G. Rixe, a lawyer practising in

Bielefeld. The respondent Government are represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent,* and, subsequently, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

A. The circumstances of the case

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

1. Factual background

The applicant is the father of the child Sinja Johannes (S.), born out of wedlock in Helmstedt on 3 May 1985. The applicant had been living with Ms B., the child's mother, since May 1980. They agreed that the child should bear his mother's surname, *i.e.* B. After their separation in November 1985, S. lived with his mother. The applicant continued to pay maintenance and had regular contacts with S. until autumn 1993.

In August 1993 Ms B. married Mr K., who was the father of her daughter, born out of wedlock in 1990 and bearing the surname K. They chose the husband's surname as their family name and she availed herself of the right to put her surname in front of that name. On 3 January 1994 S.'s surname was changed in the record of his birth from B. to K. on the motion of Ms B.-K. and her husband Mr K. The applicant's objections were to no avail. On 6 December 2001 the Court declared inadmissible his application (no. 31178/96) concerning the change of S.'s surname and compensation for financial losses because of an undue refusal of access. On 30 April 2004 the Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, decided that the applicant's communication (no. 1115/2002) concerning the same subject-matter was inadmissible.

2. The applicant's first request for access to his son and other family matters

a. The applicant's first request for access to his son

i. Proceedings before the Bremen District Court

On 27 January 1994, following problems in having access to his son, the applicant applied to the Bremen District Court, having jurisdiction in guardianship matters, for a decision granting him a right to visit (*Umgangsregelung*) his son every second weekend, during the holidays and on important public holidays. On 17 February 1994 he lodged a motion to

be granted an interim injunction obliging Ms B.-K. to give him information about his son's development.

At a hearing on 6 April 1994 the Bremen District Court, with judge F. sitting alone, heard the applicant, Ms B.-K. and a representative of the Youth Office. It then decided by way of an interim injunction that provisionally S. should be entitled to visit the applicant every four weeks on Sunday.

On 22 June 1994 the Bremen District Court judge Ms H. heard S. at his home. S. did not express any wishes concerning the present frequency of contacts with his father, but stated that he did not wish to see him more often for the time being.

Visits took place in accordance with the decision of 6 April 1994 until July 1994. Subsequently, Ms B.-K. no longer fully complied with the decision and, following a clash with the applicant in the presence of S., prohibited visits as from October 1994.

At a court hearing on 1 November 1994 held by judge H. in the presence of the applicant, Ms B.-K., their respective spouses and a social worker, the applicant repeated his request to see his son every second week-end. Ms B.-K. explained that initially she had granted the applicant access to S. as a sort of "pledge" to be able to end the relationship with him. S. appeared relieved since she had prevented the visits. The court informed the parties that it did not intend to impose coercive measures to enforce the decision of 6 April 1994 as it did not appear possible, given the conflict between the parents, to enforce such visits for the time being.

By decision of 30 December 1994 the Bremen District Court set aside its decision of 6 April 1994 on a provisional determination of the question of access and dismissed the applicant's repeated requests to impose a coercive penalty on Ms B.-K. to enforce access. It further ordered that pending the preparation of an expert opinion, Ms B.-K. should inform the applicant about his son's development monthly. The court noted that there had been persistent conflicts between the parents concerning the implementation of the visiting arrangement of 6 April 1994. An altercation between the parents had taken place in their son's presence in September 1994. The implementation of access had put such a strain on S. that he had to undergo psychotherapy. Pending the outcome of an expert report on the question whether access was in S.'s best interest at the present stage, it was therefore impossible to change Ms B.-K.'s determination of the applicant's contacts with S.

In a separate decision of the same day, the District Court dismissed the applicant's request for an interim injunction ordering Ms B.-K. to refrain from any activities concerning her intended temporary emigration to Kyrgyzstan with her family in order to work there as a German teacher. It further rejected his request to withdraw Ms B.-K.'s right to determine S.'s place of residence and to transfer it to the Youth Office or himself.

In its reasoning, the court observed that a stay in a foreign country did not constitute a risk for S.'s well-being. For the child the integration in a family was essential. The applicant's fears as to a suspension of access to S. on account of Ms B.-K.'s temporary stay abroad could not justify withdrawing the mother's rights regarding custody or the determination of the child's place of residence. The District Court further ordered that a psychological expert opinion should be prepared by the expert K. on the question of future visits between the applicant and his son, about the consequences of suspending access and the consequences of S.'s stay in a foreign country.

On 21 March 1995 the Bremen District Court informed Ms B.-K. that she would be ordered to pay a coercive penalty of 500 Deutschmarks (DEM) if she did not comply with her duty to inform the applicant about S.'s development within four weeks. Ms B.-K. subsequently appealed against this decision, while the applicant requested the imposition of this penalty on her.

In a hearing before the Bremen Regional Court on 30 May 1995 which was attended by the applicant, Ms B.-K. and a representative of the Youth Office, the applicant withdrew his appeal against the setting aside of the interim injunction of 6 April 1994 on access and against the refusal of interim measures.

On 4 July 1995 Ms B.-K. informed the District Court that she was no longer willing to participate in the psychological examination ordered by the court. She notably argued that she feared that the applicant would not treat the contents of the report confidentially.

On 2 August 1995 the District Court judge H. visited S.'s family at home. When heard by the judge S. indicated that he did not wish to visit his father because his parents were constantly fighting. He and his sister had been talking in detail about the envisaged stay in Kyrgyzstan. They had obviously been involved in the planning. Moreover, Ms B.-K. stated that she had decided to work abroad as a teacher three years ago, initially in Canada; later she had taken an interest in Kyrgyzstan.

Subsequently, Ms B.-K. and her family, including S., moved to Rotfront in Kyrgyzstan for three years.

On 5 September 1995 the applicant requested the court to render a decision without obtaining a psychological expert opinion on the question of access, given that Ms B.-K. and S. had moved abroad.

On 25 September 1995 the Bremen District Court dismissed the applicant's request for access and, upon the request of Ms B.-K., ordered a three-year suspension of the applicant's access to his son. The applicant's repeated requests for coercive measures to enforce access were dismissed.

The District Court found that contacts between the applicant and his son were not only not beneficial for the child, but in the given circumstances detrimental. There was no reason to replace Ms B.-K.'s determination of the applicant's access to S. by a court order. The child's well-being would

require a stable and unchallenged position in his family and a free and easy contact with the applicant, his natural father. However, the parents were both unable to secure such a situation. If the applicant reproached Ms B.-K. for failing to exercise a positive influence on the child with a view to access, he overlooked his own obligation to refrain from any activities complicating his son's life with the parent having custody and other persons in his company. Having regard to Ms B.-K.'s submissions concerning the applicant's conduct and the course of the various court proceedings, the District Court considered that Ms B.-K. had restricted or prohibited access with good reason, in order to preserve her son from suffering strain. The applicant obviously misunderstood his obligations towards his child when he repeatedly interfered with Ms B.-K.'s exercise of custody and challenged her decisions in court. In this respect, the court had regard to the proceedings concerning the change of the child's surname, concerning an intention to register S. at a private school or the planned stay abroad. There was no indication of a possible solution to this conflict. The applicant failed to see his child's situation in life and Ms B.-K.'s concern about the child and his development. In these circumstances, Ms B.-K. was no longer obliged to exercise a positive influence as regards access to his father on the child, who did no longer wish to have contacts with him. The District Court further criticised the applicant for having disclosed his son's letters to third persons.

The District Court found that in these circumstances of an insurmountable conflict between the parents and given the necessity for S. to undergo psychotherapy, visits were contrary to the child's well-being. Access therefore had to be suspended, irrespective of S.'s stay abroad, even where contacts might have been implemented during the child's visits to Germany. The question of access should be reconsidered when S. had settled in his new family.

The District Court rendered its decision without having had recourse to a psychological expert report, which would have remained incomplete without hearing Ms B.-K., who refused to undergo a psychological examination. She could not be forced to accept such examination, and her refusal was in any event justified having regard to the applicant's past indiscretions.

Finally, according to the District Court, Ms B.-K. had not acted irresponsibly when refusing to keep the applicant informed about the child's development, as she had to fear that he would disclose such information and infringe her and her child's right to privacy.

ii. Proceedings before the Bremen Regional Court

On 10 October 1995 the applicant lodged an appeal with the Bremen Regional Court against the District Court's decision dated 25 September 1995. On 8 and 13 March 1996 he challenged District Court

judge H. for bias, arguing that he had found out that both judge H. and Ms B.-K.'s counsel were members of the same feminist organisation and that judge H. was one of the editors of "*Streit*", a so-called "feminist legal journal".

On 22 August 1996 the Regional Court heard the applicant, a representative of the Youth Office and, given Ms B.-K.'s and S.'s stay in Kyrgyzstan, Ms B.-K.'s counsel.

On 30 September 1996 the Bremen Regional Court amended the District Court's decision of 25 September 1995 to the effect that Ms B.-K.'s motion for suspension of the applicant's access to S. for a fixed period of time was dismissed. Apart from that, it upheld the District Court's decision, notably the refusal to grant access.

As regards the applicant's request for access, the Regional Court considered that, contrary to the District Court's view, it could not be established without taking expert evidence whether granting the applicant access was detrimental to S.'s well-being. However, on account of the factual developments, namely the child's and his mother's stay abroad, there were *de facto* obstacles to a court determination of the father's access to the child. The applicant had to tolerate Ms B.-K.'s decision, which she was entitled to take pursuant to section 1711 of the Civil Code, to work abroad temporarily and to take her family with her. The child was not suffering any disadvantages as he was living in a stable family relationship. Furthermore, there was nothing to suggest any long-term prejudice to the applicant's relation with his child.

The Regional Court did not approve of the District Court's reasoning concerning coercive measures. Ms B.-K. had no discretion whether or not she wished to comply with the court order of December 1994 concerning her duty to inform the applicant on S.'s development. In case of difficulties, she would rather have had to apply for a review of the said court order. However, the wording of the court order had limited her obligation to provide information about S. "pending the preparation of the expert opinion". Consequently, she could assume that, being in a position to terminate the examination by refusing to cooperate, she had also not been obliged to submit the information in question to the applicant.

As far as the three-year suspension of access was concerned, the Regional Court found that there was no legal basis for such a decision, the natural father having no general right of access. Pursuant to section 1711 § 1 of the Civil Code, the child's mother determined the question of access; the court could order access if this was in the child's best interest. The court had to decide upon repeated requests of a natural father even if this was burdensome. In any event, a decision suspending access with far-reaching consequences for the future could not be taken without psychological expert advice, including an exploration of the child and his mother. If the mother refused to undergo such an examination, the court could not arrive at a

finding that the natural father's access would in future be detrimental to the child's well-being. The applicant's conduct, at least given his written submissions, might have appeared difficult. Nevertheless, the Regional Court, having heard the applicant, had got the impression that he had begun to reconsider his previous position and conduct.

On 15 October 1996 the Bremen Regional Court dismissed the applicant's objections against its decision of 30 September 1996 and his motion for rectification of the minutes of the hearing.

b. The applicant's request to withdraw Ms B.-K.'s right of custody

On 9 May 1995 the applicant, his requests for interim measures having remained unsuccessful (see above the second of the two District Court decisions of 30 December 1994), lodged requests to withdraw Ms B.-K.'s right of custody of S. or alternatively, to withdraw her right to determine the child's place of residence.

On 13 September 1995 the Bremen District Court, with judge H. sitting alone, dismissed these requests. It found that there were no indications that there were risks for the child's well-being which could justify an interference with Ms B.-K.'s right of custody. The mere fact that she wished to live abroad temporarily with her family was no reason to doubt her capacity to educate her son. Moreover, a stay abroad could not be regarded as detrimental to the child's well-being, but could rather be profitable. In this respect, the court had regard to the statements made by the child when questioned by the District Court judge. The court also noted that it was not intended to emigrate definitively, but to stay temporarily in Kyrgyzstan with the financial security of a German employment contract. Having regard to expert information, there were no indications of health risks, in particular due to radioactivity. The court further considered the consequences of granting the applicant's requests. If S. stayed in Germany alone, he would be separated from his family for a period of two to three years, contrary to the principles of continuity and stability. Should, in such circumstances, the family decide to stay in Germany the child would suffer from the frustration of being deprived of the intended stay abroad. Consequently, even if the standards for fathers of children born in wedlock as laid down in section 1634 of the Civil Code were applied, the applicant's right of access did not outweigh S.'s, Ms B.-K.'s and their family's right to respect for their family life.

The District Court rendered its decision without having had recourse to expert evidence, as the expert report ordered in December 1994 would have remained incomplete without questioning Ms B.-K. The latter had, however, refused to undergo psychological examination and could not be forced to do so.

On 10 June 1996 the Bremen Regional Court dismissed the applicant's appeal and his motion to challenge the District Court judge, Ms H., for bias.

It confirmed that a serious interference such as withdrawing a parent's right of custody could only be justified in case of a serious risk for the child's well-being, which was not identical to the applicant's interest in having access. Having regard to S.'s hearing on 2 August 1995 by the District Court, the Regional Court considered that the child had been involved in the decision-making process concerning the stay abroad and that he identified with this plan.

The Regional Court dispensed with hearing S. and his mother who were staying abroad. Awaiting their return would have unduly delayed the proceedings. Hearing the applicant in court would not have disclosed any new relevant information or arguments.

As regards the applicant's motion for bias, the Regional Court noted that the judge concerned was no longer working at the District Court so that the motion was futile.

On 3 September 1996 the Bremen Court of Appeal dismissed the applicant's further appeal. As regards the applicant's complaint about the failure to obtain a psychological expert opinion, the Court of Appeal observed that a party could not be forced to participate in a psychological exploration. It further found that the District Court judge had heard the child in the absence of his parents and their representatives, as required under the principles established in German case-law. The Regional Court could therefore take the contents of this hearing into consideration. Hearing the child's mother had not been necessary, as she was living abroad. The applicant had failed to inform the Regional Court that she had been passing her summer holidays in Germany. Hearing the applicant again in person had not been necessary, as he had extensively set out his statements in writing. As the applicant had only brought his motion for bias against the District Court judge H. after she had rendered the decision, the Regional Court did not have to quash the District Court's decision, even if the motion for bias against H. had been well-founded. Finally, the Regional Court had taken its decision on a reasonable factual basis. It had carefully examined S.'s interests and correctly concluded that a stay abroad of several years to which he looked forward did not amount to a danger for his well-being. The child's interest in living with his family outweighed the applicant's interest in having access to him.

c. The applicant's constitutional complaints

On 1 October 1996 the applicant lodged a complaint (no. 1 BvR 2025/96) with the Federal Constitutional Court against the decisions of the Bremen courts refusing to withdraw Ms B.-K.'s right of custody of S.

On 31 October 1996 the applicant, without being represented by counsel, lodged a further complaint (no. 1 BvR 2210/96), comprising written

submissions of 44 pages, with the Federal Constitutional Court against the Bremen courts' decisions refusing to grant him access to S.

On 5 March 1997 the Federal Constitutional Court, referring to the relevant provisions of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz),* refused to admit the applicant's constitutional complaints without giving any reasons. The decision was served on 12 March 1997. The applicant's objection to this decision was to no avail.

3. The applicant's renewed request for access

a. Proceedings before the Bremen District Court

On 15 November 1996 the applicant lodged a fresh motion to be granted access to his son. He requested that during his son's stay in Kyrgyzstan, he should have access to him for two to three days every two months and during part of his son's summer holidays. On his son's return to Germany, he should have access every second weekend, during part of all school holidays and on his son's and his own birthday. Pending determination of his access, he should be kept informed about the child's development. He subsequently repeated these requests.

Following a query of the District Court dated 6 March 1997 Ms B.-K.'s counsel informed the court that the latter would stay in Germany in July 1997 and would be available for a hearing.

On 3 July 1997 the Bremen District Court, with judge Ho. sitting alone, heard S., Ms B.-K., the applicant and a representative of the Youth Office.

On 10 July 1997 the applicant requested, *inter alia*, the rectification of the minutes of the hearing, the ordering of an expert report on the question of access and the examination of twelve witnesses.

On 27 August 1997 the President of the Bremen District Court, following the applicant's request, informed him that the judges sitting or having sat in his cases to date had had jurisdiction pursuant to the assignment of functions in the District Court.

On 1 September 1997 the applicant again requested to verify whether the judge dealing with his case in the Bremen District Court had jurisdiction and urged the court to render a decision soon. On 9 October 1997 he lodged a further motion for the minutes of the hearing to be rectified. On 23 October 1997 he asked the court to postpone its decision for two weeks and complained in a letter dated 27 October 1997 that certain documents had not been communicated to him.

Following the court's query dated 31 October 1997 the Youth Office submitted its report on the question of the applicant's access to his son on 19 November 1997.

On 20 November 1997 the applicant lodged an appeal to the Bremen Regional Court requesting to be granted access to S. and to transfer Ms B.-K.'s right to determine S.'s place of residence to the Youth Office.

On 15 December 1997 the Bremen District Court dismissed the applicant's motion to be granted access to S. It noted that S. was still living in Kyrgyzstan where his mother was working as a German teacher until summer 1998. The reasons underlying the Bremen Regional Court's decision of 30 September 1996, namely factual obstacles to granting the applicant's request, were therefore still valid. In principle, contacts with the natural father were important for a child's well-being. However, having regard to S.'s living conditions and the applicant's submissions, access as requested by him would not further the child's well-being but rather be detrimental. The applicant refused to accept his son's family situation. Moreover, his conduct, *e.g.* his unannounced visit to his son's school in Kyrgyzstan or his attempt to have his son and Ms B.-K. removed from the German records of residence, showed the applicant's lack of respect for his son's interests. The applicant further disregarded the fact that, as was shown in the hearing on 3 July 1997, his twelve-year-old son was scared by his conduct and did not wish to see him. This wish could not be regarded as irrelevant, as suggested by the applicant. Even though it was not excluded as a matter of principle to grant a father access to his child against the child's will, this was only possible in cases in which their relationship would otherwise be permanently prejudiced. Such risk did not, however, exist in the present case. S. indeed profited from his stay in Kyrgyzstan and had gained in stability. Against this background, the applicant's subsidiary request to transfer the mother's right to determine the child's place of residence to the Youth Office also showed the extent to which he gave priority to his parental rights over his son's interests.

The District Court dismissed the applicant's request for information on his son's development for the same reasons as his request to be granted access.

The District Court also rejected the applicant's requests to take further evidence. Taking expert evidence had to be refused as Ms B.-K. did not agree and an expertise could not be prepared against her will. The persons named as witnesses could not make any statements with respect to the current situation.

b. Proceedings before the Bremen Regional Court

On 7 January 1998 the Bremen Regional Court dismissed the applicant's appeal of 20 November 1997, arguing that due to the District Court's decision dated 15 December 1997 the appeal was futile.

On 21 April 1998 the applicant lodged an appeal against the District Court's decision of 15 December 1997 and complained about the length of the proceedings. Moreover, he challenged the single judge at the District

Court, Mr Ho., for bias and argued that he had not had jurisdiction to deal with his case. He subsequently submitted approximately fifteen further written statements on his appeal and his motions.

On 29 April 1998 the Bremen District Court refused to modify its decision (*Nichtabhilfeentscheidung*) of 15 December 1997 and forwarded the applicant's appeal to the Bremen Regional Court.

In June 1998 Ms B.-K., her husband, their daughter and S. returned to Germany.

By a letter dated 2 July 1998 the presiding judge of the Regional Court gave the applicant an overview concerning his motions lodged and the applicable law. The judge suggested to the applicant to withdraw part of his motions in order to enable the court to reach a decision in due time.

On 13 August 1998 the Bremen Regional Court, sitting *in camera*, conducted a hearing in the presence of the applicant and Ms B.-K.'s representative. The latter refused to indicate her client's address. Several procedural issues were discussed, *inter alia*, the question of bias of the District Court judge and of the alphabetical distribution of cases at the District Court. On the Regional Court's inquiry, the Bremen District Court, following an administrative session, indicated that pursuant to the relevant internal court rules the distribution of the applicant's case to judge Ho. was based on his child's surname as registered after its change recorded in the birth register.

On 25 August 1998 the Bremen Regional Court dismissed the applicant's repeated requests to rectify the minutes of the hearing.

On 7 October 1998 the Bremen Regional Court, upon the applicant's appeal, partly amended a decision taken by the District Court in respect of legal expenses.

On 13 October 1998 the Bremen Regional Court dismissed the applicant's appeal against the District Court's decision of 29 April 1998 concerning the jurisdiction of judge Ho. It found that pursuant to the relevant internal court rules the judge rendering the decision had had jurisdiction to deal with the applicant's case. The applicant's two further appeals against this decision to the Bremen Court of Appeal were to no avail, as no appeal lay against the Regional Court's decision.

On 29 October 1998 the Bremen Regional Court ordered a psychological expert report on the question of access and appointed K. as expert.

On 28 December 1998 the Bremen Regional Court dismissed the applicant's motion for bias of 21 April 1998. Having regard to the official statements made by judge Ho. at the District Court in reply to the applicant's allegations, it found that there were no indications of bias on his part. The applicant's two appeals to the Bremen Court of Appeal were to no avail.

On 13 and 20 January 1999 the Bremen Court of Appeal also rejected as inadmissible the applicant's repeated complaints concerning several

procedural directions issued by the presiding judge at the Bremen Regional Court. It found that no appeal lay against these decisions.

On 5 February 1999 the Regional Court held a hearing in the presence of the applicant and two advisers, Ms B.-K. and her lawyer, expert K. and a representative of the Youth Office. It dismissed the applicant's request to adjourn the hearing on account of the absence of a representative of the Youth Office at the child's new address, finding that at that stage of the proceedings, his or her presence was not necessary. The applicant appealed and challenged the three Regional Court judges for bias.

On 4 June 1999 another bench of the Regional Court, after having heard the judges concerned, dismissed the applicant's motion for bias, for which he had given additional reasons in at least five further written submissions to the court.

On 15 July 1999 the Bremen Court of Appeal declared the applicant's complaints about the conduct of the proceedings by the Regional Court inadmissible and dismissed his appeals against the decisions of 5 February and of 4 June 1999, respectively. The applicant's objections were to no avail.

On 18 August 1999 the Bremen Regional Court dismissed the applicant's repeated request to transfer the case to the court at the child's place of residence. It found that it had jurisdiction to adjudicate on the appeal against the decision rendered by the Bremen District Court, irrespective of the parties' present place of residence. The Bremen Court of Appeal subsequently dismissed the applicant's appeal.

On 7 September 1999 the Bremen Regional Court granted the applicant's motion to suspend the proceedings until termination of the mediation procedure in the custody proceeding he instituted in the Kirchhain District Court on 2 July 1999 (see below 6.).

On 24 February 2000 the Bremen Regional Court, upon the applicant's request to appoint S. a guardian *ad litem*, appointed Ms R., a lawyer practising in Marburg. On 27 March 2000 the Bremen Court of Appeal dismissed the applicant's appeal against the appointment of a counsel as guardian as inadmissible, as no appeal lay against this decision. The guardian subsequently met S. twice and also heard the applicant.

On 14 September 2000 the President of the Bremen Regional Court informed the applicant about the results of the guardian *ad litem*'s hearing of S. The latter had stated that he could imagine meeting with his father again under certain circumstances. Therefore, it appeared preferable to try to establish contacts between the applicant and his son before hearing S. again in court in the presence of an expert. The court would then be in a better position to reach its decision on the question of access. With regard to his numerous other procedural requests, the President considered that it might be useful for him to clarify in an oral hearing which of these requests he still intended to pursue.

On 26 October 2000 Ms B.-K.'s counsel informed the court that S. did not presently wish to have contacts with his father and wanted to decide for himself when to contact him.

On 21 December 2000 the Bremen Court of Appeal declared inadmissible the applicant's complaint about the length of the proceedings before the Bremen Regional Court. It considered that the present case gave no reason to depart from the still prevailing legal opinion that no action lay for an order requiring a lower court to process an action. The applicant's conduct, in particular his numerous requests and appeals, had contributed significantly to the length of the proceeding. In any event, the Regional Court now planned to further the proceedings as it intended to fix a date for questioning S. in court. On 11 January 2001 the Bremen Court of Appeal dismissed the applicant's objections against this decision.

On 13 February 2001 the Federal Constitutional Court refused to admit the applicant's constitutional complaint (no. 1 BvR 186/01) about the Court of Appeal's decisions of 21 December 2000 and 11 January 2001 and about the length of the proceedings before the Bremen District Court, the Bremen Regional Court and the Bremen Court of Appeal. It did not give reasons for its decision.

Already on 9 February 2001 the Bremen Regional Court heard the applicant, Ms B.-K., the guardian *ad litem* and the expert. As S. failed to appear in court, he was questioned in a further hearing in court on 30 March 2001. S., then aged fifteen, stated that he preferred the suspension of access to his father to prevail for the time being. Even though he had started to develop some interest in his father again, he was also scared because of his father's unpredictability. He had been scared when his father had suddenly appeared at his school or in Kyrgyzstan. He wished to have contacts with his father in writing first, and without any arrangements by the court. When he had sent a letter to his father in October 2000, the latter had, however, sent the letter to the court.

On 29 May 2001 expert K. submitted her report. She recommended that contacts between the applicant and his son in accordance with the latter's wishes be resumed soon. S. wanted to write to his father to lay down his views on contacts. If they agreed, personal contacts between them would be possible in the near future.

On 13 June and 15 August 2001 the applicant objected to the expert on grounds of bias. In her comments on this motion, the guardian *ad litem* informed the court of the applicant's statements on the progress of the proceedings. The applicant had argued that he was unable to withdraw the numerous motions he had lodged in addition to the motion to be granted access to S., because he wished to lodge an application with the European Court of Human Rights in order to be paid damages by the Federal Republic of Germany. The applicant contested having made such statements.

On 20 August 2001 the Bremen Regional Court dismissed the applicant's motion for bias against expert K. It found that objectively, there was no reason to doubt the expert's impartiality.

On 21 December 2001 the applicant's motion for bias against the judges of the Bremen Court of Appeal having jurisdiction to deal with his case was dismissed by a different chamber of that court. On 10 January 2002 the Bremen Court of Appeal dismissed the applicant's complaint against the Regional Court's decision of 20 August 2001 as ill-founded. It further dismissed his complaint against the length of the proceedings before the Regional Court as inadmissible, but argued alternatively that the complaint was also ill-founded, as the delays had mainly been caused by the applicant himself.

On 30 January 2002 the Federal Court of Justice dismissed the applicant's appeal against the decisions of the Bremen Court of Appeal of 21 December 2000 and 11 January 2001. It found that the appeal was inadmissible, as no further appeal lay against the said decisions of the Court of Appeal. On 13 February 2002 the Federal Court of Justice dismissed the applicant's objections against the said decision.

On 22 April 2002 the Federal Constitutional Court, without giving further reasons, refused to admit the applicant's constitutional complaint (no. 1 BvR 278/02), comprising written submission of more than 120 pages, concerning the court decisions on his motion for bias against the expert K. and the length of the proceedings. It imposed a fine of 500 euros (EUR) for abuse of petition on the applicant. The applicant's objections against this decision were to no avail.

On 13 August 2002 the Bremen Regional Court dismissed the applicant's renewed motion for bias against the expert K. as inadmissible, as it just repeated his earlier motions which had been rejected. It further dismissed the applicant's motions to appoint a different guardian *ad litem*, to appoint two more experts and to make a verbatim record of the hearing and granted him access to the case-file.

On 4 September 2002 the Regional Court, having changed its composition, ordered a hearing of the applicant, Ms B.-K., S. and the expert K.

On 12 November 2002 the Bremen Regional Court dismissed the applicant's motion for bias against the judges sitting in his case as ill-founded. It found in particular that from 1 January 2002 onwards three different judges had jurisdiction to deal with the applicant's case. As the file already comprised some 1,840 pages until then, the judges, who needed some time to read those files, could not be considered to be biased for having delayed the proceedings.

On 3 May 2003 S. attained the age of majority. At that time, the proceedings in the Bremen Regional Court had not yet been terminated.

4. The applicant's constitutional complaint against the amended Law on Family Matters

On 12 October 1998 the applicant lodged a complaint with the Federal Constitutional Court challenging the amended Law on Family Matters (*Reform zum Kindschaftsrecht*) of 16 December 1997, which had come into force on 1 July 1998. Without setting out in detail which provisions of that Law he considered to contravene the Basic Law, he complained in general terms that the said Law discriminated against fathers of children, when compared to mothers of children.

On 19 January 1999 the Federal Constitutional Court refused to admit the applicant's constitutional complaint (no. 1 BvR 1963/98). The decision was served on him on 26 January 1999.

5. The applicant's request for joint custody

On 2 July 1999 the applicant filed a request, certified by a notary, with the District Court claiming joint custody of S.

On 4 April 2000 the Kirchhain District Court, which had jurisdiction following S.'s and his mother's change of residence, dismissed the applicant's request after having heard the applicant, Ms B.-K., S. and a representative of the Youth Office in February 2000. It found that the conditions laid down in section 1626a of the Civil Code for joint custody were not met, as S.'s mother was not willing to exercise custody jointly. The court observed that the preference given to the mother of a child born out of wedlock with respect to custody matters could only be questioned from a constitutional point of view if her refusal of joint custody appeared arbitrary and contrary to the child's well-being. In the present case, the parents did not live together, had no common views on essential questions, as evidenced by the numerous court proceedings, and joint custody of S. would not be in the latter's best interest. S. had stated that the applicant was alien to him and that on account of past events when the applicant had suddenly appeared on several occasions, he was even afraid of him. Furthermore, the applicant's request was not justified under section 1666 of the Civil Code, as there were no indications that Ms B.-K.'s refusal of joint custody would entail a risk to S.'s well-being. In any event, Ms B.-K.'s refusal of access alone would not be sufficient to question her sole custody. In these clear circumstances there had been no need to appoint a guardian *ad litem* for the child or to order a psychological expert opinion.

On 16 June 2000 the Frankfurt (Main) Court of Appeal dismissed the applicant's appeal, endorsing the District Court's reasoning. On 8 August 2000 the Frankfurt (Main) Court of Appeal rejected the applicant's objections against its June decision.

On 6 February 2001 the Federal Constitutional Court, without giving further reasons, refused to admit the applicant's constitutional complaints

(nos. 1 BvR 1293/00 and 1 BvR 1640/00) lodged against the decision of the District Court and the two decisions of the Court of Appeal.

6. Further related matters

In 1994 Mr K., Ms B.-K.'s husband, filed an application with the Bremen District Court for the adoption of S. The proceedings were suspended in 1995. On 13 August 1999 Mr K. withdrew his application. The District Court informed the applicant accordingly.

The applicant subsequently instituted further proceedings in the Kirchhain District Court requesting mediation in the matter of access to his son and information about his son's private and schooling matters. On 5 July 2000 the Frankfurt (Main) Court of Appeal, upon the applicant's appeal, decided that the applicant was entitled to information on the type of school which his son attended, his class and his results, his interests in sports and music and any serious diseases as well as to a recent photograph. His requests for further information were dismissed.

B. Relevant domestic law

1. Custody and right of access

The statutory provisions on custody and access are to be found in the German Civil Code. They have been amended on several occasions and many were repealed by the amended Law on Family Matters (*Reform zum Kindschaftsrecht*) of 16 December 1997, which came into force on 1 July 1998.

a. Legislation in force before 1 July 1998

Before the entry into force of the amended Law on Family Matters, the relevant provisions of the Civil Code concerning custody of and access to a child born out of wedlock were worded as follows:

Section 1705

"Custody over a minor child born out of wedlock is exercised by the child's mother ..."

Section 1711

"1. The person having custody of the child shall determine the father's right of access to the child. Section 1634 § 1, second sentence, applies by analogy.

2. If it is in the child's interests to have personal contact with the father, the guardianship court can decide that the father has a right to personal contact. Section 1634 § 2 applies by analogy. The guardianship court can change its decision at any time.

3. The right to request information about the child's personal circumstances is set out in section 1634 § 3.

4. Where appropriate, the youth office shall mediate between the father and the person who exercises the right of custody."

The relevant provisions of the Civil Code concerning access to children born in wedlock at that time read as follows:

Section 1634

"1. A parent not having custody has the right to personal contact with the child. The parent not having custody and the person having custody must not do anything that would harm the child's relationship with others or seriously interfere with the child's upbringing.

2. The family court can determine the scope of that right and can prescribe more specific rules for its exercise, also with regard to third parties; ... The family court can restrict or suspend that right if such a measure is necessary for the child's welfare.

3. A parent not having custody who has a legitimate interest in obtaining information about the child's personal circumstances may request such information from the person having custody in so far as this is in keeping with the child's interests. The guardianship court shall rule on any dispute over the right to information."

b. Legislation in force since 1 July 1998

Pursuant to section 1626 a § 1, as amended, the parents of a minor child born out of wedlock jointly exercise custody if they make a declaration to that effect (declaration on joint custody) or if they marry. Otherwise, the child's mother has sole custody (section 1626 a § 2).

Section 1626 § 1, which applies to children born in wedlock, provides that the father and the mother have the right and the duty to exercise parental authority (*elterliche Sorge*) over a minor child. The parental authority includes the custody (*Personensorge*) and the care of property (*Vermögenssorge*) of the child.

Pursuant to section 1666 of the Civil Code the courts sitting in family matters may order the necessary measures – including restrictions of the right of custody – if a child's welfare is jeopardised. Custody may only be withdrawn if other measures have proved ineffective or have to be regarded as insufficient to remove the danger (section 1666a of the Civil Code).

According to section 1684, as amended, a child – born in or out of wedlock – is entitled to have access to both parents; each parent is obliged to have contact with, and entitled to have access to, the child. Moreover, the parents must not do anything that would harm the child's relationship with the other parent or seriously interfere with the child's upbringing. The family courts can determine the scope of the right of access and prescribe more specific rules for its exercise, also with regard to third parties; and they may order the parties to fulfil their obligations towards the

child. The family courts can, however, restrict or suspend that right if such a measure is necessary for the child's welfare. A decision restricting or suspending that right for a lengthy period or permanently may only be taken if otherwise the child's well-being would be endangered. The family courts may order that the right of access exercised in the presence of a third party, such as a Youth Office or an association.

Pursuant to section 1686 of the Civil Code each parent who has a legitimate interest in obtaining information about the child's personal circumstances may request such information from the other parent in so far as this is not contrary to the child's best interests.

2. The Act on Non-Contentious Proceedings

Proceedings in family matters are governed by the Act on Non-Contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*).

In proceedings regarding access, the competent youth office has to be heard prior to the decision (section 49 § 1).

Section 50 of the Act, as amended by the Law on Family Matters, provides that, in proceedings concerning a minor child, the family court may appoint a guardian *ad litem* for that child to assist him in the protection of his interests.

According to section 52 of the Act, as amended, the court shall, in proceedings concerning a child, seek to establish agreement between the parties as soon as possible and at any stage of the proceedings. The court shall hear the parties as soon as possible and inform them about possibilities of counselling in family matters in order to develop a consensual concept for exercising custody and parental responsibilities. To the extent that there is no risk of delay which is detrimental to the child's best interests, the court shall suspend the proceedings if the parties agree to out-of-court counselling or if there is a prospect of agreement between the parties.

Pursuant to section 52a of this Act, as amended, the family court shall mediate between the parents upon the request of one parent if one parent claims that the other parent obstructs the implementation of a court decision on access to a common child.

COMPLAINTS

1. Complaints relating to the applicant's first request for access in 1994

a. As regards the German court proceedings concerning his first request for access to his son, the applicant complained under Article 8 of the Convention that the Bremen District Court's decision of September 1995, as

confirmed by the Bremen Regional Court, amounted to a breach of his right to respect for his family life.

b. The applicant further considered that the said court decisions discriminated against him as a father of a child born out of wedlock and violated Article 14, taken in conjunction with Article 8, of the Convention.

c. The applicant further complained that the proceedings concerning his first request for access exceeded a reasonable time and thereby frustrated his interest to obtain access to his son. In this respect, he invoked Articles 6 and 8 of the Convention.

d. In the context of his length complaint, the applicant submitted that the delays in the District Court proceedings had been caused by the allegedly biased judge Ms H. and that he accordingly had no impartial tribunal, as guaranteed by Article 6 § 1 of the Convention.

2. Complaints relating to the applicant's 1994 request for interim measures on access

a. The applicant complained under Article 8 of the Convention that the German authorities failed to take appropriate measures to implement the Bremen District Court's decision of 6 April 1994, granting him access to his son.

b. Invoking Articles 8 and 6 of the Convention the applicant claimed that the length of the proceedings concerning his 1994 request for interim measures had exceeded a reasonable time.

c. The applicant further complained under Article 6 about the unfairness of the proceedings concerned, arguing that the District Court judge dealing with the case had been biased.

3. Complaints relating to the applicant's request to withdraw Ms B.-K.'s right of custody

a. With regard to the German court decisions refusing measures restricting or withdrawing Ms B.-K.'s right of custody, the applicant complained that in particular the Bremen Court of Appeal's decision of 3 September 1996 violated his right to respect for his family life, as guaranteed by Article 8 of the Convention. As regards the Court of Appeal's assessment of the facts, the applicant also relied on Article 6 of the Convention.

b. In this context, the applicant contended that the German court decisions refusing measures regarding Ms B.-K.'s right of custody and the underlying statutory provisions amounted to discrimination against him as father of a child born out of wedlock, if confronted with the legal situation

for fathers of children born in wedlock. He invoked Article 14 in conjunction with Article 8 of the Convention.

c. Relying on Articles 8 and 6 of the Convention, the applicant further claimed that the duration of the proceedings concerning his request to withdraw Ms B.-K.'s right of custody had been excessive.

d. The applicant complained under Article 14, in conjunction with Article 6, of the Convention that the Federal Constitutional Court's decision of 5 March 1997 contained no reasoning.

4. Complaints relating to the applicant's renewed request for access and for information in 1996

a. In his submission of 21 April 2001, the applicant complained that the length of the proceedings before the Bremen District Court and the Bremen Regional Court concerning his 1996 requests for access and for information on his son amounted to a breach of his right to respect for his family life, as guaranteed by Article 8 of the Convention. He also invoked Article 6 of the Convention.

b. Relying on Article 6 the applicant submitted *inter alia* that, pending the child's stay in Kyrgyzstan, the Bremen District Court had not been competent and that in any event, under the alphabetical distribution of work, the case should not have been assigned to the District Court judge Mr Ho. He also alleged that this judge had been biased.

c. The applicant further complained under Article 8 of the Convention that the decisions refusing access and information violated his right to respect for his family life.

d. In this respect, the applicant also considered to be victim of discrimination, contrary to Article 14, in conjunction with Article 8, of the Convention.

e. Finally, the applicant maintained that he had no effective remedy regarding the excessive length of these proceedings, contrary to Article 13 of the Convention.

5. Complaints relating to the applicant's constitutional complaint against the amended Law on Family Matters

In his submissions of 26 February 1999, the applicant further complained under Article 8, taken alone and in conjunction with Article 14 of the Convention, about the Federal Constitutional Court's decision of 19 January 1999. In that decision, the Federal Constitutional Court had dismissed his complaint about the amended Law on Family Matters of 16 December 1997, which had come into force on 1 July 1998.

6. Complaints relating to the applicant's request for joint custody in 1999

a. As regards the refusal of his request for joint custody by the Kirchhain District Court on 4 April 2000, as confirmed upon appeal, the applicant maintained that his right to respect for his family life (Article 8), his right to a fair trial (Article 6) and an effective remedy (Article 13 of the Convention) had been violated.

The applicant alleged various shortcomings in the establishment of the relevant facts, in particular in questioning his son, and complained about the lack of an expert opinion. He also repeats the complaint about the lack of reasoning in the Federal Constitutional Court's decision of 6 February 2001.

b. In the applicant's submission, the German courts, in refusing his request for joint custody, had attached more weight to the mother's position and had therefore discriminated against him as a father, contrary to Article 14, read in conjunction with Article 8, of the Convention.

THE LAW

A. The Government's request to strike the applications out of the list or to declare them inadmissible for loss of victim status

By a letter dated 30 July 2003 the Government asked the Court to strike the present applications out of its list of cases pursuant to Article 37 § 1 (c) of the Convention or, alternatively, to declare them inadmissible. They noted that S. had attained the age of majority on 3 May 2003. Under German law parents had no right of access to their children of full age. The applicant was therefore no longer victim of a presumed violation of Convention rights. Consequently, it was no longer justified to continue the examination of the application.

The applicant contested this view. He argued that the Court had jurisdiction to deal with his case, as he had a continuous interest in the Court's finding whether the decisions of the national courts on access had violated his Convention rights. He stressed that he had complained in particular that the proceedings in the German courts had lasted unreasonably long, and in fact he had not obtained a decision on access by the national courts before his son had come of age. In these circumstances, it contravened the principles of good faith to argue that the proceedings before the Court were now futile.

Article 37 § 1 of the Convention provides, as relevant:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> ...
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

Article 34 of the Convention provides, as relevant:

> "The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."

The Court observes that the applicant's son S., to whom he sought access and of whom he applied for custody, indeed attained the age of majority on 3 May 2003. Consequently, even assuming that the Court considered the suspension of the applicant's contacts with S. and the refusal to grant him joint custody of S. to entail breaches of his Convention rights, it would no longer be possible to remedy such breaches by granting access or custody in the future. However, the Court's task in the present case is not to assess whether access or custody should henceforth be granted to the applicant, but to examine the actual circumstances of his case before the Court (see, *mutatis mutandis*, *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX; *Mihailov v. Bulgaria* (dec.), no. 52367/99, 9 September 2004). The Court is called to determine *ex post* whether the decisions rendered in the different sets of proceedings which started in the Bremen and Kirchhain District Courts and the conduct of these proceedings complied with the applicant's rights guaranteed by Articles 8, 6, 14 and 13 of the Convention. This examination is not futile when, due to the duration of the proceedings in the national courts – which can rather itself raise an issue under the Convention – or the lapse of time since then, an irreversible situation has evolved.

Accordingly, the Court finds no reason for not continuing the examination of the application. Therefore, it rejects the Government's request that the application be struck out of its list of cases under Article 37 § 1 (c) of the Convention.

The Court further recalls that an applicant will only cease to have standing as victim within the meaning of Article 34 of the Convention if the national authorities have acknowledged the alleged violations either expressly or in substance and then afforded redress for the breaches of the Convention (see, *inter alia*, *Eckle v. Germany*, judgment of 15 July 1982,

Series A no. 51, p. 30, § 66; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Guisset v. France*, no. 33933/96, § 66, ECHR 2000-IX).

The Court notes that the German authorities, notably the courts, have neither acknowledged the breach of the applicant's Convention rights nor afforded him any redress therefor. Consequently, the applicant has not lost his status of victim within the meaning of Article 34 of the Convention, irrespective, again, of the fact that it would no longer be possible to remedy breaches of the Convention notably by granting access or custody in the future.

Therefore, the Court likewise rejects the Government's objection that the applicant no longer has standing as victim pursuant to Article 34 of the Convention.

B. Complaints relating to the applicant's first request for access in 1994

1. The Government's objection

The Government maintained that the applicant failed to exhaust domestic remedies in accordance with Article 35 § 1 of the Convention. They argued that the applicant's constitutional complaint against the decision of the Bremen Regional Court dated 30 September 1996 had in fact been inadmissible, as he had obviously failed to substantiate sufficiently his complaint. They conceded that the Federal Constitutional Court had not expressly found in the operative part of its decision that the applicant's complaint had been inadmissible. However, that court did not always state expressly that a constitutional complaint had not been admitted due to its inadmissibility, as it did not have to give reasons at all.

The applicant contested this view. He stressed that the Federal Constitutional Court had not dismissed his complaint, which he had lodged in person, as inadmissible. In any event, he had given extensive reasons for his complaint.

The Court recalls that, whereas Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be brought subsequently before the Court should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34; *Elçi and Others v. Turke*y, nos. 23145/93 and 25091/94, § 604, 13 November 2003).

The Court notes that the Federal Constitutional Court refused to admit the applicant's constitutional complaint without giving further reasons for its decision. In particular, in its decision that court had not found the applicant's complaint to be inadmissible for a lack of substantiation. In these circumstances, it is not the function of the Court to substitute itself for the Federal Constitutional Court and to speculate why that court had decided not to admit the applicant's complaint. It is notably not for the Court to determine whether or not the Constitutional Court considered or should have considered the applicant's complaint as insufficiently substantiated and therefore as inadmissible (see *argumentum a fortiori Uhl v. Germany*, no. 64387/01, 6 May 2004; *Süss v. Germany* (dec.), no. 63309/00, 13 October 2005).

The Court concludes that the applicant exhausted all remedies in the civil courts and obtained a decision of the Federal Constitutional Court on his constitutional complaint, lodged in compliance with the formal requirements and time-limits laid down in domestic law. The Government's objection on grounds of failure to exhaust domestic remedies must accordingly be dismissed.

2. Complaints under Article 8 of the Convention

The applicant claimed that the German court decisions dismissing his first request to be granted access to his son violated his right to respect for his family life as guaranteed by Article 8 of the Convention, which, in so far as relevant, 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 morals, or for the protection of the rights and freedoms of others."

The Court notes that it was undisputed between the parties that the domestic courts' decisions not to grant the applicant's first request for access to his son interfered with the applicant's right to respect for his family life as guaranteed by Article 8 § 1. The Court shares this view.

Any such interference with an applicant's right to respect for his family life will constitute a violation of Article 8 unless it is "in accordance with the law", pursued an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society".

The decisions at issue had a basis in national law, namely section 1711 § 2 of the Civil Code in its version in force before 1 July 1998.

The court decisions refusing to grant the applicant access to his son were aimed at protecting his son's best interests, that is, the latter's "health or morals" and "rights and freedoms". Accordingly, they pursued legitimate aims within the meaning of paragraph 2 of Article 8.

It is a matter of dispute between the parties whether the interference with the applicant's right to respect for his family life was "necessary in a democratic society".

The Government argued that the refusal to regulate the applicant's access to S. had been necessary in a democratic society. Given the considerable conflicts between the applicant and Ms B.-K., ordering contacts between the applicant and his son would have caused serious psychological harm to S. and would therefore have been contrary to S.'s best interest. Furthermore, S.'s right to live with his mother and Ms B.-K.'s right to leave Germany freely, as guaranteed by Article 2 of Protocol No. 4 to the Convention, had to be weighed against the applicant's interest in having access to S.

The Government further submitted that in order to reach their considered decision, the courts had heard S., then aged nine and ten respectively, his parents and a representative of the Youth Office. The courts had also attempted to obtain an expert report on the question of access, but had no means to force Ms B.-K. to undergo psychological examination. The applicant himself had suggested rendering a decision without having recourse to an expert opinion on access in these circumstances.

In the applicant's view, the German court decisions not to grant him access had not been "necessary in a democratic society". He argued that every decision based on section 1711 § 2 of the Civil Code (in its version in force at the relevant time) not to grant access contravened Article 8. The said section failed to take a father's right of access adequately into account. Furthermore, the German courts had not given sufficient reasons for refusing to grant him access to S. In particular, certain minor quarrels between the parents on the implementation of access did not justify the prohibition of contacts between the applicant and his son, which had therefore been disproportionate. The Bremen Regional Court had based its refusal of access on allegedly factual obstacles without considering possibilities of arranging visits in Kyrgyzstan or Germany. Furthermore, the Bremen Regional Court had not duly examined whether it had been in S.'s best interest to move abroad, given that this led to a suspension of contacts with his father.

The applicant further submitted that he had also not been involved sufficiently in the decision-making process. The Bremen District Court had failed to hear the applicant, Ms B.-K. and a representative of the Youth Office directly before rendering its decision. Furthermore, it had been necessary to obtain an expert opinion on S.'s true wishes concerning contacts with him, even if Ms B.-K., due to her refusal to cooperate, could not be examined. He had merely dropped his motion to obtain an expert opinion on this issue when Ms B.-K. and S. had moved abroad, so that an examination had no longer been possible.

The Court recalls that in determining whether the refusal to grant access was "necessary in a democratic society" it has to consider whether, in the

light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their margin of appreciation (see, *inter alia*, *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55; *Elsholz v. Germany* [GC], no. 25735/94, § 48, ECHR 2000-VIII; *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII).

The Court further recalls that whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. The Court cannot satisfactorily assess whether the reasons adduced by the national courts to justify these measures were "sufficient" for the purposes of Article 8 § 2 without at the same time determining whether the parent has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests (see, *inter alia*, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V; *Hoppe v. Germany*, no. 28422/95, § 52, 5 December 2002; *Sommerfeld*, cited above, § 66).

In reviewing whether the domestic courts, in the exercise of their margin of appreciation, based their decisions on relevant grounds the Court reiterates at the outset that in cases arising from individual applications it is not its task to examine the domestic legislation – here section 1711 § 2 of the Civil Code – in the abstract. The Court must examine the manner in which that legislation was applied to the applicant in the particular circumstances. It therefore does not find it necessary to consider whether the former German legislation as such, namely, section 1711 § 2 of the Civil Code, failed to take a father's right of access adequately into account. The question to be decided by the Court is whether the application of section 1711 § 2 of the Civil Code in the present case led to a disproportionate interference with the applicant's right to respect for his family life (see, *mutatis mutandis*, *Elsholz*, cited above, § 59; *Sommerfeld*, cited above, § 86).

The Court observes that the Regional Court decided not to grant the applicant access to his son because it was apparently convinced that such a decision was in any event impossible to enforce in Kyrgyzstan. It is satisfied that, in the absence of any arguments to the contrary, this reason was relevant in the circumstances. The Regional Court further found that it was

in S.'s best interests to stay with his mother, who could not be prevented from temporarily moving abroad, and his new family, rather than to stay in Germany. Furthermore, when heard by the District Court before moving to Kyrgyzstan, S., then aged ten, had indicated that he did not wish to see his father because of the persistent fights between his parents. In these circumstances, the Court is satisfied that the domestic courts' decisions not to regulate the applicant's access to S. can be taken to have been made in S.'s best interests, which, due to their serious nature, must override the applicant's interests. In rendering their decisions, both the District and the Regional Court parted from the assumption that the applicant could apply for access again at a later stage, notably when his son was staying in Germany. The Regional Court, by quashing the three-year-suspension of access ordered by the District Court, had also affirmed that in principle, contacts of a child with his father were in the child's best interests. Therefore, the national courts adduced relevant reasons to justify their decisions refusing to grant access.

In assessing whether those reasons were also sufficient for the purposes of Article 8 § 2, the Court will notably have to determine whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests.

The Court observes that both in the proceedings before the District Court and before the Regional Court, the applicant was placed in a position enabling him to put forward all arguments in favour of obtaining a visiting arrangement. The evidential basis for the District Court's decision included the statements of his son S., then aged nine and ten respectively, who had been heard twice by that court, once less than two months before the court rendered its decision. The District Court further heard both the applicant, Ms B.-K. and a representative of the Youth Office twice in person. The Regional Court heard the applicant, a representative of the Youth Office and, given Ms B.-K.'s and S.'s stay in Kyrgyzstan, Ms B.-K.'s representative again.

The District Court had further attempted to obtain an expert report on the question of access, which, however, could not be completed due to Ms B.-K.'s subsequent refusal to undergo a psychological examination and her removal to Kyrgyzstan together with S. The Court recalls that as a general rule it is for the national courts to assess the evidence before them, including the means to ascertain the relevant facts. It would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of access to a parent not having custody (see, in particular, *Sommerfeld*, cited above, § 71). In the present case, the Court observes that the Regional Court based its decision not to grant access in the first place on *de facto* obstacles to implement such a decision. In order to reach a decision on that ground, expert advice on the question of access was unnecessary. Furthermore, in order to determine whether or not it was in

S.'s best interests to move abroad with his mother and his family or not, that court could have recourse to the District Court's minutes of the hearings of S. and Ms B.-K. as well as on the applicant's hearing and submissions.

Having regard to the foregoing and to the respondent State's margin of appreciation, the Court is satisfied that the German courts' procedural approach was reasonable in the circumstances and provided sufficient material to reach a reasoned decision on the question of access in the particular case. The Court can therefore accept that the procedural requirements implicit in Article 8 of the Convention were complied with.

It follows that the applicant's complaint under Article 8 concerning his first request of access to his son must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

3. Complaints under Article 14 of the Convention, taken in conjunction with Article 8 of the Convention

The applicant complained that in the proceedings concerning his first request for access he had been victim of discriminatory treatment in breach of Article 14 of the Convention, read in conjunction with Article 8. He argued that, in compliance with the applicable provisions at that time, he had been treated less favourably being a father of a child born out of wedlock, when compared to mothers of children born out of wedlock or fathers of children born in wedlock. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] 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 Government maintained that the court decisions refusing to grant the applicant access to S. had not discriminated against the applicant on grounds of marital status or gender. As the courts had found that contacts between the applicant and S. would be contrary to the latter's best interests, they would also have suspended access if S. had been born in wedlock. Likewise, for the courts' decisions merely S.'s best interest and not the applicant's gender had been decisive. In any event, fathers and mothers of children born out of wedlock were not in a comparable situation, so that a different treatment was not discriminatory.

The applicant argued that section 1711 § 2 of the Civil Code and the court decisions based on this provision had discriminated against him as a father of a child born out of wedlock, when compared to divorced fathers of children born in wedlock and to mothers of children born out of wedlock. At the relevant time fathers of children born out of wedlock had a considerably more restricted right of access to their children than fathers of children born in wedlock. Furthermore, the domestic courts had discriminated against him when applying the said provision. They had refused to grant him access to his son merely because they had found that

contacts would not be in S.'s best interest. However, contacts of fathers of children born in wedlock or of mothers of children born out of wedlock with their respective children could only have been suspended if such contacts had posed a threat to the children's well-being. He had also been discriminated in a further aspect in his position as father of a child born out of wedlock, when compared to mothers of such children. Unlike him, these mothers had a right of access to their children because of section 1705 of the Civil Code (granting them sole custody), which could only be excluded when contacts were contrary to the child's well-being.

The Court observes that section 1711 § 2 of the Civil Code on contacts between a father and his child born out of wedlock indeed contained different standards than section 1634 of the Civil Code, regulating the right of access of a parent not having custody to his or her child born in wedlock. The parent of a child born in wedlock had a legal right of access which could be restricted or suspended if necessary in the child's interest. On the contrary, the father of a child born out of wedlock had no general right of access. The personal contact between such children and their fathers depended on a favourable decision by the child's mother or on a court order finding such contact to be in the child's best interests. As found above, it is, however, not necessary for the Court to consider in the abstract whether the former German legislation as such was discriminatory within the meaning of Article 14. It needs to be determined whether the application of the provision in the present case has led to a different approach than would have ensued in the case of a child born in wedlock and the father, or in the case of the mother of a child born out of wedlock.

The Court notes that the Regional Court expressly disagreed with the District Court's finding that contacts between the applicant and his son were contrary to the latter's best interests – a finding which would have excluded access of a parent irrespective of marital status or gender. The Regional Court argued that such a decision could not be taken without psychological expert advice. However, the Regional Court based its decision not to regulate the applicant's access to S. essentially on *de facto* obstacles to a court order of contacts, especially presumable difficulties to have its decision enforced, given that S. had moved to Kyrgyzstan. In the Court's view, these considerations do not reflect any difference in treatment on grounds of marital status or gender, but take account of a factual situation. The same applies to the Regional Court's finding that, because of his stable family relationship, it was in S.'s best interests to move abroad together with his mother and his new family. It cannot, therefore, be said on the facts of the present case that a divorced father or a mother not having custody of her child born out of wedlock would have been treated more favourably in a comparable situation.

In so far as the applicant complained under Article 8 also about the duration of the proceedings, the Court will examine his complaint under Article 6 § 1.

It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

4. Complaints under Article 6 § 1 of the Convention

According to the applicant, the length of the proceedings concerning his first request for access to his son exceeded a reasonable time. He further complained that the judge dealing with his case at the Bremen District Court, Ms H., had been biased and that his case therefore had not been dealt with by an impartial tribunal. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal ..."

a. Length of the proceedings

i. Period to be taken into consideration

It is uncontested between the parties that the period to be taken into consideration started on 27 January 1994, when the applicant lodged his first motion to be granted access to his son with the Bremen District Court.

According to the Government, this period ended on 30 September 1996, when the Bremen Regional Court rendered its decision, whereas the applicant submitted that it ended only on 12 March 1997, when he was served the decision of the Federal Constitutional Court. The Court recalls that according to its case-law as it stands, the proceedings before the Federal Constitutional Court are to be taken into account in assessing the reasonableness of the length of proceedings concerning family matters (see, among many others, *Niederböster v. Germany*, no. 39547/98, § 32, ECHR 2003-IV; *Nekvedavicius v. Germany* (dec.), no. 46165/99, 19 June 2003) and that proceedings end for the purposes of Article 6 § 1 when the person concerned is notified of the court decision in question (see, *inter alia*, *Gast and Popp v. Germany*, no. 29357/95, § 69, ECHR 2000-II). The relevant period therefore ended on 12 March 1997 in the present case. Consequently, the proceedings lasted some three years and two and a half months in three levels of jurisdiction.

ii. The reasonableness of the length of the proceedings

The reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicants' conduct and that of the competent authorities.

On the latter point, the importance of what was at stake for the applicants in the litigation has to be taken into account. It is essential that custody and access cases be dealt with speedily (see, for example, *Nuutinen v. Finland*, no. 32842/96, § 110, ECHR 2000-VIII; *Wimmer v. Germany*, no. 60534/00, § 31, 24 February 2005).

As to the complexity of the applicant's case, the Government argued that the proceedings in question had indeed been complex, not least as the applicant had lodged numerous extensive motions with the courts. The applicant contested this view, arguing that neither the facts of his case nor the legal questions raised by it had been complicated.

The Court observes that the court proceedings involved hearing the parties, their son and a representative of the Youth Office. Furthermore, an expert had been involved in the proceedings, even though she finally could not finish her report due to Ms B.-K.'s refusal to cooperate. Furthermore, the applicant had lodged several motions other than the motion to be granted access for the guardianship courts to deal with. These comprised notably motions concerning requests for information, for ordering Ms B.-K. not to emigrate and for withdrawing her right to determine S.'s place of residence. Moreover, the applicant had applied for interim injunctions and their enforcement. Ms B.-K., on her part, had refused to comply with several court decisions concerning access, information to be given to the applicant or concerning an expert examination. In these circumstances, the proceedings had not been simple.

As regards the applicant's conduct, the Government maintained that the applicant himself had prolonged the proceedings by lodging many extensive motions. The applicant contested this view. The Court observes that, according to the applicable legal provisions, the applicant had the right to lodge the additional motions he had brought notably with the Bremen District Court. However, this rendered the first access proceedings more complex and necessitated several further intermediate decisions which inevitably prolonged these proceedings.

As to the conduct of the courts dealing with the applicant's case, the Government argued that these courts had continuously furthered the proceedings. They also stressed that the District Court had initially granted the applicant access to S. by way of an interim injunction. The applicant, on his part, took the view that the Bremen District Court had failed to process his case diligently in that it had ordered an expert report only in December 1994 and had not attended to its speedy conclusion. Furthermore, he found that the duration of the proceedings of one year before the Regional Court had equally been excessive, given that it had merely held one hearing.

The Court notes that the proceedings have been pending in the Bremen District Court from 27 January 1994 to 25 September 1995. During that period the District Court rendered four reasoned intermediate decisions on

further motions brought by the applicant and conducted four hearings. Furthermore, it had granted the applicant access to his son by way of an interim injunction on 6 April 1994 until 30 December 1994, thereby acting with the speed and diligence necessary in access cases. In these circumstances, the Court finds that the District Court must be found to have constantly furthered the proceedings. The access proceedings have then been pending in the Bremen Regional Court from 10 October 1995 to 30 September 1996 and in the Federal Constitutional Court from 31 October 1996 to 5 March 1997, that is, for a total length which, even in access proceedings which necessitate special diligence, cannot be deemed excessive.

In view of these facts, the Court considers that the length of the proceedings concerning the applicant's first request for access cannot be regarded as unreasonable. This part of the application must therefore be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention.

b. Impartiality of the tribunal

Invoking Article 6 § 1 of the Convention, the applicant further argued that the judge dealing with his case at the Bremen District Court, Ms H., had not been impartial.

The Court has examined the applicant's complaint as submitted by him. However, having regard to all material in its possession, the Court finds that this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

C. Complaints relating to the applicant's 1994 request for interim measures to enforce access

Invoking Article 8 of the Convention, the applicant complained that the German authorities failed to take appropriate measures to implement the Bremen District Court's decision of 6 April 1994 granting him access to his son. He further complained under Articles 8 and 6 of the Convention about the length of these proceedings. He further claimed that the proceedings concerned had been unfair, because the District Court judge dealing with the case had been biased.

The Court has examined the applicant's complaints as submitted by him. However, having regard to all material in its possession, the Court finds that these complaints, even assuming their compatibility *ratione materiae* with the Convention and the exhaustion of domestic remedies in all respects, do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application

must equally be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

D. Complaints relating to the applicant's request to withdraw Ms B.-K.'s right of custody

The applicant complained under Article 8 of the Convention that in particular the Bremen Court of Appeal's decision of 3 September 1996 violated his right to respect for his family life. The interference with his parental rights was disproportionate, as the Court of Appeal had failed to consider whether there had been sufficient reasons justifying Ms B.-K.'s decision to work abroad and whether she might have remained in Germany. The District Court's assumption that S. might suffer if the plan to stay in a foreign country had not been implemented was mere speculation. As regards the Court of Appeal's assessment of the facts, the applicant also relied on Article 6 of the Convention.

The applicant further maintained that the German court decisions refusing measures regarding Ms B.-K.'s right of custody and the underlying statutory provisions amounted to discrimination against him as father of a child born out of wedlock, if confronted with the legal situation for fathers of children born in wedlock. He relied on Article 14, read in conjunction with Article 8, of the Convention in this respect.

Invoking Articles 8 and 6 of the Convention, the applicant claimed that the duration of the proceedings concerning his request to withdraw Ms B.-K.'s right of custody had been excessive.

Furthermore, the applicant complained under Article 14, taken in conjunction with Article 6 of the Convention that the Federal Constitutional Court's decision of 5 March 1997 contained no reasoning.

The Court has examined the applicant's complaints as submitted by him. However, having regard to all material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

E. Complaints relating to the applicant's renewed request for access and for information in 1996

1. Complaints under Article 6 of the Convention

The applicant claimed that the length of the proceedings before the Bremen District Court and the Bremen Regional Court concerning his 1996 requests for access and for information on his son had been unreasonable.

He further submitted that, pending the child's stay in Kyrgyzstan, the Bremen District Court had not had jurisdiction and that in any event, under the alphabetical distribution of work, the case should not have been assigned to District Court judge Mr Ho. He also alleged that this judge had been biased.

The applicant relied on Article 6 of the Convention, which, in so far as relevant, provides:

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

a. Length of the proceedings

i. The Government's objection

The Government argued that the applicant failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They maintained that the applicant had not substantiated sufficiently his constitutional complaint about the length of the renewed access proceedings. His complaint had therefore been inadmissible, and had not complied with the requirements of Article 35 § 1. Furthermore, the applicant had lodged his constitutional complaint before having exhausted all effective remedies in the courts sitting in family matters. In particular, he had lodged his constitutional complaint before having obtained a decision of the Bremen Regional Court.

The applicant contested this view. He maintained that pursuant to Article 35 § 1 of the Convention he had merely been obliged to exhaust effective domestic remedies. The duration of the proceedings in the Bremen Regional Court had already been excessive. He therefore did not have to await the termination of these proceedings before lodging a complaint about the length of the proceedings with the Federal Constitutional Court and subsequently with this Court.

The applicant further argued that, even assuming that a constitutional complaint was an effective remedy with respect to complaints concerning the length of proceedings, he had given detailed reasons for his complaint. The Federal Constitutional Court had not dismissed his complaint as inadmissible.

The Court refers to its above findings with respect to the Government's objection relating to the applicant's first request for access (see B.1. above). It notes that also in the proceedings concerning the applicant's renewed request for access, the Federal Constitutional Court, in its decisions of 13 February 2001 and 22 April 2002, has not given any reasons for not admitting the applicant's constitutional complaints. In particular, that court did not expressly consider the applicant's complaints to be inadmissible

because he had not substantiated them sufficiently. In these circumstances, it is not for the Court to determine whether the Federal Constitutional Court considered or should have considered the applicant's complaints as insufficiently substantiated and therefore inadmissible.

Furthermore, the Court is not convinced that in order to lodge an admissible constitutional complaint against the length of proceedings – that is, in the present case, the proceedings in the Bremen Regional Court – the proceedings concerned have to be terminated. To illustrate this, the Court refers to a successful constitutional complaint with the Federal Constitutional Court about the length of pending proceedings in the case of *Grässer v. Germany* (no. 66491/01, decision of 6 September 2004) pending before this Court.

The Court therefore concludes that the Government's objection on grounds of failure to exhaust domestic remedies must be rejected.

ii. As to the merits

α. Period to be taken into consideration

The period to be taken into consideration in determining whether the proceedings complied with the "reasonable time" requirement laid down in Article 6 § 1 started on 15 November 1996, when the applicant lodged his second motion to be granted access to his son with the Bremen District Court. The proceedings can be taken to have ended on 3 May 2003, when S. attained the age of majority and the applicant's request to be granted access to him, which cannot be ordered in respect of children of full age, thus became futile. The proceedings therefore lasted for more than six years and five months in two levels of jurisdiction.

β. The reasonableness of the length of the proceedings

The Court recalls its settled case-law, cited above, on how to determine the reasonableness of the duration of proceedings.

As regards the complexity of the applicant's case the Government argued that by his numerous motions, the applicant had rendered the access proceedings very complicated. The applicant contested this view.

The Court finds that the applicant had indeed brought many motions concerning the conduct of the proceedings. He had requested, *inter alia*, the rectification of minutes of court hearings on several occasions and the hearing of witnesses and had challenged the District Court's jurisdiction to deal with his case as well as several procedural directions given by the courts. Furthermore, he had repeatedly challenged judges for bias and had also objected to the court-appointed expert and the guardian *ad litem*. This resulted in a very voluminous case-file. Moreover, the proceedings entailed hearing many persons, namely the applicant, Ms B.-K., S. and his

guardian *ad litem*, an expert and a representative of the Youth Office. Consequently, the access proceedings must be considered as quite complex.

As to the applicant's conduct the Government submitted that it was entirely imputable to him that the proceedings on his renewed request for access were still pending in the Bremen Regional Court. He had continuously lodged numerous extensive motions for evidence or manifestly ill-founded motions for bias, as well as appeals against various intermediate decisions or questioning the courts' jurisdiction. Moreover, the applicant contravened the principles of good faith if he first requested on several occasions that the proceedings be suspended and then complained about their length when they were continued.

The applicant contested having considerably protracted the proceedings by lodging motions abusively and in order to be awarded damages by this Court. He had legitimately availed himself of his right to lodge motions in order to secure compliance with his procedural rights and his right to be heard within a reasonable time. As regards his complaint about the length of the proceedings which he brought after he had initially applied to suspend the proceedings, he argued that the Regional Court had attempted to put him off by promising contacts with his son in writing. However, such contacts had never taken place.

The Court notes that in the proceedings before the Bremen District Court, the applicant lodged, *inter alia*, two motions for the minutes of the hearing to be rectified, challenged the jurisdiction of the judge sitting in his case twice, requested twelve witnesses to be called and once asked the court to postpone its decision for two weeks. Even though the applicant had the right to bring these motions, his conduct did not only render the access proceedings more complex, but also necessitated several intermediate decisions to be taken, which prolonged the proceedings.

The Court further observes that in the proceedings before the Regional Court the applicant brought numerous motions in often extensive and repeated submissions. In particular, he challenged the jurisdiction of both the District and the Regional Court, brought motions to rectify minutes of hearings, to appoint further experts and to grant him access to the case-file. Moreover, he objected to the appointed guardian *ad litem* and challenged the District Court judge once, the judges of the Regional Court on three occasions and the court-appointed expert twice for bias. The latter motions, which were all to no avail, necessitated hearing the other party, Ms B.-K., as well as the persons challenged for bias and awaiting the decisions of the Court of Appeal. The Court notes in this respect that the Regional Court informed the applicant already at an early stage of the proceedings that his numerous procedural motions prevented the court to render a decision on access in due course.

The Court also notes that the applicant has lodged a number of appeals which were rejected as inadmissible because no appeal lay against the

decisions in question. The Bremen Court of Appeal notably dismissed as inadmissible two further appeals concerning the jurisdiction of the District Court judge, two appeals about procedural directions by the Regional Court, an appeal concerning the conduct of the proceedings by the Regional Court, an appeal against the appointment of a lawyer as guardian *ad litem* and two appeals concerning the length of the proceedings. Furthermore, the Federal Court of Justice dismissed as inadmissible the applicant's appeals against the length of the proceedings. In addition to that, the proceedings were suspended between 7 September 1999 and 24 February 2000 on the applicant's own motion.

Taking account of the amount of time by which the proceedings were delayed following notably the applicant's inadmissible appeals, the Court cannot but conclude that the applicant significantly contributed to the duration of the proceedings before the Regional Court.

As regards the conduct of the proceedings by the national courts, the Government argued that the courts persistently furthered the proceedings and attempted to re-establish contacts between the applicant and his son. In the applicant's view, the Bremen District Court had notably delayed the proceedings in that it had belatedly asked the Youth Office to submit its report. Likewise, the Bremen Regional Court had not complied with its duty to conduct the access proceedings with special diligence. It had, *inter alia*, failed to appoint a guardian *ad litem* and a psychological expert already at an early stage of the proceedings and had not ensured that the expert submitted her report in due course.

The Court observes that the proceedings have been pending in the District Court from 15 November 1996 to 15 December 1997, that is, one year and one month. During this period of time, the District Court heard the applicant, Ms B.-K., S. and a representative of the Youth Office and furthered the proceedings by organising a hearing at a moment when Ms B.-K. and S. stayed in Germany and by reminding the Youth Office to submit its report. In these circumstances, the duration of the proceedings in the District Court cannot be considered as unreasonable.

As regards the conduct of the proceedings by the Bremen Regional Court, the Court notes that the proceedings have been pending there from 21 April 1998 at least until 3 May 2003, when they became futile due to the fact that S. had come of age. They therefore lasted for more than five years in this level of jurisdiction. The Court cannot but note that this duration is considerable. However, it also observes that the Regional Court has continuously furthered the proceedings. It heard the persons involved in the proceedings on four occasions. It further relied on the advice of a psychological expert and on the help of a guardian *ad litem* appointed to protect S.'s interest, who in turn had to hear the persons concerned themselves. Contrary to the applicant's view, the Court is also satisfied that the Regional Court attempted to establish contacts between the applicant

and S., notably with the help of S.'s guardian *ad litem*. It accepts that the reasonable approach adopted by the Regional Court on 14 September 2000 to try to have visits organised between the applicant and his son, then aged fifteen, without a court order before rendering a decision on access necessarily prolonged the proceedings. S. had expressly stated that he wished to agree on contacts with his father himself, without the court ordering such contacts. In these circumstances, it was in S.'s best interests that the court awaited the outcome of the attempts to agree on contacts outside court (see also section 52 of the Act on Non-Contentious Proceedings). However, the applicant, contrary to his son's wishes, had forwarded S.'s letters to the court and had refused to consent to resuming contacts cautiously in accordance with his son's wishes.

Moreover, the Regional Court rendered at least eleven intermediate decisions on motions lodged by the applicant. On at least thirteen occasions, it had been necessary for that court to await decisions rendered by the appellate courts following the applicant's appeals, which were all to no avail. Furthermore, the applicant had lodged a motion with the Kirchhain District Court to be granted joint custody of S. while the access proceedings were pending in the Bremen Regional Court. As these custody proceedings concerned a request which went further than the applicant's motion to be granted access, the Regional Court had to take these additional proceedings into consideration.

In view of the particular circumstances of this case, the Court is therefore satisfied that the overall duration of the proceedings concerning the applicant's renewed request for access can still be considered as reasonable. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

b. Further issues

The Court has examined the applicant's further complaints under Article 6 concerning the jurisdiction of the Bremen District Court and of judge Ho., whom he also considered to be biased, as submitted by him. However, having regard to all material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Complaints under Article 8 of the Convention

The applicant claimed that the decisions refusing access and information and also the length of the proceedings concerned amounted to a breach of his right to respect for his family life, as guaranteed by Article 8 of the Convention.

a. Length of the proceedings

The Government, referring to their submissions with respect to Article 6, took the view that there had also been no violation of Article 8 due to the proceedings' length. The courts had attempted to secure an agreement between the parties and S. on access, but, contrary to the wishes of his son, the applicant had refused to re-establish contacts in writing and possibly in person subsequently.

The applicant, equally referring to his submissions with respect to Article 6, maintained that the excessive length of the access proceedings had also violated his right to respect for his family life as guaranteed by Article 8.

The Court has already examined the applicant's complaint about the length of the proceedings concerning his renewed request for access and information under Article 6 § 1 of the Convention. No separate issue arises under Article 8 of the Convention.

b. Refusal of access and information

The Government argued that the applicant failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention because the proceedings concerned were still pending in the Bremen Regional Court.

The applicant did not comment on this issue.

The Court has examined the applicant's complaint as submitted by him. Even assuming that the applicant has exhausted domestic remedies in the meantime and notably obtained a decision by the Federal Constitutional Court also in respect of the present complaint, the Court, having regard to all material in its possession, finds that his complaint does not disclose any appearance of a violation of Article 8 of the Convention. It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

3. Complaints under Article 14, read in conjunction with Article 8, of the Convention

The applicant also considered that in the proceedings concerning the refusal of his renewed request for access and information he has been victim of discrimination, contrary to Article 14, in conjunction with Article 8, of the Convention.

The Court has examined the applicant's complaint as submitted by him. However, having regard to all material in its possession, the Court finds that this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

4. Complaint under Article 13 of the Convention

The applicant finally maintained that he had not disposed of an effective remedy to complain about the excessive length of the proceedings concerning his renewed request for access and information. He invoked Article 13 of the Convention in this respect, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government argued that the applicant had had at his disposal an effective remedy within the meaning of Article 13 in order to complain about the excessive length of the access proceedings. They submitted, firstly, that it had been open to the applicant to lodge a complaint with the Federal Constitutional Court against the excessive length of the proceedings. He had a constitutional right to effective protection of his legal interests (*Anspruch auf effektiven Rechtsschutz*), which entailed a right to be heard within a reasonable time by a court. Secondly, he could have lodged an appeal for failure to act (*Untätigkeitsbeschwerde*), which, even though such an appeal was not expressly provided for by law, was increasingly recognized by the appellate courts. Accordingly, the Bremen Court of Appeal had dealt with the applicant's complaint about the duration of the proceedings on the merits and had considered giving instructions to the lower court about the processing of his case. It had, however, found that instructions had not been called for, as the length of the proceedings had been attributable to the applicant himself.

The applicant maintained that he had not had at his disposal an effective remedy in order to complain about the length of the access proceedings. He relied, in particular, on the Court's judgment of 26 October 2000 in the case of *Kudła v. Poland* (no. 30210/96). He argued that a complaint to the Federal Constitutional Court could not be considered as an effective remedy. The Federal Constitutional Court could not order any measures to speed up delayed proceedings. Furthermore, that court had a wide discretion whether or not to admit constitutional complaints, which were often not dealt with expeditiously. Likewise, the majority of courts dealing with family matters considered an appeal for failure to act – as in his own case – as inadmissible, because such an appeal was not provided for in the Act on Non-Contentious Proceedings.

According to the Court's case-law, Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52; *Voyager Limited v. Turkey* (dec.), no. 35045/97, 4 September 2001; *Ivison v. the United Kingdom* (dec.), no. 39030/97, 16 April 2002).

The Court has found above that the substantive complaint under Article 6 § 1 about the length of the proceedings in question is manifestly ill-founded. For similar reasons, the applicant did not have an "arguable claim" for the purposes of Article 13, and Article 13 is therefore inapplicable to his case. It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

F. Complaints relating to the applicant's constitutional complaint against the amended Law on Family Matters

The applicant further complained that in its decision dated 19 January 1999, the Federal Constitutional Court had dismissed his complaint about the amended Law on Family Matters of 16 December 1997, which had entered into force on 1 July 1998. He relied on Article 8, taken alone and in conjunction with Article 14 of the Convention.

The Court has examined the applicant's complaints as submitted by him. However, having regard to all material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

G. Complaints relating to the applicant's request for joint custody in 1999

The applicant further claimed that the decision of the Kirchhain District Court dated 4 April 2000, as confirmed upon appeal, not to grant him joint custody of his son amounted to a violation of his right to respect for his family life (Article 8), his right to a fair trial (Article 6) and to an effective remedy (Article 13 of the Convention). He maintained in particular that there had been various shortcomings in the establishment of the relevant facts, in particular in questioning his son. Furthermore, he complained that no expert had been consulted and that the Federal Constitutional Court did not give any reasons for its decision dated 6 February 2001.

Furthermore, the applicant took the view that the German courts, in refusing his request for joint custody, attached more weight to the mother's position and therefore discriminated against him as a father, contrary to Article 14, read in conjunction with Article 8, of the Convention.

The Court has examined the applicant's complaints as submitted by him. However, having regard to all material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this

part of the application must also be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the applications inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President