COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF HOFFMANN v. GERMANY

(Application no. 34045/96)

JUDGMENT

STRASBOURG

11 October 2001

FINAL

11/01/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hoffmann v. Germany,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr A. PASTOR RIDRUEJO, *President*,
Mr G. RESS,
Mr L. CAFLISCH,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 20 September 2001,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 34045/96) against the Federal Republic of Germany lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Friedhelm Hoffmann ("the applicant"), on 15 July 1996.

2. The German Government ("the Government") were represented by their Agents, Mrs H. Voelskow-Thies, *Ministerialdirigentin*, of the Federal Ministry of Justice, at the initial stage of the proceedings, and subsequently by Mr K. Stoltenberg, *Ministerialdirigent*, also of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that the German court decisions dismissing his request for access to his daughter, born out of wedlock, amounted to a breach of his right to respect for his family life and that he was a victim of discriminatory treatment in this respect. He further complained about a breach of his right to a fair hearing. He invoked Articles 6, 8 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 12 December 2000 the Chamber declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a German national, born in 1954 and living in Mülheim. He is the father of the child J., born out of wedlock on 25 August 1985. The applicant and the child's mother, Ms S., lived together at the time of the child's birth. They separated in spring 1987.

J.'s mother married in 1992 and J.'s family name was changed to her mother's new family name.

8. On 23 June 1987 the Mülheim District Court decided that the applicant should be entitled to visit his daughter. These visiting arrangements were confirmed in a court settlement between the parents in July 1987. Under the terms of this settlement, the applicant was entitled to visit the child every 14 days. After some first visits, the applicant did no longer exercise his right of access to his daughter.

9. On 9 May 1990 the child's mother applied with the Mülheim District Court for an amendment of the above settlement to the effect that the applicant should no longer be allowed access to his child. It was stated that the applicant had not exercised his right of access for three years so that J. had completely forgotten him. His wish to see her again was not in J.'s interest.

10. On 12 June 1990 the Mülheim Youth Office (*Jugendamt*), having regard to a report by the *Diakonisches Werk*, a Catholic welfare organisation, recommended that the applicant should not be granted access to his child.

11. On 9 October 1990 the Mülheim District Court ordered that a medical report be prepared on the question of access. The report dated 27 June 1991 recommended that contact between the applicant and J. be build up carefully and gradually, despite of the risk for J.'s emotional balance. The established sound emotional ties between J. and her mother and the relationship of trust with the mother's partner should, however, not be upset.

12. In a further report of 26 August 1991, the *Diakonisches Werk* recommended that the applicant should meet J. in a child guidance centre (*Erziehungsberatungsstelle*). If these contacts developed positively, they should be extended or, in the event of a negative experience, access should be stopped. The Youth Office shared this assessment.

13. On 3 November 1992 the Mülheim Child Guidance Centre confirmed that, between 10 August and 11 September 1992, J. had met the applicant three times in the centre in her mother's presence. It was stated that J. had sensed the conflicts between her parents and was under mounting emotional strain as a result.

14. On 14 December 1992 the Mülheim District Court heard the applicant and J.'s mother. In these and the following proceedings, both parties were represented by counsel.

15. On 18 December the Mülheim District Court heard the then seven-year-old child in the absence of her parents. She stated that she had not recognised her natural father and that she did not want to see him.

16. On 23 January 1993 the District Court set aside its earlier decision of 23 June 1987 and the court settlement of July 1987.

The court noted *inter alia* that the applicant had not exercised his right to visit his daughter since 1987 and that J.'s mother was opposed to the applicant's request. The court found that the applicant was not entitled to have access to his daughter.

Referring to section 1711 of the Civil Code (*Bürgerliches Gesetzbuch*), the District court observed that the mother, in the exercise of her right to custody, determined the child's relations with third persons, and that therefore her will was decisive. The father could only be granted a right of access by court order if this was in the interest of the child. According to the court's findings, these conditions were not met in the applicant's case. The court considered that, as the parents separated when J. was only one and a half years old and as he did not exercise his right of access for several years, he was a stranger in respect of the child. No bonds existed between her and the applicant and she did not regard him as her father.

The District Court further considered that the attempt to overcome this situation had failed. It noted that, in the course of several meetings between the applicant and his daughter at an educational assistance office in August and September 1992, he had remained a stranger to J. who did not wish to have contacts with her father. In the court's view, it was not in J.'s interest to act contrary to her wish. After several changes, her mother's new husband had become a person exercising parental functions (*männliche Bezugsperson*). J.'s stable position and emotions would be shaken if contacts with a stranger were forced. In this context, the court considered that J. was very sensitive and vulnerable and therefore needed stable living conditions and a family life free of conflict. Her physical and emotional well-being could be easily affected and she had difficulties in concentrating and learning. Her wish not to have any contacts with her father had, therefore, to be accepted.

17. On 26 March 1993 the Duisburg Regional Court dismissed the applicant's appeal.

The Regional Court endorsed the District Court's findings under section 1711 of the Civil Code. The Regional Court further found that the applicant's appeal submissions did not disclose any new elements that were relevant. His argument that it had not been his fault that he had not been able to exercise his right of access since 1987 was irrelevant, as the child's interests were decisive. His criticism of section 1711 was irrelevant as this provision was the applicable legislation according to which granting access contrary to the mother's will was only possible in the interest of the child. However, in the applicant's case the District Court, on the basis of an expert opinion, had correctly found that J.'s wish not to have contacts with the applicant had to be accepted. Moreover, even assuming that J. was influenced by her mother, such influence could not justify to force her to have contacts with the applicant. In this respect, the Regional Court again noted the expert's findings that J. was very sensitive and vulnerable and that any forced contacts would certainly harm her.

18. On 4 June 1993 the Düsseldorf Court of Appeal declared the applicant's further complaint inadmissible, pursuant to section 63a of the Non-Contentious Proceedings Act (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*). The Court of Appeal considered that the prevailing legal situation, excluding a further appeal in proceedings concerning a father's access to his child born out of wedlock, could not be objected to from a constitutional point of view. Even if the criteria established in the Federal Constitutional Court's decision of 1991 on the necessity to abolish discrimination against children born out of wedlock were applied to procedural rules, the general standards as to the period left to the legislator for the purpose of amending the relevant legislation did not yet permit the conclusion that the existing legislation was unconstitutional.

19. On 21 July 1993 the applicant filed a constitutional complaint with the Federal Constitutional Court, complaining that the refusal of access to his daughter infringed his parental rights and amounted to discrimination, as well as about the refusal of his further appeal. The First Chamber of the First Senate of the Federal Constitutional Court acknowledged receipt on 28 July 1993.

20. On 17 January 1994 the Constitutional Court informed the applicant's lawyer that it was dealing with a further case concerning section 1711 of the Civil Code which had already been submitted. A decision in that case was envisaged for the current year. The processing of the applicant's case was therefore postponed. On 18 January 1995, upon the applicant's inquiry, the Judge at the Federal Constitutional Court dealing with the applicant's case informed him that a decision on the other case was envisaged for the current year. In a letter of 5 August 1996, the applicant's representative was informed that the date of a decision upon his complaint could not be foreseen. The applicant was subsequently informed that, in the light of the legislative reforms, a decision on his constitutional complaint

did no longer appear necessary and the applicant agreed to consider the complaint as settled.

The applicant's renewed request for access to J. remained unsuccessful.

II. RELEVANT DOMESTIC LAW

A. Legislation on family matters currently in force

21. 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 (Federal Gazette 1997, p. 2942), which came into force on 1 July 1998.

22. Section 1626 § 1 reads as follows (the Court's translation):

> "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."

23. 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. 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 exercised in the presence of a third party, such as a Youth Office authority or an association.

B. Legislation on family matters in force at the material time

24. Before the entry into force of the amended Law on Family Matters, the relevant provision of the Civil Code concerning custody and access for a child born in wedlock was worded as follows (the Court's translation):

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*."

25. The relevant provisions of the Civil Code concerning custody of and access to a child born out of wedlock were worded as follows (the Court's translation):

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."

C. The Act on Non-Contentious Proceedings

26. Like proceedings in other family matters, proceedings under former section 1711 § 2 of the Civil Code were governed by the Act on Non-Contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*).

27. According to section 12 of that Act, the court shall, *ex officio*, take the measures of investigation that are necessary to establish the relevant facts and take the evidence that appears appropriate.

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

29. As regards the hearing of parents in custody proceedings, section 50a (1) stipulates that the court shall hear the parents in proceedings concerning custody or the administration of the child's assets. In matters relating to custody, the court shall, as a rule, hear the parents personally. In cases concerning placement into public care, the parents shall always be heard. According to paragraph 2 of section 50a, a parent not having custody shall be heard except where it appears that such a hearing would not contribute to the clarification of the matter.

30. Section 63 provides for a right of a further appeal challenging the first appeal decision. Section 63a of that Act as in force at the material time excluded this right in proceedings concerning a natural father's access to his child born out of wedlock. This provision has been repealed by the Law on Family Matters of 1997.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

31. The applicant complained that German court decisions dismissing his request for access to his child, born out of wedlock, amounted to a breach of Article 8 of the Convention, the relevant part of which 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."

A. The parties' submissions

32. The applicant submitted that contacts between him and his daughter would have been in the child's interest. The mother had alienated J. and successfully prevented any contacts.

33. The Government admitted that the relationship between the applicant and his daughter came within the notion of family life under Article 8 § 1. However, in their submission, the statutory regulations on the right of access of fathers to their children born out of wedlock did not, as such, amount to an interference with the rights under that provision.

The Government conceded that the German court decisions in the present case, which were based on this legislation, amounted to an interference with the applicant's right under Article 8 § 1. In their view, this interference was in accordance with German law and served to protect the interests of the applicant's child. Moreover, the interference complained of was necessary in a democratic society within the meaning of Article 8 § 2. In this respect, the Government submitted that the child's best interests were the principle guiding the German courts.

B. The Court's assessment

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

34. The Court recalls that the notion of family under this provision is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit from the moment and by the very fact of his birth. Thus there exists between the child and his parents a bond amounting to family life (see the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 18-19, § 44).

Furthermore, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, amongst others, the Johansen v. Norway judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, pp. 1001-1002, § 52, and *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII).

35. The Court notes that the applicant lived with his daughter from her birth in August 1985 until spring 1987. In court proceedings in July 1987, he obtained a right of access. The subsequent decisions refusing the applicant access to his daughter therefore interfered with the exercise of his

right to respect for his family life as guaranteed by paragraph 1 of Article 8 of the Convention.

36. In these circumstances, the Court considers that there is no need to examine whether or not section 1711 of the Civil Code as such constituted an interference with the applicant's right to respect for his family life.

2. Whether the interference was justified

37. The interference mentioned in the preceding paragraph 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".

a. "In accordance with the law"

38. The relevant decisions had a basis in national law, namely, section 1711 § 2 of the Civil Code as in force at the relevant time.

b. Legitimate aim

39. In the Court's view the court decisions of which the applicant complained were aimed at protecting the "health or morals" and the "rights and freedoms" of the child. Accordingly they pursued legitimate aims within the meaning of paragraph 2 of Article 8.

c. "Necessary in a democratic society"

40. In determining whether the impugned measure was "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 this measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. 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 from these considerations 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 power of appreciation (see the Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55, and, *mutatis mutandis*, *Elsholz v. Germany* cited above, § 48).

41. 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 recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care.

However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of 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 the parents and a young child would be effectively curtailed (see *Elsholz v. Germany* cited above, § 49).

42. The Court further recalls that a fair balance must be struck between the interests of the child and those of the parent and that in doing so 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 of the Convention to have such measures taken as would harm the child's health and development (see *Elzholz v. Germany* cited above, § 50; and *T.P. and K.M. v. the United Kingdom*, no. 28945/95, § 71, ECHR-..).

43. In the present case the Court notes that the competent national courts, when setting aside the applicant's right of access, relied on the statements made by the applicant and the child's mother, the comments of the Mülheim Youth Office and the local *Diakonisches Werk*, and in particular on the statements made by the child, questioned by the District Court at the age of about seven, as well as on expert advice. The courts took into account the strained relations between the parents and found that any further contact would negatively affect the child.

44. The Court does not doubt that these reasons were relevant. However, it must be determined whether, having regard to the particular circumstances of the case and notably the importance of the decisions to be taken, the applicant 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 the W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 29, § 64; the above-mentioned Elsholz judgment, § 52).

45. The Court recalls that in the present case the District Court had regard to several reports on the question of contacts between the applicant and his child J., one of them being based on the experience of meetings between the applicant and J. in a child guidance centre. The applicant, represented by counsel, had the opportunity to comment on these reports.

46. In the Court's opinion, the applicant was thereby sufficiently involved in the decision-making process. The German courts arrived at the contested decision after weighing in the balance the various competing interests in issue. As pointed out above, it is not the Court's task to sit in appeal on the merits of that decision.

47. Having regard to all circumstances, the Court finds that, having regard to their margin of appreciation, the German courts were entitled to

consider the refusal of access to be necessary and that their reasons for so concluding were "sufficient" for the purposes of paragraph 2 of Article 8.

48. In sum, there has been no violation of the applicant's rights under Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN TOGETHER WITH ARTCLE 8

49. The applicant further complained that he had been a victim of discriminatory treatment in breach of Article 14 of the Convention read in conjunction with Article 8. 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."

50. The Government maintained that neither the statutory regulations on the right of access to children born out of wedlock in themselves, nor their application in the particular case, discriminated against the applicant in the enjoyment of his right to respect for his family life.

The Government recalled the Commission's decisions according to which the provisions of section 1711 of the Civil Code did not entail any discrimination contrary to Article 14 (application no. 9588/81, decision of 15 March 1984; application no. 9530/81, decision of 14 May 1984, both unpublished). The consideration that fathers of children born out of wedlock often were not interested in contacts with their children and might leave a non-marital family at any time, and that it was normally in the child's interest to entrust the mother with custody and access, still applied, even if the number of non-marital families had increased. Section 1711 § 2 of the Civil Code struck a reasonable balance between the competing interests involved in all these cases.

In this context, the Government observed that the amended Law on Family Matters did not alter this assessment.

51. The Court has held in an earlier case that it was not necessary to consider whether the former German legislation as such, namely, section 1711 § 2 of the Civil Code, made an unjustifiable distinction between fathers of children born out of wedlock and divorced fathers, such as to be discriminatory within the meaning of Article 14, since the application of this provision in the case in question did not appear to have led to a different approach than would have ensued in the case of a divorced couple (see *Elsholz v. Germany* cited above, § 59).

52. The Court notes that in the present case, both the District Court and the Regional Court expressly stated that access could only be granted if in the interest of the child, as required under section 1711 of the Civil Code in force at the relevant time. It is true that the German courts had recourse to

psychological expertise and had relied on the statements made by the child in court. After an unsuccessful attempt to build up contacts between the applicant and J. in a child guidance centre, they concluded that it was not in J.'s interest to act contrary to her wish not to see the applicant, who had remained a stranger to her.

53. The approach taken by the German courts in the present case reflects the underlying legislation which put fathers of children born out of wedlock in a different, less favourable position than divorced fathers. Unlike the latter, natural fathers had no right of access to their children and the mother's refusal of access could only be overridden by a court when access was "in the interest of the child". Under such rules and circumstances, there was evidently a heavy burden of proof on the side of a father of a child born out of wedlock. The crucial point is that the courts did not to regard contacts between child and natural father *prima facie* as in the child's interest, a court decision granting access being the exception to the general statutory rule that the mother determined the child's relations with the father. Even if the impugned decisions contain formulations referring to J.'s sensitive and vulnerable personality and the risk that her stability and emotions would be shaken if contacts with the applicant were to be enforced, the mother's initial prohibition of further contacts and her influence on the child remained decisive. A telling element in this respect is the Regional Court's argument that, even assuming that J. had been influenced by her mother, such influence could not justify to force her to have contacts with the applicant.

Accordingly, there is sufficient reason to conclude that the applicant as a natural father was treated less favourably than a divorced father in proceedings to suspend his existing right of access

54. In this context, the Court has also considered the applicant's argument as to a procedural difference, namely the exclusion of a further appeal under the Act on Non-Contentious Proceedings in the version in force at the relevant time.

55. For the purposes of Article 14 a difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 37, ECHR 2000-X).

56. According to the Court's case-law, very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention (see the *Camp and Bourimi v. the Netherlands* cited above, § 38).

57. In the present case, the Court is not persuaded by the Government's arguments, which are based on general considerations that fathers of children born out of wedlock lack interest in contacts with their children and might leave a non-marital relationship at any time.

58. Such considerations did not apply in the applicant's case. He had acknowledged paternity and had in fact been living with the mother at the child's birth in 1981. Their relationship only broke up several years later when the child was more than five years old. More important, he had continued to show a concrete interest in contacts with her for sincere motives.

59. As the Government rightly pointed out, the number of non-marital families had increased. When deciding the applicant's case, the Regional Court stated the urgent need for a legislative reform. Complaints challenging the constitutionality of this legislation were pending with the Federal Constitutional Court. The amended Law on Family Matters eventually entered into force in July 1998.

The Court wishes to make it clear that these amendments cannot in themselves be taken as demonstrating that the previous rules were contrary to the Convention. They do however show that the aim of the legislation in question, namely the protection of the interests of children and their parents, could also have been achieved without distinction on the ground of birth (see, *mutatis mutandis*, the Inze v. Austria judgment of 28 October 1987, Series A no. 126, p. 18, § 44).

60. The Court therefore concludes that there was a breach of Article 14 of the Convention, taken together with Article 8.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

61. In respect of the German court decisions refusing him access to his child and the proceedings concerned, the applicant also alleged that he had been the victim of a violation of Article 6 § 1 of the Convention, the relevant part of which reads:

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

62. The Court recalls that the Court's task under the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Elsholz v. Germany* cited above, § 66).

63. The Court had first regard to its findings with respect to Article 8 (see paragraphs 46-48 above) that the applicant was sufficiently involved in the decision-making process. The Court considers that there was no violation of the applicant's rights under Article 6 § 1 in the proceedings before the District Court and the Regional Court.

64. However, the applicant further argued the exclusion of a further appeal with the Court of Appeal.

65. The Court reiterates that Article 6 § 1 does not compel the States to set up courts of appeal or of cassation. Nevertheless, where such courts exist, the guarantees contained in Article 6 must be complied with *inter alia* by ensuring effective access to the courts so that litigants may obtain a decision relating to their "civil rights and obligations" (see, *mutatis mutandis*, the Delcourt v. Belgium judgment of 17 January 1970, Series A no. 11 pp. 13-14, § 25, and *Kudla v. Poland* (GC), no. 30210/96, § 122, ECHR 2000-XI; see also *García Manibardo v. Spain*, no. 38695/97, § 39, ECHR 2000-II).

66. The Court notes that in proceedings concerning a natural father's access to his child born out of wedlock, the general right of a further appeal against a first appeal decision, as provided in section 63 of the Act on Non-Contentious Proceedings, was excluded by operation of law, namely by section 63a of that Act as in force at the material time (see paragraph 30 above). Having regard to its findings under Article 14 of the Convention (see paragraphs 54 and 59 above), the Court concludes that this limitation on the applicant's right of access to a court was not compatible with Article 6 § 1.

67. In these circumstances, the Court finds that there has been a breach of that provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

69. The applicant sought 70,000 German marks (DEM) in compensation for non-pecuniary damage, pointing to the distress he had felt as a result of the separation from his child since 1987.

70. The Government found the claim excessive.

71. The Court considers that the applicant undoubtedly sustained non-pecuniary damage. It cannot be said on the evidence that the applicant would probably have been granted access to his child had the violations of Articles 14, taken together with Article 8, of the Convention and of Article 6 of the Convention not occurred. The Court has notably found that the applicant was the victim of discrimination as regards one of the most

fundamental rights, namely that of respect for family life. The Court further notes that since 1990 the applicant has been refused access to his child. It can reasonably be presumed that those circumstances taken as a whole have caused the applicant substantial suffering.

72. The Court thus concludes that the applicant suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. None of the factors cited above lends itself to precise quantification. Making an assessment on an equitable basis, as required by Article 41, the Court awards the applicant DEM 25,000.

B. Costs and expenses

73. The applicant further estimated his expenditure in the domestic proceedings at DEM 6,500 for costs and expenses before the German courts. He submitted receipts for such expenses in a total sum of DEM 2,480, other documents were no longer available.

74. The Government questioned the amount exceeding DEM 2,480.

75. If the Court finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see the Hertel v. Switzerland judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63). In the instant case, having regard to the subject-matter of the proceedings before the German courts and what was at stake in them, the applicant is entitled to request payment of the costs and expenses incurred before these courts to the extent that these costs and expenses are shown to have been actually and necessarily incurred and are reasonable as to quantum (cf., *mutatis mutandis*, *Elsholz v. Germany* cited above, § 73).

76. In the absence of receipts or other supporting documents, the Court is not persuaded that the applicant incurred costs and expenses in the total estimated amount. Deciding on an equitable basis, the Court awards him the sum of DEM 2,500.

C. Default interest

77. According to the information available to the Court, the statutory rate of interest applicable in Germany at the date of adoption of the present judgment is 8,62 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 8 of the Convention;

2. *Holds* by five votes to two that there has been a violation of Article 14 of the Convention, taken together with Article 8;

3. *Holds* by six votes to one that there has been a violation of Article 6 of the Convention;

4. *Holds* by five votes to two
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention;
      (i) 25,000 (twenty five thousand) German marks in respect of non-pecuniary damage;
      (ii) 2,500 (two thousand five hundred) German marks in respect of costs and expenses, together with any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 8,62 % shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 11 October 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Antonio PASTOR RIDRUEJO
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinions of Mrs Vajić and Mr Pellonpää are annexed to this judgment.

A.P.R.
V.B.

PARTLY DISSENTING OPINION OF JUDGE VAJIĆ

1. Unfortunately, in view of the Court's judgment in *Elsholz v. Germany* (cited in paragraph 34 of the present judgment) I am unable to share the opinion of the majority that there has been a violation of Article 8 in conjunction with Article 14 of the Convention in the present case.

I agree with the views which Judge Pellonpää has expressed in his dissenting opinion.

2. I have with some hesitation voted with the majority in favour of a finding that the applicant's rights under Article 6 of the Convention were violated in the present case.

I see considerable force in the view of Judge Pellonpää that the problem that raises Section 63a of the Act on Non-Contentious Proceedings, as in force at the relevant time (see paragraph 306) is one of discrimination rather than access to court and could therefore have been dealt with under Article 6 read in conjunction with Article 14.

I accept, however, that the problem can also be looked at as one of unreasonable limitation on access to court. In other words, the exclusion of a general right of a further appeal by operation of law (in the version of the law in force at the relevant time), limited the applicant's right of access to court to such an extent that it amounted to a violation of Article 6 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE PELLONPÄÄ

While I agree with the conclusion that there has been no violation of Article 8 alone in this case, I am unable to subscribe to the opinion of the Chamber that there has been a violation of Article 14 taken together with Article 8.

The Chamber attempts to make a distinction between this case and the case of *Elsholz v. Germany* (cited in paragraph 34 of the present judgment), in which the application of Section 1711 § 2 of the Civil Code "did not appear to have led to a different approach than would have ensued in the case of a divorced couple" (paragraph 51 of the present judgment).

I am not convinced by the alleged distinguishing features. In paragraph 52 it is emphasized "that in the present case, both the District Court and the Regional Court expressly stated that access could only be granted if in the interest of the child..." In so far as this appears to be given as a distinguishing feature, I note that similar statements are also to be found in the decisions of the District Court and the Regional Court in the *Elsholz* case (see paragraphs 13 and 18 of the *Elsholz* judgment). According to paragraph 53 of the present judgment the "crucial point is that the courts did not regard contact between child and natural father *prima facie* as in the child's interest, a court decision granting access being the exception to the general statutory rule that the mother determined the child's relations with the father." I fail to see that the approach of the domestic courts on this point was in any relevant manner different in *Elsholz*, in which the District Court stated that the provisions "concerning the father's right to personal contact with his child born out of wedlock ... was conceived of as an exemption clause which had to be construed strictly" (paragraph 13 of the *Elsholz* judgment).

In the *Elsholz* case the Court, when coming to its conclusion of a non-violation of Article 14 emphasized that the "risk of the child's welfare was ... the paramount consideration" (paragraph 60) in the national decisions. Therefore it could not "be said ... that a divorced father would have been treated more favourably" (paragraph 61). The child's interests, however, seem to have been an equally paramount consideration in the present case. Thus both the District Court and the Regional Court very much emphasized the particular vulnerability and sensitivity of the child and the dangers inherent in any forced contact between her and the applicant. Contrary to what the majority appears to suggest, I do not consider "the Regional Court's argument that, even assuming that J. had been influenced by her mother, such influence could not justify to force her to have contacts with

the applicant" (paragraph 53) as any particular proof of discrimination. To me this seems to be just another example of the paramount importance given to the child's interests, there being nothing indicating that in a comparable situation concerning a divorced father a different approach would have been taken.

Although there may have been some differences between the domestic court decisions in the two cases, those differences in my view were not of such a nature as to justify a violation in one and a non-violation in the other. Like in *Elsholz*, the present applicant has not shown that, in a parallel situation, a divorced father would have been treated more favourably.

I have also voted against the violation of Article 6. I do recognize that Section 63a of the Act on Non-Contentious Proceedings, as in force at the relevant time (see paragraph 30), was problematic from the point of view of the Convention. In my view the problem was, however, one of discrimination rather than access to court to be analysed under Article 6 alone. Therefore, I would have been able to vote for a violation of Article 6 read in conjunction with Article 14. Indeed, the situation is almost a classic example of discrimination as envisaged in the *locus classicus* on the subject, the Belgian Linguistic case (judgment of 23 July 1968, Series A no 6), in which the Court stated:

> "to recall a further example [of discrimination].... Article 6 does not compel States to institute a system of appeal courts. A State which does set up such Courts consequently goes beyond its obligations under Article 6. However, it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions" (p. 33).