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

Application no. 59008/00
by Reinhold SIEBERT
against Germany

The European Court of Human Rights (Third Section), sitting on 9 June 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs A. GYULUMYAN,
Ms R. JAEGER,
Mr E. MYJER,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 20 June 2000,

Having deliberated, decides as follows:

THE FACTS

The applicant, Reinhold Siebert, is a German national, who was born in 1954 and lives in Gütersloh, Germany. He is also acting on behalf of his daughter Anna. He is represented before the Court by Mr G. Rixe, a lawyer practising in Bielefeld. The respondent Government are represented by Mr K. Stoltenberg, *Ministerialdirigent*, and, subsequently, Mrs A. Wittling-Vogel, *Ministerialrätin*, 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 married and lives with his wife and two children born in wedlock.

He is the father of the child Anna, born out of wedlock on 29 December 1993 in Bielefeld. On 10 February 1994, he acknowledged paternity before the Gütersloh Youth Office.

The applicant and the child's mother, Ms K., who died after giving birth to her daughter, had an extramarital relationship since 1991. The applicant had allegedly planned to divorce his wife and marry the child's mother.

Following her premature birth, Anna was kept in hospital in an incubator. She suffered from a cerebral haemorrhage that had occurred during her birth. This resulted in a so-called hydrocephalous, a blockage of flow of the cerebrospinal fluid. Anna was operated upon twice and a shunt tube was placed to drain excess cerebrospinal fluid. The tube needs to be elongated in regular intervals corresponding to Anna's growth and its functioning has to be supervised permanently.

Anna stayed in hospital until 11 March 1994, where the applicant visited her every day. She has since then been living with Mr P and his wife Ms P., her mother's half-sister. Due to her premature birth and her disease, Anna's development is retarded by seven months and she needs constant medical supervision.

2. Proceedings regarding guardianship

a. First set of proceedings before the guardianship courts

On 3 January 1994, a judicial officer (*Rechtspfleger*) of the Gütersloh District Court, sitting as a court competent in guardianship matters, decided that pursuant to section 1791 c of the Civil Code, the Gütersloh Youth Office (*Jugendamt*) was Anna's guardian (*Vormund*).

On the same day, the applicant requested the District Court to discharge the Youth Office as Anna's guardian and to appoint him as guardian.

On 5 January 1994, Mr P., who was then sixty years old, and Ms P., who was then aged thirty-nine, applied to the District Court to be appointed as Anna's guardians. In its recommendation dated 1 February 1994, the Youth Office, after having heard the applicant, his wife and their two children, as well as Mr and Ms P. and their son, and after having visited their respective places of residence, supported the request.

On 9 March 1994, following a hearing of Ms P., the applicant and his wife on 1 March, a judicial officer of the District Court discharged the Youth Office as guardian and appointed Mr and Ms P. The applicant's request for appointment as guardian was dismissed. The judicial officer, having regard to the Youth Office's report, found that Mr and Ms P. were living in a stable relationship and were experienced in raising children. On the contrary, the applicant's marriage was problematic and unstable. His family lived for at least eight years on social benefits, and the applicant acted in an irresponsible manner in financial matters. The officer considered that, on account of her illness, Anna continued to need intensive care, in particular medical treatment. Due to her limited faculties, the applicant's wife had difficulties in communicating with others. She had already experienced serious problems in raising their two children, that is, their daughter aged 19, and especially their mentally disabled son aged 18. She would not be in a position to ensure this care, especially if the applicant envisaged taking up employment. Moreover, there were doubts that the document filed by the applicant, which allegedly constituted Ms K.'s last will in respect of child care issues, had been typed by her. According to that document, Ms K. wanted her children to be raised in the applicant's family, if anything happened to her.

On 14 March 1994, the applicant lodged an appeal against this decision with the District Court. The appeal was examined by a judge who decided on 15 March 1994 not to amend the decision of 9 March 1994. The appeal and the files were forwarded to the Bielefeld Regional Court. In these appeal and the following proceedings, the applicant was assisted by counsel.

On 24 August 1994 the Regional Court heard the parties, that is, the applicant, Ms and Mr P. and the representative of the Gütersloh Youth Office, as well as two witnesses. As the applicant had named another witness after this hearing to support his allegation that Ms K. had been raped several times by Mr P. when she was a child, the Regional Court heard that witness and Mr P. in a further hearing on 27 October 1994.

On 28 December 1994, the Regional Court dismissed the applicant's appeal. It found that the District Court's decisions to reject the applicant's request for appointment as guardian and to appoint Mr and Ms P. could not be objected to.

As to the applicant's motion to be appointed as guardian, the Regional Court found that Anna's late mother had not validly nominated the applicant as their daughter's guardian in accordance with Sections 1776 and 1777 of the Civil Code. The document submitted by the applicant, which allegedly contained Ms K.'s last will in respect of child care issues, was typed and not hand-written and did not, therefore, constitute a valid last will. Referring to Section 1779 § 2 of the Civil Code, the court considered that the applicant was not suitable for appointment as Anna's guardian. He had been unemployed since 1980, received unemployment and social benefits, and had no precise professional plans for the future. His financial and family situation was not stable.

As regards his marital relationship, the court considered the spouses' submissions that they had envisaged to divorce and that they now intended to continue their relationship in order to take care of Anna. Having regard to three different medical expert reports prepared in July and August 1994 on Anna's state of health and latest development, the court noted that Anna presently needed constant medical attendance and would always be in need of special care. Due to her premature birth and her operations, complications could arise at any time in the future, which, if noticed too late, could cause brain damage. The Regional Court found that the applicant's wife would encounter difficulties in ensuring this constant intensive care for her husband's illegitimate daughter. Moreover, the applicant did not exclude that his marriage would irretrievably break down. In that event, he intended to place Anna with third persons, possibly his sister. Given Anna's state of health, such a change in the person taking care of her could endanger her well-being. The applicant still did not seem to realise how fragile his daughter's state of health was.

The Regional Court further considered that, even assuming that the applicant was suitable to be appointed as guardian, he would not have priority over other relatives under the relevant statutory provision, Section 1779 § 2 of the Civil Code. There was notably no indication that Anna's mother had wanted her daughter to be raised by the applicant, nor that she would have been opposed to her daughter being raised by a member of her family. In particular, the court, having thorough regard to the evidence before it, including the statement of a witness presented by the applicant, was not convinced that Ms K. had drafted the document which allegedly constituted her last will.

In its view, Mr and Ms P., on account of their stable personal, family and financial situation, were suitable to act as Anna's guardians. They had been married for more than ten years and had a regular income. Since Anna lived with them, Ms P. had shown that she was able to give Anna the intensive care she needed and was suitable to ensure her constant medical attendance. Having regard to Mr and Ms P.'s statements, the Regional Court was convinced that they would raise Anna like their own child. In this context,

the Regional Court noted that there was no indication whatsoever that Mr P. had raped Anna's mother. Thoroughly reasoning its decision, the court found that the applicant's allegations to that effect were unfounded and that the witness presented by him to prove a sexual abuse of Ms K. had not told the truth.

On 27 February 1995, the applicant lodged a further appeal with the Hamm Court of Appeal, arguing *inter alia* that when deciding on the question of guardianship, the District Court should have granted priority to him as father of the child. Third persons should only be appointed as guardians if the natural parents posed a threat to the child's well-being.

On 26 February 1996 the Hamm Court of Appeal dismissed his appeal regarding his request for appointment as guardian. Insofar as the appointment of both Ms and Mr P. as guardians was concerned, the court remitted the case to the District Court.

The Court of Appeal observed that the Regional Court had erroneously referred to section 1779 of the Civil Code on the appointment of guardians instead of section 1886 on their dismissal from office, Mr and Ms P. having been appointed in March 1994. Irrespective of this different legal approach, the Court of Appeal, in a detailed reasoning, concluded that there were no objections on points of law to the Regional Court's finding that the applicant was unsuitable as guardian. Due to the applicant's unsuitability, it was irrelevant whether the applicant, if he had been suitable, would have had to be given priority over other relatives as the child's natural father.

As to the appointment of both Ms and Mr P. as guardians, the Court of Appeal found that there were no objections on points of law to the Regional Court's finding that only Mr and Ms P. were suitable as guardians. However, it observed that pursuant to section 1775 of the Civil Code, only one guardian should be appointed, the appointment of supplementary guardians being an exception. It was for the District Court to make a choice between Mr and Ms P.

As regards the applicant's procedural complaints, the Court of Appeal noted that subject-matters governed by the Act on Non-Contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*) were, as a rule, dealt with in non-public hearings and decisions were served in writing. However, it considered that guardianship proceedings, which were a matter governed by this Act, did not fall within the ambit of Article 6 § 1 of the Convention.

b. The resumed proceedings before the guardianship courts

On 3 April 1996, a judicial officer of the Gütersloh District Court, after having heard Ms and Mr P. and the Youth Office, discharged Mr P., with his consent, as Anna's guardian, finding that it was mainly Ms P. who cared for the child.

On 23 April 1996, the applicant appealed against this decision and again requested to be appointed as guardian for Anna. He further requested that a curator *ad litem* (*Verfahrenspfleger*) be appointed to represent Anna's interests in the proceedings and applied for legal aid.

On 3 June 1996, the Bielefeld Regional Court dismissed the applicant's appeal and refused to grant him legal aid. It found that following the final decision of the Hamm Court of Appeal of 26 February 1996, only Mr and Ms P. were eligible as Anna's guardian, and a choice was therefore only to be made between them. Ms P. was best suited to undertake this task, as she was taking care of the child.

On 19 August 1996, the applicant lodged a further appeal. He asked for legal aid and requested the Hamm Court of Appeal to stay the execution of the decisions regarding the guardianship of Anna. He complained about irregularities in the proceedings and about their length.

On 20 May 1997 the Hamm Court of Appeal dismissed the applicant's appeal. It regarded his complaint about the refusal of legal aid as inadmissible, as no appeal lay against the Regional Court's decision in this respect. It confirmed the Regional Court's decision to appoint Ms P. as guardian. According to the Court of Appeal, the fact that Ms P. had applied for adopting Anna did not amount to a conflict of interests which would disqualify her as guardian, as a curator *ad litem* could be appointed for the adoption proceedings. Moreover, the dispute about the applicant's access to Anna did not call her suitability as guardian into question, notably because there had not yet been a court decision on the applicant's right to access. As regards the conduct of the proceedings, the Court of Appeal found that the Regional Court, given the limited scope of the question before it, had not been required to hear in person the applicant or Mr and Ms P. The Youth Office had submitted written observations and, in these circumstances, the appointment of a curator *ad litem* for Anna had not been necessary. As the appeal was unfounded, no legal aid could be granted. A stay of execution of the guardianship decisions was regarded as contrary to the child's interests.

c. Proceedings before the Federal Constitutional Court

On 21 March 1996, the applicant lodged a constitutional complaint (no. 1 BvR 757/96) in his own and his daughter's name with the Federal Constitutional Court, which reached that court on 9 April 1996. He alleged that the German courts' decisions of 9 March 1994, 28 December 1994 and 26 February 1996 violated their right to respect for family life protected by Article 6 of the Basic Law (*Grundgesetz*). He argued in particular that the courts, in their interpretation of the relevant provisions on the appointment of a guardian, had failed to observe that as the child's parent, whose position was protected by Article 6 of the Basic Law, he had to be given priority over other relatives. He further maintained that his daughter and he himself were discriminated against *vis-à-vis* legitimate children and their parents.

He also complained that the proceedings before the Regional Court and the Court of Appeal had lasted too long, bearing in mind the special diligence required in family matters. Moreover, the District and Regional Court failed to pronounce their decisions publicly.

On 30 June 1997, the applicant lodged a second complaint (no. 1 BvR 1191/97) in his own and his daughter's name with the Federal Constitutional Court, which reached that court on 2 July 1997. He complained about the length and alleged unfairness of the resumed guardianship proceedings leading to the decisions of 3 April 1996, 3 June 1996 and 20 May 1997. He submitted in particular that the courts, in choosing a guardian who refused to grant him access to his daughter and planned to adopt her, infringed his parental rights. He further argued that the fact that a judicial officer decided who should act as a child's guardian violated his right to be given a decision by a competent judge. Due to the conflict between Ms P.'s interest as guardian and his daughter's interests, the latter should have been represented by a curator *ad litem* in the proceedings. The refusal of the courts to grant him legal aid violated his right of equal access to court.

On 13 December 2000, following further submissions of the applicant, in one of which he asked to render a decision soon, the Constitutional Court, sitting as a panel of three judges, refused to admit both complaints in a joint decision. It found that the question whether the applicant could validly lodge a constitutional complaint in his daughter's name could be left open. In any event, the questions raised by the complaints had been rendered obsolete by the entry into force of the amended Law on Family Matters of 16 December 1997 (*Reform zum Kindschaftsrecht*) on 1 July 1998. The court argued that the applicant had already applied to be granted custody of his daughter pursuant to the amended provisions of the Civil Code, which were to be considered by the competent civil courts. Therefore, the refusal to admit the constitutional complaints did not entail a particularly grave disadvantage for him. The decision was sent to the applicant on 27 December 2000.

3. Proceedings concerning the applicant's access to his child

a. Proceedings before the District Court

On 27 March 1995, the applicant applied for the first time to the competent Rheda-Wiedenbrück District Court for a decision granting him access to his daughter (*Umgangsrecht*) two hours per week and applied for legal aid. He asked that Mr and Ms P. be obliged to grant him access and that they should pay a fine of 5,000 DEM (approximately 2,556 euros) should they refuse to do so. He submitted that as a father, he had a right to visit Anna regularly and that the relevant local authorities should help negotiate a solution.

On 20 April 1995 the Rheda-Wiedenbrück District Court requested the Gütersloh District Court to submit the case file of the guardianship proceedings.

On 4 July 1995 the District Court granted the applicant legal aid.

On 11 July and 8 August 1995 the District Court again requested the courts dealing with the guardianship proceedings to submit the case file of these proceedings.

On 1 August 1995 the District Court held a hearing attended by the applicant, Mr and Ms P. and an official of the local Youth Office. It decided to suspend the proceedings in order to inspect the files of the guardianship proceedings pending before the Hamm Court of Appeal, and requested that court to submit these files.

The District Court received the relevant files on 16 August 1995. On 22 August 1995, these files were, upon the Court of Appeal's request, returned with an indication that, upon termination of the appeal proceedings, they should again be sent to the District Court for further inspection. Following two queries of the District Court, the Court of Appeal informed the District Court on 28 November 1995 that the proceedings were still pending. On 11 December 1995, the District Court, upon the applicant's repeated request to resume the proceedings, informed the parties that, in order to decide on the applicant's right of access, it had to inspect the files concerning the guardianship proceedings, which were still pending before the Hamm Court of Appeal.

On 5 January and 5 February 1996 respectively, the applicant again asked to resume the proceedings. On 22 February 1996 the Hamm Court of Appeal informed the new competent District Court judge on her request that a decision would be rendered within the next days.

On 22 February 1996, the District Court received the applicant's request to grant him access to his daughter by an interim decision. On 23 February 1996, the District Court dismissed this request, finding that no such decision could be taken without hearing the parties again, the previous hearings having been held before a different judge.

On 19 April 1996, following the Hamm Court of Appeal's decision of 26 February 1996 in the guardianship proceedings, the District Court received a copy of this decision submitted by the applicant. It conducted a further hearing on 5 July 1996. On 19 July 1996 the applicant was granted access to the case files, which he returned on 12 August 1996. On 29 August 1996 the District Court ordered that an expert opinion on the question of access be prepared. On 24 September 1996 the District Court, after having heard the parties, appointed a different expert, as the expert originally appointed no longer worked as a court expert.

Even though the District Court had twice granted the applicant, at his request, an extension of the time-limit to comment on the expert report sent to him on 27 November 1996, the applicant did not submit any comments

until 14 April 1997, when the competent judge fixed the date for the next hearing.

On 28 May 1997, following a hearing on 16 May 1997 in the presence of the applicant, Ms P., a representative of the Youth Office and a psychological expert, the District Court dismissed the applicant's request for access to his daughter.

The court noted that pursuant to section 1711 § 2 of the Civil Code, the father of an illegitimate child could be granted access only if this was in the interests of the child's well-being. In contrast, pursuant to section 1634 of the Civil Code a parent of a child born in wedlock who did not have custody had, as a rule, a right of access, which could only exceptionally be excluded if this was necessary in the child's best interests. The court expressed doubts as to whether this difference in treatment was reconcilable with the parents' and children's constitutional right to respect for their family life. However, even interpreting section 1711 § 2 of the Civil Code as granting the natural father a right of access to his child if this did not entail a risk to the child's well-being, the applicant could not be granted access to Anna.

Having regard to the parties' and the expert's submissions, the District Court found that access would have a detrimental effect on Anna's well-being.

The District Court agreed with the expert's finding that, in principle, a natural father should have access to his children. However, in the special circumstances of the case, granting the applicant access to Anna would be contrary to her best interests. Anna's fragile state of health and psychological condition did not permit for visits in Ms P.'s absence. According to the expert report, separating Anna from Ms P. even for a short time would lead to heavy emotional reactions on the part of the child. Even the slightest change in her daily routine could be very harmful to her health and state of mind.

However, given the extreme enmity between the applicant and Ms P., contacts could not take place in the presence of both of them without prior psychological counselling. The court took into account that the applicant had repeated his allegations that Mr P. had raped Anna's mother and was not willing to refrain from repeating these allegations. Under these circumstances, Ms P. could not reasonably be expected to participate in such a preparation of contacts, which could not be enforced without the willingness of both her and the applicant to cooperate.

Whereas in principle, contacts at a neutral place could be organised with expert assistance in a way so as to exclude any detriment to a child's well-being, children like Anna would still sense the tensions between the adults and get involved in their conflicts. At the present stage, contacts were therefore contrary to Anna's best interests. The court considered that once the child's development permitted for contacts with persons outside her primary surroundings, its decision to deny access could be reviewed.

b. Proceedings before the Regional Court

On 4 August 1997, the applicant appealed against this decision. He argued that the refusal to grant him access to his child infringed his parental rights as guaranteed by the Civil Code and the Basic Law. He complained of irregularities in the proceedings before the District Court, in particular that his daughter Anna had not been heard and had not been appointed a curator *ad litem*. He also alleged that the representative of the Youth Office heard in court was biased as she had also been involved in the parallel adoption proceedings initiated by Mr and Ms P. Finally, the applicant complained about the excessive length of the proceedings. He requested legal aid.

On 26 August 1997 the Rheda-Wiedenbrück District Court decided not to amend its decision of 28 May 1997 and forwarded the case-files to the Bielefeld Regional Court.

Following the Regional Court's request on 2 September 1997, the applicant submitted a copy of his submissions reasoning the appeal on 16 October 1997.

On 22 January 1998, following the applicant's reminder, the Bielefeld Regional Court, without holding a hearing, dismissed the applicant's appeal and confirmed the decision of the District Court. The Regional Court found that the question of whether section 1711 § 2 of the Civil Code was unconstitutional could be left open. In cases in which the child's best interests warranted a restriction of contacts between father and child, access had to be limited or excluded, irrespective of whether the father of a legitimate or illegitimate child was concerned.

The Regional Court found that the interests of a child's well-being required that access be prohibited if it posed a serious risk to the child's health. Contacts between the applicant and his daughter posed such a threat to Anna's health. Having regard to the expert opinion, it considered that Anna's development was retarded on account of her premature birth and of her hydrocephalous, which necessitated her attentive supervision and constant medical treatment. As long as the parties refused to reconcile, any visits would be an intrusion into Anna's everyday life, which would endanger her very fragile state of health and mind and could even lead to a collapse. The applicant had not made any effort to overcome these tensions, and his intention to enforce access against Ms P.'s will showed his lack of understanding for Anna's needs.

Moreover, the Regional Court dismissed the applicant's procedural complaints. As regards the applicant's allegation that the representative of the Youth Office was biased, it noted that the District Court had consulted the Youth Office, but it was not possible to challenge its representatives in court for bias.

It also found that there had been no need to hear Anna, since neither her preferences, nor a personal impression of her had been necessary in

reaching a decision after having obtained the expert's report stating that contacts would be detrimental to her health. A hearing would only have had unnecessary negative effects on the well-being of Anna, who had just reached the age of four.

The Regional Court added that there were no exceptional circumstances which necessitated appointing a curator *ad litem* for the child. Moreover, having regard to the expert's findings on the tensions between the parties, the District Court had not unduly omitted to attempt to secure an agreement between the parties.

Finally, the Regional Court dismissed the applicant's appeal in so far as he complained about the length of the proceedings before the District Court. It found that by an appeal, he could only challenge a decision as such and could not generally raise the question whether a court's conduct violated individual rights under the Basic Law.

c. Proceedings before the Federal Constitutional Court

On 27 February 1998, the applicant lodged a constitutional complaint (no. 1 BvR 457/98) both in his and his daughter's name with the Federal Constitutional Court, which reached that court on 4 March 1998. He also applied for an interim injunction obliging Ms P. to grant him access to his daughter. He claimed in particular that the refusal to grant him access violated his parental rights as guaranteed by the Basic Law. Furthermore, he complained about the length of the proceedings notably before the District Court. He also asked the Federal Constitutional Court to determine whether the Regional Court's dismissal of his complaint about the length of proceedings amounted to a violation of his right to an effective remedy. He requested his complaint to be given priority treatment.

On 13 December 2000, following further submissions of the applicant, the Federal Constitutional Court, without giving further reasons, refused to admit the complaints. The decision was served on the applicant on 28 December 2000.

d. Subsequent developments

On 29 March 2001, the applicant again requested the Rheda-Wiedenbrück District Court to be granted access to Anna. He suggested that access be granted for four hours every two weeks, and that during a transitory period, contacts between him and Anna should take place in the presence of a third person. He referred to a report of the local youth office on Anna's current condition. According to that report, Anna was by then attending elementary school and had become an integrated member of her class. She no longer had to deal with major impediments arising from the damage to her health suffered at birth, but still needed to have regular medical check-ups in hospital.

Following a hearing of the parties on 17 September 2001, the Rheda-Wiedenbrück District Court ordered that a psychological expert opinion be prepared on the question of whether granting the applicant access to his daughter would pose grave threats to the child's health and further development. In the course of the preparation of the expert opinion, the applicant met his daughter for approximately one and a half hours in January 2002.

On 27 September 2002 the Rheda-Wiedenbrück District Court, after having heard the parties, the child, her curator *ad litem*, a representative of the Youth Office and a psychological expert, decided that the applicant had the right to meet his daughter for one hour per month in the presence of a social worker. It found that pursuant to Section 1684 of the Civil Code, the applicant was entitled to access to his daughter despite the persistent enmity between him and Ms P. Agreeing with the expert, it considered that limited contacts between the applicant and his daughter were also in Anna's best interest.

4. Further parallel proceedings

a. Adoption proceedings

On 7 March 1995 Mr and Ms P. initiated adoption proceedings in the Rheda-Wiedenbrück District Court.

On 5 February 1996, the proceedings were suspended in view of the pending legitimisation proceedings. On 1 March 1999 the Rheda-Wiedenbrück District Court again suspended the proceedings awaiting a decision in the then pending custody proceedings.

b. Legitimisation proceedings

On 22 January 1996, the applicant filed a request for Anna's legitimisation (*Ehelicherklärung*) with the Gütersloh District Court. On 22 December 1998, the District Court decided to discontinue the proceedings in view of the entry into force of the amended Law on Family Matters of 16 December 1997 (*Reform zum Kindschaftsrecht*) on 1 July 1998.

c. Custody proceedings

On 25 January 1999, the applicant lodged a request with the Rheda-Wiedenbrück District Court to be granted custody of Anna pursuant to section 1680 § 2 of the Civil Code as amended by the Law on Family Matters of 16 December 1997. He applied for legal aid.

On 14 April 1999, the District Court refused to grant him legal aid. The applicant appealed against this decision on 4 May 1999.

At a court hearing held on 6 July 2001, the applicant submitted that he should be granted custody, but that Anna should continue to live with Mr and Ms P. The District Court decided that Anna should be heard in court.

On 25 September 2001, the District Court held a further hearing. It ordered that, prior to hearing Anna in court, a psychological report should be prepared as to whether it posed a threat to her well-being to grant the right of custody and the right of care to different persons.

On 15 March 2005 the Rheda-Wiedenbrück District Court, after having heard Anna and a psychological expert, dismissed the applicant's motion to have custody of his daughter. It found that the applicant, who had, during the past two and a half years, not exercised his right to visit Anna once per month, purportedly for health reasons, did not have a sufficiently stable relationship with his daughter. It therefore would be contrary to the best interests of Anna, who felt threatened by the applicant, to grant custody to the latter. The applicant appealed against this decision.

B. Relevant domestic law

The statutory provisions on guardianship, custody and access are to be found in the 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 entered into force on 1 July 1998.

1. Guardianship of minors

The guardianship of minors is governed by sections 1773 to 1895 of the Civil Code. The above-mentioned reform amended section 1779 § 2 (see below).

Section 1773 provides that a guardian shall be appointed if a minor is not under parental custody or if the parents are prohibited from representing the minor in personal matters or matters pertaining to property. Pursuant to section 1775, the guardianship court shall as a rule appoint only one guardian for a child.

Sections 1776 to 1778 concern the nomination of a guardian by parents having custody of the child; the nomination is effected by way of a testamentary disposition (section 1777 § 3).

Section 1779 § 1 provides that, if no person nominated by the parents is appointed, the guardianship court chooses a guardian after having consulted the local Youth Office.

Section 1779 § 2 stipulates criteria for this choice. The court shall choose a person who, considering the person's personal and financial situation and all other circumstances, appears suitable as guardian. Relatives and relatives by marriage were to be given priority; in case of a child born

out of wedlock, the court had a discretion in deciding whether the natural father, his relatives and their spouses should be considered.

Section 1779 § 2, second sentence, as amended in 1998, provides that in choosing between several suitable persons, the parents' likely will, the ward's personal relations, the kinship with the child as well as the ward's faith have to be taken into account. The distinction between legitimate and illegitimate children was abolished.

The ward's relatives shall be heard before appointing a guardian unless this would cause excessive delays or costs (section 1779 § 3).

Pursuant to section 1791 c § 1, the Youth Office is appointed guardian of a child born out of wedlock if there is a need for a guardian to exercise custody and care of property of the child.

Sections 1882 to 1895 stipulate the conditions for a termination of guardianship. The court shall discharge a guardian if the guardian acted in a manner contrary to the ward's interests, in particular if the guardian acted in breach of his duties (section 1886). It shall discharge the Youth Office as guardian and appoint a suitable person as guardian after having consulted the Youth Office if such a person is available and if this is in the ward's interest (section 1887).

2. Custody and access

a. Legislation in force at the material time

Before the entry into force of the amended Law on Family Matters, the relevant provision of the Civil Code concerning custody of and access to a child born in wedlock was worded 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; as long as no decision is made, the right, under section 1632 § 2, of the parent not having custody may be exercised throughout the period of contact. 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.
>
> 4. Where both parents have custody and are separated not merely temporarily, the foregoing provisions shall apply *mutatis mutandis*."

Pursuant to section 1681 § 1 of the Civil Code in its version then in force, in cases in which the mother had sole custody at the time of her death, custody had to be transferred to the father, if this was not contrary to the child's best interests.

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."

b. Legislation on family matters currently in force

Section 1626 § 1 reads as follows:

"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 1626 a, as amended by the Law on Family Matters, 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.

If the mother of an illegitimate child had sole custody pursuant to section 1626 a and dies, custody shall be transferred to the child's father, if this is in the child's best interests (section 1680 § 2).

According to section 1684, as amended, a child 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 is exercised in the presence of a third party, such as a Youth Office authority or an association.

3. 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*).

Pursuant to section 50 of that Act, as amended by the Law on Family Matters, the court appoints a curator *ad litem* to represent the minor child in the proceedings if this is necessary in order to protect the child's interests.

COMPLAINTS

The applicant lodged his complaints in respect of the guardianship proceedings and the first set of access proceedings both in his own name and on behalf of his daughter Anna. He invoked Articles 6, 8, 13 and 14 of the Convention.

As regards the guardianship proceedings, the applicant complained that the refusal to appoint him as his daughter's guardian and the appointment of Ms P. as guardian violated their right to respect for family life. When determining the question of whom to appoint as guardian, the national law and the courts should have granted him priority *vis-à-vis* third persons as the child's natural father. Furthermore, the courts had failed duly to establish the relevant facts, *inter alia* as to his suitability as guardian. He submitted that the fact that Anna had been placed with Ms P. without awaiting a final decision on the question of guardianship had created an irreversible situation. The Court of Appeal had not drawn the appropriate conclusions as to Ms P.'s conflict of interest on account of her adoption request and the refusal of access. He considered that a curator *ad litem* should have been appointed to represent Anna in these proceedings. He alleged further irregularities such as the involvement of a judicial officer in the proceedings before the District Court and, in the context of the resumed proceedings, the refusal of legal aid.

As regards the conduct of the access proceedings, the applicant claimed that the refusal of the courts to grant him any access to his daughter was disproportionate and violated their right to respect for family life. The courts had notably failed to take the necessary steps to achieve an agreement

between the parties. The courts should have appointed a curator *ad litem* and they should have heard Anna in person. Furthermore, in the appeal proceedings, the parties had not been heard in person and he had unduly been refused legal aid. Moreover, according to him, the Federal Constitutional Court's decision of 13 December 2000 concerning his complaints about the refusal of access lacked a sufficient reasoning.

With respect to both the guardianship and the access proceedings, the applicant complained about discrimination against him and Anna in their respective situation as natural father and child born out of wedlock, when compared to children born in wedlock and their fathers and also when compared to mothers of children born out of wedlock. He further complained that the decisions taken by the competent civil courts had not been pronounced in public. He submitted that, while these proceedings had been pending, he had not had an effective remedy in respect of the alleged breach of his right to a hearing within a reasonable time. He finally claimed that the length of the guardianship proceedings and the access proceedings had been excessive.

THE LAW

A. The Government's objections

1. *Incompatibility* ratione personae

The Government contended that, in so far as the applicant complained in his daughter's name, the application was incompatible *ratione personae* with the Convention. The applicant did not have a right to conduct proceedings in his daughter's name. As he had never been his daughter's guardian or granted the right to custody of her, he was not authorised to represent her interests.

The applicant contested this view. He argued that it was necessary for the effective protection of a child's Convention rights to entitle also a parent who did not have custody of his child to represent that child's interests before the Court. Otherwise, the child's interests which did not coincide with the rights of the person having custody or being the guardian, would not be properly protected. This was particularly true in the present case, in which the national courts had refused to appoint his daughter a curator *ad litem* to represent her interests. In any event, the applicant could claim to be a victim of the violations of his daughter's Convention rights, because he was indirectly affected by these violations.

The Court recalls that a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person (see, *mutatis mutandis*, *Nielsen v. Denmark*, judgment of 28 November 1988, Series A no. 144, pp. 21-22, §§ 56-57). Moreover, the conditions governing individual applications are not necessarily the same as national criteria relating to *locus standi*. National rules in this respect may serve purposes different from those contemplated by Article 34 of the Convention and, whilst those purposes may sometimes be analogous, they need not always be so (see *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142, p. 15, § 31).

Whether a natural parent has standing to act on his child's behalf in the proceedings before the Court is dependent on whether the party who opposes the natural parent and is entitled to represent the child under domestic law can be deemed to effectively protect the child's Convention rights (see, *mutatis mutandis*, *Sahin v. Germany* (dec.), no. 30943/96, 12 December 2000).

Accordingly, the Court has found that in the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his rights under the Convention. Consequently, even though the parent has been deprived of parental rights, the standing as the natural parent suffices to afford him the necessary power to apply to the Court on the child's behalf, too, in order to protect his or her interests (cf. *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 138, ECHR 2000-VIII).

On the contrary, the Court has drawn a different conclusion in respect of a dispute between a mother who had custody over a child and the child's natural father about the latter's access to the child. Such conflicts concerning parental rights other than custody do not oppose parents and the State on the question of deprivation of custody where the State as holder of custodial rights cannot be deemed to ensure the children's Convention rights. In cases arising out of disputes between parents, it is the parent entitled to custody who is entrusted with safeguarding the child's interests. In these situations, the position as natural parent cannot be regarded as a sufficient basis to bring an application also on behalf of a child (see *Sahin*, cited above; *Petersen v. Germany* (dec.), no. 31178/96, 6 December 2001).

In the present case, the Court observes that the impugned guardianship and access proceedings concerned conflicts between the applicant as his daughter's natural parent and his daughter's aunt as the person appointed by the State authorities to act as the child's guardian. As in the case of *Scozzari and Giunta* (cited above, § 138), there is therefore a conflict between

a natural parent and a State-appointed guardian over a minor's interests. The Court notes that, unlike in the said *Scozzari and Giunta* case, the applicant had not been deprived of parental rights he once had. He had in fact never been entitled under German law to represent the interests of his daughter born out of wedlock. He also had neither been appointed as his daughter's guardian nor been awarded custody of her by a court order at any moment before lodging his application with the Court in her name. However, the Court does not deem these differences to be of such a degree to make this case distinguishable from the above-cited one. It considers it decisive that in the proceedings in question, there had not been a natural parent involved who had been entitled to ensure the child's Convention rights. The child had also not been appointed a curator *ad litem* to represent her interests at least in the proceedings before the national courts.

Under these circumstances, the applicant has standing to act on his daughter's behalf. The Government's objection must accordingly be dismissed.

2. Non-exhaustion of domestic remedies

The Government argued that, in so far as the applicant had lodged the application in his daughter's name, domestic remedies have not been exhausted as required by Article 35 § 1 of the Convention. The applicant's daughter had not herself been a party to the guardianship or access proceedings in the national courts and had not lodged a motion that the applicant be appointed as her guardian or be granted access to her. In its decision concerning the guardianship proceedings, the Federal Constitutional Court had expressly left open the question whether the daughter's constitutional complaint had been inadmissible because the applicant had not been entitled to lodge a complaint in her name.

The applicant contested this. He maintained that, whereas the child Anna had not formally been a party to the guardianship and access proceedings, her rights had been directly affected by the outcome of the proceedings. The Federal Constitutional Court had not dismissed the child's constitutional complaints as inadmissible. According to the case-law of that court, it was not necessary for an applicant like Anna to exhaust domestic remedies, if this caused irreversible damage to that applicant due to the delays caused by such proceedings. In any event, children were not awarded the position of a party to guardianship or access proceedings under German law. The child also had not been represented by a curator *ad litem* in the proceedings before the German courts.

The Court recalls that under Article 35 of the Convention, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility

and effectiveness (see, *inter alia*, *Dalia v. France*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 87, § 38; *Horvat v. Croatia*, no. 51585/99, § 38, ECHR 2001-VIII).

Furthermore, in the area of exhaustion of domestic remedies, there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to convince the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *inter alia*, *Horvat v. Croatia*, cited above, § 39).

The Court notes that the applicant's daughter had indeed not been a party to the guardianship and access proceedings before the civil courts. However, it is uncontested between the Government and the applicant that under German law, children were not entitled to act as a party to such proceedings. The Court further observes that the applicant has lodged the complaints to the Federal Constitutional Court also in his daughter's name. These complaints have not been dismissed for non-compliance with formal requirements or time-limits by that court. Under these circumstances, the Government failed to demonstrate that there had been an effective remedy which the applicant's daughter, represented by the applicant, failed to exhaust.

Therefore, the Court concludes that the Government's objection on grounds of failure to exhaust domestic remedies cannot be upheld.

B. Complaints under Article 8 of the Convention

The applicant complained that the German court decisions refusing to appoint him as his daughter's guardian, appointing Ms P. as guardian and refusing to grant him access to his daughter violated both his and his daughter's right to respect for family life. He further alleged that their requisite interests had not been adequately protected in the decision-making process. He invoked 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."

1. Whether there was an interference with the applicant's right to respect for family life

The Court recalls that the notion of "family" in Article 8 is not confined solely to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together outside marriage. A child born out of such a relationship is *ipso iure* part of a "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his birth the parents are no longer cohabitating or if their relationship has then ended (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, pp. 17-18, § 44; *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, pp. 55-56, § 30). Furthermore, the Court considers that Article 8 cannot be interpreted as only protecting "family life" notably between natural father and child which has already been established. Where the circumstances warrant it, it must extend to the potential relationship which may develop between a natural father and a child born out of wedlock. Relevant factors in this regard include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the natural father to the child both before and after the birth (see, *inter alia*, *Nekvedavicius v. Germany*, no. 46165/99, 19 June 2003).

In the present case, the applicant's extramarital relationship with the child's mother, Ms K., lasted some two years, during which he lived with his wife and their two children. The relationship ended because of Ms K.'s death after giving birth to the child. The applicant had allegedly planned to divorce his wife and marry the child's mother. He acknowledged paternity of his daughter shortly after her birth. He visited her daily in hospital until she was given into the care of her foster family. By the numerous court proceedings instituted by him, he has shown his desire to have personal contacts with her, although later on he made no use of his right to access. There thus exists between the applicant and his daughter a bond amounting to family life within the meaning of Article 8 § 1.

The Court further recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures which hinder such enjoyment amount to an interference with the right protected by Article 8 (see, amongst others, *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, pp. 1001-1002, § 52; *Haase v. Germany*, no. 11057/02, § 82, ECHR 2004-III). The refusal to appoint the applicant as the only living parent of his daughter as her guardian, the appointment of Ms P. as guardian and the refusal to grant the applicant access to his daughter amounted to an interference with the applicant's and his daughter's right to respect for family life as guaranteed by paragraph 1 of Article 8.

2. Whether the interference was justified

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

The relevant decisions had a basis in national law. The civil courts based their decisions concerning guardianship notably on sections 1779 and 1886 of the Civil Code, in their versions then in force. The provision governing the decision on access was section 1711 § 2 of the Civil Code as in force at the relevant time.

The Court is satisfied that the court decisions of which the applicant complained were aimed at protecting the "health or morals" and the "rights and freedoms" of his daughter, and thus pursued legitimate aims within the meaning of paragraph 2 of Article 8.

In determining whether the impugned measures were "necessary in a democratic society", the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify these measures 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 margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court has recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see *Elsholz*, cited above, § 49; *Sommerfeld*, cited above, § 63; *Görgülü v. Germany*, no. 74969/01, § 42, ECHR 2004-...).

Furthermore, the Court has consistently held that taking a child into care should normally be regarded as a temporary measure to be discontinued as

soon as circumstances permit, and that any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child (see, *inter alia*, *Johansen*, cited above, p. 1008, § 78). The Court considers that these considerations are applicable, *mutatis mutandis*, to the appointment of a person other than a natural parent as a child's guardian, which results in the child's placement in a foster family. In this regard, a fair balance must be struck between the interests of the child and those of the parent and, in striking such a balance, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see *Johansen*, cited above, p. 1008, § 78; *Elsholz*, cited above, § 50; *Görgülü*, cited above, § 43).

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 decision-making process, seen as a whole, provided the applicants with the requisite protection of their interests (see, *inter alia*, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V; *Sommerfeld*, cited above, § 66).

a. Guardianship proceedings

The Court agrees with the applicant that granting parental rights to a person other than a child's natural parent, and placing the child in a foster family who intends to adopt the child, is not consistent with the ultimate aim enshrined in Article 8 of reuniting the natural parent and the child. In principle, parental rights should rest with the natural parents of a child, whether born in or out of wedlock. Such measures may therefore only be applied in exceptional circumstances and can only be justified if they were motivated by an overriding requirement pertaining to the child's best interests (see, *mutatis mutandis*, *Johansen*, cited above, pp. 1008-1009, § 78; *Görgülü*, cited above, § 45).

The Court finds that the national courts, in determining whom to appoint as Anna's guardian, carefully reasoned their decisions refusing to appoint the applicant and appointing Ms P. instead. It notes that, in the circumstances given at the time the decisions were taken, the national courts could reasonably conclude that the applicant's marital relationship was unstable. The applicant had had an extramarital relationship, out of which his daughter Anna was born, and prior to Ms K.'s death, he and his wife had envisaged divorce. Due to her limited intellect, his wife had problems in

communicating with others, and she had already encountered considerable difficulties in ensuring the care of her mentally disabled son. It was, however, supposed to be the task of the applicant's wife to look after his new born illegitimate daughter.

Moreover, the Court attaches decisive importance to the national courts' findings concerning Anna's fragile state of health at the relevant time. Following her premature birth and her operations, complications could arise at any moment, which, if not noticed immediately, could cause serious damage to her health, notably her brain. She therefore needed intensive attention and care and constant medical attendance and check-ups. The national courts concluded that, given the applicant's family situation, this intensive care, which was necessary to ensure Anna's health and development, could not be secured by the applicant.

The Court finds that there have therefore been overriding requirements pertaining to Anna's best interests at the relevant time, which, in the special circumstances of the case, justified awarding guardianship of Anna not to the applicant, her natural father, but to her aunt. Under these circumstances, the national courts could reasonably appoint Ms P. as guardian. The Court notes that she intended to adopt Anna, and refused to grant the applicant access to her prior to a court decision ordering access, which ran counter to the applicant's aim as protected under Article 8 to reunite with his daughter. However, it was in the child's best interests, which prevail over the applicant's interests, to appoint Ms P. as guardian. She was a relative of Anna who volunteered to care for her, and was able to secure to her the intensive medical attendance she needed. Furthermore, the courts later decided that transferring custody of Anna to the applicant was contrary to the child's best interests.

The Court, having regard to the State's margin of appreciation in this respect, is therefore satisfied that the decisions concerning guardianship were based on relevant grounds.

In order to decide whether the grounds adduced by the national courts to justify these measures were also “sufficient” for the purposes of Article 8 § 2, it needs to be determined whether the decision-making process, seen as a whole, provided the applicant and his daughter with the requisite protection of their interests.

The Court notes that the District Court had heard the applicant, his wife as well as Ms P. before rendering its first decision on guardianship. That court further had regard to a report given by the Youth Office, which had visited the applicant's family as well as the P. family in their respective places of residence and had heard the family members, including their children. The Regional Court had also heard the applicant, Ms and Mr P., a representative of the Youth Office and three witnesses, two of which had been presented by the applicant. That court further had regard to three different medical expert reports. The resumed guardianship proceedings

merely concerned the question whether Ms or Mr P. was more suitable as guardian. The applicant, who was held to be unsuitable for the task, had not been heard anew by the District Court with respect to this question. However, he had commented on this issue since the outset of the guardianship proceedings and had filed submissions on this question before the Regional Court, the Court of Appeal and the Federal Constitutional Court. Furthermore, given the fact that the Youth Office had been heard throughout the guardianship proceedings, the Court is not convinced that the failure of the national courts to additionally appoint the applicant's daughter a curator *ad litem* to represent her interests in these proceedings reveals an insufficient involvement of her in the decision-making process (see, *mutatis mutandis*, *Paradis and Others v. Germany*, no. 4783/03, 15 May 2003).

The Court is therefore satisfied that the applicant and his daughter had been placed in a position enabling them to put forward all their arguments and that the national courts had relied on a sufficient evidential basis to reach their thoroughly reasoned decisions.

It follows that there has been no violation of Article 8 in this respect.

b. Access proceedings

In determining whether the refusal of the national courts to grant the applicant access to his daughter in the first set of the access proceedings was "necessary in a democratic society", the Court again 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.

The Court notes that both the District Court and the Regional Court, having regard to the parents' and children's constitutional rights to respect for family life, parted from the assumption that in principle, a natural father should have access to his child, whether born in or out of wedlock. Access should only be excluded if it entailed a risk for the child's well-being. However, the courts, agreeing with a psychological expert in this respect, found that in the special circumstances of the case, contacts between the applicant and his daughter would pose a serious threat to Anna's health. Anna's fragile state of health and psychological condition did not allow for contacts between her and the applicant in Ms P.'s absence and might even lead to her collapse. Given the extreme enmity between Ms P. and the applicant, to which the applicant had significantly contributed by his repeated unproven allegations that Mr P. had raped Anna's mother, contacts could not take place without prior psychological counselling.

The Court bears in mind that a strict scrutiny of the reasons adduced by the national courts is called for as regards restrictions placed by them on parental rights of access. Such limitations entail the danger that the family relations between the parent and notably a young child would be effectively

curtailed. However, the Court observes that the national courts gave priority to Anna's best interests, which, given her state of health, overrode the applicant's interest in visiting her. It is therefore satisfied that in the circumstances of the present case, the national courts have based their decisions to deny the applicant access to his daughter on relevant grounds.

In this respect, the Court also observes that notably the District Court expressly acknowledged its duty to reassess the situation and to try to overcome any of the obstacles which might hinder granting an even very limited access (see, *mutatis mutandis*, *Nekvedavicius*, cited above). Complying with this duty, the District Court, in its subsequent decision of 27 September 2002, has granted the applicant a limited right of access, of which the applicant made no use.

It remains to be determined whether the decision-making process, seen as a whole, provided the applicant and his daughter with the requisite protection of their interests, so that the reasons adduced by the national courts to justify the refusal of access can be considered as "sufficient" for the purposes of Article 8 § 2.

The Court notes that the District Court heard the applicant, a representative of the Youth Office, as well as Ms and Mr P. in person. It also heard in person a psychological expert on the question whether or not access was detrimental to Anna's best interests. The Regional Court, without hearing itself the parties in person again, had regard to these findings and further submissions by the applicant on appeal. Both courts also disposed of the decision of the Hamm Court of Appeal of 26 February 1996 in the guardianship proceedings. The Court, having regard to the proceedings as a whole, and taking into consideration also the previous proceedings on guardianship, is satisfied that the applicant had therefore been sufficiently enabled to put forward all his arguments, even though he had not been heard in person again by the Regional Court.

The Court observes that the national courts found it unnecessary to also hear Anna, who was aged three and four respectively at the time of the District and Regional Court decisions. The Regional Court argued that hearing her had been unnecessary. The refusal to grant the applicant access to her was based on the fact that contacts had been found to threaten her fragile state of health. Therefore, neither her preferences nor a personal impression of her had been necessary to decide the question whether access was in her best interests, and a hearing would merely have had unnecessary negative effects on her well-being. The Court is satisfied that these reasons given by the national courts are sufficient to explain why, in the circumstances of the present case, a hearing of the child in person could indeed be dispensed with. Given Anna's rather young age, her fragile state of health and the fact that her preferences were indeed not necessary for rendering the decision, the national courts could reasonably conclude that they did not need to hear her.

The Court further notes that the national courts did not avail themselves of the possibility to appoint Anna a curator *ad litem* to represent her interests. However, the decisions to refuse her father access had been based solely on the danger contacts would pose to her fragile state of health. In these circumstances, the Court, having regard to the national courts' margin of appreciation, is not persuaded that the failure to appoint her such a guardian was unreasonable and did not provide them with sufficient material to reach a reasoned decision on the question of access in the particular case. The Court therefore concludes that the procedural requirements implicit in Article 8 were complied with.

c. Conclusion

It follows that the applicant's complaints under Article 8 concerning both the guardianship and the access proceedings must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

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

The applicant further complained in his and his daughter's name that both in the guardianship and in the access proceedings they had been victims of discriminatory treatment in breach of Article 14 of the Convention, read in conjunction with Article 8. They argued that they had been discriminated in their respective situation as natural father and child born out of wedlock, when compared to children born in wedlock and their fathers and also when compared to mothers of children born out of 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."

1. Guardianship proceedings

The applicant argued that pursuant to the legislation in force at the relevant time, the father of a child born out of wedlock could obtain parental rights over his child by being appointed as the child's guardian by a court order. Pursuant to section 1779 § 2 of the Civil Code, he had to prove that he was suitable as guardian, and he was not expressly granted priority *vis-à-vis* other suitable relatives. On the contrary, the father of a child born in wedlock could be granted custody of his child on death of the child's mother. Pursuant to section 1681 § 1 of the Civil Code in its version then in force, in cases in which the mother had sole custody at the time of her death, custody had to be transferred to the father, if this was not contrary to the

child's best interests. Pursuant to section 1705 of the Civil Code, custody of a minor child born out of wedlock is exercised by the child's mother.

The Court observes that, at the material time, the relevant provisions of the Civil Code therefore contained different standards for natural fathers and children born out of wedlock, when compared to children born in wedlock and their fathers, and also when compared to mothers of children born out of wedlock. The Court recalls, however, that in cases arising from individual applications it is not its task to examine the domestic legislation in the abstract, but it must examine the manner in which that legislation was applied to the applicant in the particular circumstances. The Court therefore does not find it necessary to consider whether the former German legislation as such made an unjustifiable distinction, such as to be discriminatory within the meaning of Article 14 of the Convention. The question to be decided by the Court is whether the application of section 1779 § 2 of the Civil Code in the present case led to an unjustified difference in the treatment of the applicant and his daughter in comparison with fathers and children born in wedlock, and when compared to mothers of children born out of wedlock (see, *mutatis mutandis*, *Elsholz*, cited above, § 59; *Sommerfeld*, cited above, § 85).

In determining whether the interference with the applicant's and his daughter's right to respect for family life, which was in itself permissible under paragraph 2 of Article 8, occurred in a discriminatory manner, the Court notes that the national courts' reasoning was clearly based on the finding that the child's health and development could not be secured in the applicant's family. The risk to the child's well-being was thus the paramount consideration. In the Court's view, the applicant has not shown that, in a similar situation, children born in wedlock and their fathers, or mothers of children born out of wedlock, would have been treated more favourably. Custody of a child born in wedlock might also not be transferred to the child's father on the mother's death, and might not remain with a mother of a child born out of wedlock, if this was contrary to the child's best interests. The application of section 1779 § 2 of the Civil Code in the present case does therefore not appear to have led to a different approach than would have ensued in the case of fathers and children born in wedlock, or in the case of mothers of children born out of wedlock.

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

2. Access proceedings

In the applicant's submission, section 1711 of the Civil Code on contacts between a father and his child born out of wedlock discriminated against the father when compared to section 1634 of the Civil Code relating to contacts between a father and his legitimate child and also when compared to the provisions concerning the mother of a child born out of wedlock.

The Court again observes that the said provisions contained different standards. The parent of a legitimate child had a legal right to access which could be restricted or suspended if necessary in the child's interest. On the contrary, the personal contact of illegitimate children and their fathers depended on a favourable decision by the child's mother or guardian or on a court ruling finding such contact to be in the child's interest. 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 decided whether the application of these provisions 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 District Court itself expressed doubts as to whether the difference in treatment ordered by section 1711 *vis-à-vis* section 1634 of the Civil Code was reconcilable with the rights to respect for family life of the parents and children concerned. It found, however, that even interpreting section 1711 of the Civil Code as granting the father of a child a right of access to his child if this did not entail a risk for the child's well-being, the applicant could not be granted access to Anna. The Regional Court equally adopted this interpretation. Consequently, the risk to Anna's welfare had again been the decisive consideration in refusing the applicant access to her. It cannot, therefore, be said on the facts of the present case that children born in wedlock and their fathers, or mothers of children born out of wedlock would have been treated more favourably.

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

D. Complaints under Article 6 of the Convention

1. Length of the proceedings

According to the applicant, the length of the guardianship and access proceedings was in breach of the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

The Government contested this view.

a. Guardianship proceedings

The Government took the view that the factual and legal aspects of the case had been very complex, given Anna's illness and her mother's death. Furthermore, it had been difficult to assess the applicant's and his wife's

aptitude to raise his illegitimate child Anna. His constitutional complaints had raised difficult questions concerning the rights of fathers of illegitimate children.

The Government further argued that the applicant had been responsible for certain delays in the proceedings. He had notably presented a document allegedly constituting the last will of Anna's mother in the course of the proceedings, which had necessitated further taking of evidence.

The Government maintained in particular that the Federal Constitutional Court had not unduly delayed the proceedings concerning the applicant's constitutional complaints of 9 April 1996 (no. 1 BvR 757/96) and of 2 July 1997 (no. 1 BvR 1191/97), in which the joint decision had been served on the applicant on 27 December 2000. They argued that only two years and nine months of the total period during which these complaints had been pending were imputable to the State. Due to the subsidiarity of constitutional complaints, the Constitutional Court had to await the outcome of the proceedings which were still pending. The applicant's and his daughter's constitutional complaint in the access proceedings (no. 1 BvR 457/98) had reached that court only on 4 March 1998. The length of the proceedings for which the State was responsible only started running from then onwards. For the same reason, it had been reasonable for the Constitutional Court to await the expected entry into force of the amended Law on Family Matters on 1 July 1998, which considerably broadened the rights of fathers of illegitimate children.

The Government further argued that, having regard to the heavy workload of the Constitutional Court, it had been reasonable to deal with the applicant's constitutional complaints concerning guardianship of and access to his daughter at the same time. Finally, they pointed out that there had been exceptional circumstances causing a certain delay in the Constitutional Court's dealing with family matters at the relevant time. The competent judge had been seriously ill for more than two years and had died in 1999.

The applicant contested this view. He argued that neither the facts nor the legal questions raised in the guardianship proceedings had been particularly complex. The Regional Court had partly taken evidence on subject-matters like, e.g., the applicant's capacity to sustain his family, which, due to the priority of a natural parent in raising his child, had been irrelevant.

The applicant further disputed that he had been responsible for delays in the proceedings. He stressed in the first place that the guardianship proceedings had to be conducted particularly speedily, given Anna's young age and the danger of alienation between him and Anna. In his view, not only the proceedings before the Bielefeld Regional Court and before the Hamm Court of Appeal, but in particular the proceedings before the Federal Constitutional Court concerning both complaints had been unduly delayed by those courts.

The applicant contested the Government's view that the Constitutional Court had to await the outcome of the pending access proceedings (no. 1 BvR 457/98), and that the duration of the proceedings before the Constitutional Court could only be calculated from then onwards. Due to the fact that his proceedings, concerning guardianship, had to be treated with special diligence, the Constitutional Court had neither been entitled to await the outcome of further proceedings brought by him, nor the entry into force of the amended Law on Family Matters. He stressed that even if his motion in the resumed guardianship proceedings had been granted, his first constitutional complaint would not have been disposed of. The resumed guardianship proceedings merely concerned the appointment of persons other than him as Anna's guardian, whereas with his first constitutional complaint, he pursued his own appointment as Anna's guardian. Likewise, his second constitutional complaint concerning guardianship would not have been disposed of even if he had merely been granted access to his daughter in the subsequent access proceedings. It had therefore not been reasonable to await the outcome of the access proceedings in the national courts. In his view, the delays in the proceedings were not attributable to the illness of the competent Constitutional Court judge, but to that court's general backlog.

The Court considers, in the light of the criteria established in its case-law on the question of “reasonable time” (the complexity of the case, the applicant's conduct and that of the competent authorities and the importance of what was at stake for the applicant in the litigation), and having regard to all the information in its possession, that an examination of the merits of this complaint is required.

b. Access proceedings

The Government maintained that the proceedings had been complex, given Anna's illness and the considerable quarrels between the parties to the proceedings.

The Government argued that in the proceedings before the District Court, the applicant had caused a delay of approximately five months. He had not submitted comments following the District Court's invitation to do so on 27 November 1996 until 14 April 1997 and had not handed back the case file back speedily after having been granted access to it on 19 July 1996.

As to the conduct of the competent authorities, the Government maintained with respect to the proceedings before the District Court, which lasted some two years and one month, that the delay of approximately one year caused by the failure of the courts dealing with the guardianship proceedings to submit their case files or the decision rendered could not be imputed to the District Court. Even though the decision who should be Anna's guardian had not been prejudicial for the access proceedings, the evidence obtained in the guardianship proceedings could be used in the

access proceedings. It had therefore been in the child's best interests that the District Court awaited the decision of the Hamm Court of Appeal, having regard to the serious quarrels between the parties.

The Government further took the view that the length of the proceedings before the Constitutional Court, which had started on 4 March 1998 and had ended on 27 December 2000, had not been unreasonable. In assessing the reasonableness of the proceedings' duration, the serious illness of the competent judge and the fact that the custody proceedings had still been pending in the civil courts had to be taken into account.

The applicant disputed that the proceedings had been complex and that he had contributed to the delays in them.

The applicant further argued that it had been unreasonable and contrary to the special diligence necessary in proceedings concerning access to a very young child for the District Court to stay such proceedings with a view to awaiting the outcome of the guardianship proceedings, which had not been prejudicial to the question of access.

As to the proceedings before the Federal Constitutional Court, the applicant stressed that there had been no reason not to render a decision on the applicant's and his daughter's complaints speedily. In particular, the Constitutional Court did not have to await the entry into force of the amended Law on Family Matters, as the Regional Court had already taken into account the new provisions in giving its decision.

The Court considers, in the light of the criteria established in its case-law on the question of "reasonable time" (the complexity of the case, the applicant's conduct and that of the competent authorities and the importance of what was at stake for the applicant in the litigation), and having regard to all the information in its possession, that an examination of the merits of this complaint is required.

2. Further issues

The applicant further complained in his and his daughter's name that the decisions on guardianship of his daughter had initially been taken by a judicial officer, and not by a judge, at the District Court. Furthermore, the applicant had unduly been refused legal aid in the resumed guardianship proceedings and in the appeal proceedings concerning access. In his view, the Federal Constitutional Court had not sufficiently reasoned its decision of 13 December 2000 refusing to grant the applicant access to his daughter. He also complained that the decisions taken by the competent civil courts both in the guardianship and in the access proceedings had not been pronounced in public. He invoked Article 6 of the Convention in these respects.

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 rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

E. Complaints under Article 13 of the Convention

The applicant further submitted that, while the guardianship and access proceedings had been pending, he and his daughter had not had an effective remedy in respect of the alleged breach of the right to a hearing within a reasonable time guaranteed by Article 6 § 1. 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 Court considers that it cannot, on the basis of the case-file, determine the admissibility of the above complaint and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this complaint to the respondent Government.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints relating to the length of the guardianship proceedings and the first set of the access proceedings;

Decides to adjourn the examination of the applicant's complaint concerning the lack of an effective remedy to complain about the length of the guardianship proceedings and the first set of the access proceedings;

Declares the remainder of the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President