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

Case of Sommerfeld v. Germany

(Application no. 31871/96)

Judgment

Strasbourg, 8 July 2003

COUR EUROPÉENNE DES DROITS DE L'HOMME
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(Application no. 31871/96)

JUDGMENT

STRASBOURG

8 July 2003

This judgment is final but may be subject to editorial revision.

In the case of Sommerfeld v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. Wildhaber, *President*,
Mr C.L. Rozakis,
Mr G. Ress,
Sir Nicolas Bratza,
Mr A. Pastor Ridruejo,
Mrs E. Palm,
Mr P. Kūris,
Mr R. Türmen,
Mrs F. Tulkens,
Mr P. Lorenzen,
Mr K. Jungwiert,
Mr J. Casadevall,
Mrs H.S. Greve,
Mr R. Maruste,
Mr E. Levits,
Mr M. Ugrekhelidze,
Mrs A. Mularoni, *judges*,
and Mr P.J. Mahoney, *Registrar*,

Having deliberated in private on 20 November 2002 and on 11 June 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 31871/96) 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, Mr Manfred Sommerfeld (“the applicant”), on 7 June 1995.

2. The applicant, who had been granted legal aid, was represented before the Court by Mrs S. Hierstetter, a lawyer practising in Munich. 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 also complained about a breach of his right to a fair hearing. He relied on 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). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1, 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.* On 12 December 2000 the application was declared partly admissible as regards the applicant's complaints 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.

6. On 11 October 2001 the Chamber delivered its judgment in which it held, by five votes to two, that there had been a violation of Article 8 of the Convention. It also held, by five votes to two, that there had been a violation of Article 14 of the Convention, taken together with Article 8. The Chamber further held by six votes to one that there had been a violation of Article 6 of the Convention. The Chamber finally held, by five votes to two, that the respondent State was to pay the applicant (i) 55,000 (fifty-five thousand) German marks in respect of non-pecuniary damage and (ii) 2,500 (two thousand five hundred) German marks in respect of costs and expenses. The separate opinions of Mrs Vajić and Mr Pellonpää were annexed to the judgment.

7. On 9 January 2002 the Government requested, pursuant to Article 43 of the Convention and Rule 73 of the Rules of Court, that the case be referred to the Grand Chamber, contending that the Chamber should not have found violations of Article 8 and 14 of the Convention. They maintained that the Chamber had erred in its approach to the margin of appreciation left to the national courts. Referring to the *Elsholz* case (*Elsholz v. Germany* [GC], no. 25735/94, ECHR 2000-VIII), they further considered that, in the present case, the application of the former German legislation, namely section 1711 § 2 of the Civil Code, had not led to discrimination between fathers of children born out of wedlock and divorced fathers.

8. On 27 March 2002 the panel of the Grand Chamber decided to refer the case to the Grand Chamber.

9. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the

Rules of Court. Judge Costa being unable to participate in the final deliberations, he was replaced by Judge Kūris pursuant to Rule 24 § 3.

10. The applicant and the Government each filed a memorial.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant, born in 1953, is the father of the child M., born out of wedlock on 25 January 1981. The applicant acknowledged paternity of M.

12. The applicant and the child's mother lived together at the time of the child's birth. They separated in September 1986. The child's mother prohibited any contact between the applicant and the child. The applicant still met M. several times at school until such contact was no longer possible. Subsequently the child's mother married Mr W., the father of her child A., born in August 1985, W. being the common family name.

A. The first request for visiting arrangements

13. On 2 October 1990 the applicant applied to the Rostock District Court for a decision granting him a right of access to his daughter. Having heard the persons concerned, the Rostock Youth Office, in comments dated 11 April 1991, advised against a right of access. The Youth Office submitted that M. had established a close relationship with Mr. W., which would be adversely affected by contact between M. and her natural father. It also stated that M., when heard in the absence of her mother, had indicated that she was not keen to see the applicant and was suffering as a result of his continuing efforts to obtain access.

14. On 27 June 1991 M., then ten years old, was heard by a judge of the District Court. She stated that the fact that the applicant was always standing at the fence of the schoolyard disturbed her and that she did not wish to visit the applicant even if access should be ordered by the court.

15. At a court hearing on 31 July 1991, the applicant and the child's mother declared that they would attempt to settle the question of a visiting arrangement with the assistance of the Youth Office. On 30 September 1991 the Youth Office informed the District Court that no agreement had been achieved and that M. had stated that she did not wish to see the applicant.

16. On 12 December 1991 the court ordered that a psychological expert opinion be prepared. On 9 April 1992, in one-page submissions, the psychologist of the Rostock Health Services stated that, as contact between the applicant and M. had been disrupted for six years, no diagnosis of their

current relationship appeared possible. The psychologist considered that the views which the applicant and M. had expressed on the question of future contact were very different. M. was growing up in a family unit and, unlike the applicant, was not suffering from any deficits in that respect, and did not wish to have any personal contact with the applicant. He should give her the necessary time to take up contact of her own motion. The psychologist noted that she had arranged a meeting between the applicant and M. which, however, had been cancelled by M.'s stepfather.

17. On 24 June 1992 the District Court judge heard the applicant and M. in the presence of the psychological expert. M. having repeatedly stated that she did not wish to have contact with the applicant, the latter affirmed that he would withdraw his request for a right of access.

18. The applicant withdrew his request on 1 July 1992.

B. The second request for a right of access

19. On 13 September 1993 the applicant again applied to the District Court for a right of access to his daughter.

20. On 15 February 1994 the District Court judge heard the thirteen-year-old M., who stated that she did not wish to talk to the applicant or accept presents from him and that he should no longer bother her. She also said that she had a father whom she loved, though it was not her natural father. The court held a hearing with the applicant and the child's mother on 26 April 1994.

21. On 1 June 1994 the District Court dismissed the applicant's application.

22. The District Court noted the comments filed by the Rostock Youth Office on 6 January 1994 as well as the parents' and the child's statements in court. The Court also had regard to the comments filed by the Youth Office in April 1991 and to the statement submitted by the psychologist in April 1992, both in the context of the first set of access proceedings.

23. The District Court found that the applicant could not be granted access to the child. Referring to section 1711 of the Civil Code, the Court observed that the mother, having sole custody, determined the father's access and the guardianship court could only decide to grant the father access if this was in the child's best interest. In this respect, the court found as follows:

> "On the basis of its extensive investigations, and especially its conversations with [M.] in 1992 and February 1994, this court has decided that, in the present case, access by the father to his child is by no means in her best interest.
>
> At the age of thirteen, [M.] is certainly able to make up her own mind and has clearly rejected the idea of establishing contact with her biological father. In the court's opinion, forcing her to see him against her will cannot be justified, since this

would seriously disturb her emotional and psychological balance. Such a decision would on no account be in her best interest.

This court cannot accept the [applicant's] sweeping statement that access is always in the child's interest. The extent to which this is true invariably depends on circumstances. In this case, the only justifiable decision is that set out in the operative part of the judgment.

..."

24. On 17 June 1994 the Rostock Regional Court dismissed the applicant's appeal on the following grounds:

"The appeal is admissible under section 20 of the Act on Non-Contentious Proceedings, but is unfounded. The District Court was right to refuse the applicant all access to [M.], since this is not in the child's best interest (sections 1711 and 1634 of the Civil Code). This court also takes the view that the District Court had no cause to permit exceptions for any specific area of life. It considers that the arguments advanced in the contested decision are correct. It regards it as important that the girl [M.] – who is, after all, thirteen years old – has stated clearly and for a long time that she wants no contact with her father. The applicant should accept this clearly expressed wish in his adolescent daughter's interest and also his own. Only if he ceased to exert pressure on her might it one day be possible for them to resume contact. The court would also point out that access to [M.] on the strength of a court order could hardly be enforced against the child's will."

25. On 22 July 1994 the applicant filed a constitutional complaint with the Federal Constitutional Court.

26. On 19 January 1996 a panel of three judges of the Federal Constitutional Court refused to entertain the applicant's complaint.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Legislation on family matters currently in force

27. 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.

28. 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."

29. Pursuant to section 1626a § 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 the child's well-being would otherwise be endangered. The family courts may order that the right of access be 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

30. 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:

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*."

Section 1632 § 2 concerned the right to determine third persons' rights of access to the child.

31. 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.”

C. The Act on Non-Contentious Proceedings

32. 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*).

33. 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.

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

35. 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.

36. Section 63 provides for the right to lodge a further appeal challenging the first appeal decision. Section 63a of the 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. That provision has been repealed by the Law on Family Matters of 1997.

D. The Convention on the Rights of the Child

37. The human rights of children and the standards to which all governments must aspire in realising these rights for all children, are set out in the Convention on the Rights of the Child. The Convention entered into force on 2 September 1990 and has been ratified by 191 countries, including Germany.

38. The Convention spells out the basic human rights that children everywhere – without discrimination – have: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. It further protects children's rights by setting standards in health care, education and legal, civil and social services.

39. States Parties to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child (Article 3). Moreover, States Parties have to ensure that a child is not separated from his or her parents against their will unless such separation is necessary for the best interests of the child; and that a child who is separated from one or both parents is entitled to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (Article 9).

THE LAW

I. PRELIMINARY ISSUE: THE SCOPE OF THE CASE BEFORE THE COURT

40. In his memorial dated 20 June 2002, the applicant invited the Grand Chamber to re-examine the Chamber's decision of 12 December 2000, whereby the Chamber had declared inadmissible his complaints about German court proceedings in relation to the adoption of his by then adult daughter.

41. The Court reiterates that the scope of a case referred to the Grand Chamber under Article 43 of the Convention is determined by the Chamber's decision on admissibility (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 139-141, ECHR 2001-VII). The Chamber declared admissible the complaints 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. It follows that the scope of the present case before the Grand Chamber is limited exclusively to those complaints and does not extend to the complaint concerning the adoption proceedings.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

42. As before the Chamber, the applicant complained that the German court decisions dismissing his second 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."

43. The Government requested the Court to find no violation of this provision.

A. Whether there was an interference

44. The parties agreed that the decisions refusing the applicant access to his child amounted to an interference with his right to respect for his family life, as guaranteed by Article 8 § 1. The Court takes the same view.

45. Any such interference will constitute a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of Article 8 and can be regarded as "necessary in a democratic society".

B. Whether the interference was justified

46. The parties did not question the Chamber's findings that the decisions at issue had a basis in national law, namely section 1711 § 2 of the Civil Code as in force at the relevant time, and that they were aimed at protecting the "health or morals" and the "rights and freedoms" of the child, which are legitimate aims within the meaning of paragraph 2 of Article 8.

47. It therefore remains to be examined whether the refusal of access can be considered "necessary in a democratic society".

1. The Chamber's judgment

48. In its judgment of 11 October 2001, the Chamber held that the competent national courts, when refusing the applicant's request for a visiting arrangement, had relied on relevant reasons in finding that contact was not in the child's interest (paragraphs 41-42).

49. Turning to the procedural requirements inherent in Article 8, the Chamber considered the evidence before the German courts, in particular the statements made by the child in court. It found that the failure to order a psychological report on the possibilities of establishing contact between the child and her father, the applicant, had entailed insufficient protection of the applicant's interests in the access proceedings (paragraphs 42-44). The Chamber concluded that in these circumstances, the national authorities had overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention (paragraph 45).

2. The parties' submissions

(a) The applicant

50. The applicant contended that, having regard to all the circumstances and to the strict scrutiny required in cases concerning restrictions of access, the Chamber had not unduly encroached on the margin of appreciation left to the domestic courts.

51. In his submission, the German courts had not sufficiently established whether the conditions for refusing access were met. Taking into account that the child had lived for five years with the applicant, there remained at least a suspicion that the wishes expressed by her resulted from her mother's influence.

52. In this connection, the applicant submitted that the Chamber had examined in detail the taking of evidence by the District Court in 1994, in particular its recourse to a rather vague expert opinion filed in earlier proceedings, and the Regional Court's failure to take fresh evidence.

53. The applicant further stressed that the child's attitude resulted from subliminal influence by the other parent. In these circumstances it was for the German courts to ensure, of their own motion and irrespective of any request made by the applicant, that psychological expert evidence was obtained.

54. Accordingly, the Chamber had not substituted its view for that of the national courts, but had limited itself to reviewing, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation.

(b) The Government

55. The Government maintained that the Chamber, in applying the necessity test under Article 8 of the Convention, had exceeded its power of review and had substituted its own evaluation for that of the domestic courts. Although stricter scrutiny was called for as regards restrictions placed by those authorities on parental rights of access, it was nevertheless for them to establish the relevant facts, that is to take and assess the evidence, as they had the benefit of direct contact with all the persons concerned.

56. In the present case, the German courts had not failed to involve the applicant in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests, nor had their assessment of the evidence been arbitrary.

57. In this connection, the Government pointed out that the German courts had acted on the understanding that the child's wishes were only relevant to the extent that they were the expression of her own free will. The courts were entitled to assess the question of whether the child was capable of forming her own free will without having recourse to an expert opinion.

58. Their decision not to obtain an expert opinion could not be regarded as arbitrary as, in their assessment, they had been able to rely not only on the age of the child, who had been thirteen at the relevant time, but also on a broad factual basis relating to several years. Since her first interview by the Youth Office at the age of nine, the child had stated that she was suffering as a result of the applicant's efforts to obtain access and that she did not wish to meet the applicant. In the first set of proceedings concerning the request for visiting arrangements, the applicant himself had apparently accepted the child's wish not to see him and withdrawn his request for a right of access. In the course of the proceedings relating to the second request, the child had repeated her refusal to have any contact. In these circumstances, there was no reason for the Regional Court to doubt that the child had expressed her own free will.

59. Moreover, the Government considered that the Chamber had not explained why ordering a psychological expert opinion was the only correct way of action. Thus, the Chamber had described the comments submitted by a psychologist of the local health services in 1992 as "rather superficial". However, this psychologist had already stated that, as contact between the applicant and the child had been disrupted for six years, no diagnosis of their current relationship appeared possible. Because of the further lapse of time, a psychological examination would have been even more difficult. There was no indication that the child's wishes were only "seemingly firm", as assumed by the Chamber.

60. The Government added that the applicant himself had not asked for an expert opinion.

61. In these circumstances it had been reasonable for the Regional Court to refrain from conducting an oral hearing.

3. The Court's assessment

62. In determining whether the refusal of access 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 *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55, and *Kutzner v. Germany,* no. 46544/99, §§ 65-66, ECHR 2002-I; see also Article 3 of the Convention on the Rights of the Child, paragraphs 39-41 above).

63. 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 v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII; and *Kutzner,* cited above, § 67).

64. Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents. In particular, a 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 *Elsholz,* cited above, § 50; and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V; see also *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I, and *Nuutinen v. Finland*, no. 32842/96, § 128, ECHR 2000-VIII).

65. In the present case, the competent German courts adduced relevant reasons to justify their decisions refusing access, namely that the then

thirteen-year-old girl had expressed the clear wish not to see her father, the applicant, and had done so for several years, so that forcing her to see him would seriously disturb her emotional and psychological balance (see paragraphs 23-24 above). In those circumstances the decisions can be taken to have been made in the interest of the child (see *Buscemi v. Italy*, no. 29569/95, § 55, ECHR 1999-VI). On this point, the Grand Chamber shares the view of the Chamber (see paragraph 41 of the Chamber's judgment).

66. The Court considers that it cannot satisfactorily assess whether those reasons 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 applicant with the requisite protection of his interests (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 29, § 64; *Elsholz,* cited above, § 52; and *T.P. and K.M. v. the United Kingdom* cited above, § 72).

67. The Chamber concluded that the national authorities had overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention. In its judgment, the Chamber reasoned:

> "43. The Court notes that the District Court heard the child and the parents and had regard to material obtained in a first set of access proceedings, *inter alia*, comments filed by a psychologist of the local health services of April 1992. The Court considers that, given the psychologist's rather superficial submissions in the first set of proceedings, the lapse of time and bearing in mind what was at stake in the proceedings, namely, the relations between a father and his child, the District Court should not have been satisfied with hearing only the child as to her wishes on the matter without having at its disposal psychological expert evidence in order to evaluate the child's seemingly firm wishes. Correct and complete information on the child's relationship with the applicant as the parent seeking access to the child is an indispensable prerequisite for establishing a child's true wishes and thereby striking a fair balance between the interests at stake. The Court further recalls that the Regional Court, which had full power to review all issues relating to the request for access, endorsed the District Court findings on the basis of the file.
>
> 44. In the Court's opinion, the German courts' failure to order a psychological report on the possibilities of establishing contact between the child and the applicant reveals an insufficient involvement of the applicant in the decision-making process.
>
> ..."

68. The Grand Chamber, for its part, observes that whether the decision-making process sufficiently protected a parent's interests depends on the particular circumstances of each case.

69. In the proceedings before the District Court and the Regional Court, the applicant was placed in a position enabling him to put forward all arguments in favour of obtaining a visiting arrangement and he also had access to all relevant information which was relied on by the courts (see, *mutatis mutandis, T.P. and K.M. v. the United Kingdom*, cited above,

§§ 78-83, and *P., C. and S. v. the United Kingdom*, no. 56547/00, §§ 136-138, ECHR 2002-VI).

70. The evidential basis for the District Court's decision included the child's statements in court, the parents' submissions and comments filed by the competent Youth Office. The District Court also relied on evidence submitted in the context of the first set of access proceedings, i.e. comments filed by the Youth Office in April 1991, and a statement submitted by a psychologist in April 1992 (see paragraph 22 above). The Regional Court endorsed the District Court's findings made on that basis (see paragraph 24 above).

71. As regards the issue of ordering a psychological report on the possibilities of establishing contact between the child and the applicant, the Court observes that as a general rule it is for the national courts to assess the evidence before them, including the means to ascertain the relevant facts (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, p. 32, § 33). It would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.

72. In this connection, the Court notes that the girl was thirteen years old when she was heard by the District Court judge on the question of access (see paragraphs 22-23 above). The same judge had already questioned her, at the ages of ten and eleven, in the context of the first set of proceedings (see paragraphs 14, 17 and 23 above). Having had the benefit of direct contact with the girl, the District Court was well placed to evaluate her statements and to establish whether or not she was able to make up her own mind. On that basis the District Court could reasonably reach the conclusion that it was not justified to force the girl to see her father, the applicant, against her will. That decision was endorsed by the Regional Court (see paragraph 24 above).

73. In these circumstances the Court is not persuaded that the failure to obtain a psychological expert opinion on the relations between the applicant and the child constituted a flaw in the proceedings.

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

75. Accordingly, there has been no violation of Article 8 of the Convention in the present case.

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

76. 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."

1. The Chamber's judgment

77. The Chamber, turning to the particular features of the present case, held that the approach taken by the German courts reflected the underlying legislation which put fathers of children born out of wedlock in a different, less favourable position than divorced fathers. In this connection, the Chamber observed that 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". For the Chamber, the crucial point was that the courts had not regarded contact between a child and the natural father *prima facie* as in the child's interest. The Chamber considered that even though the District Court's decision had contained the formulation that there would be a risk to the child's mental and psychological well-being had she to take up contact with the applicant against her wish, the mother's initial prohibition on further contact and her influence on the child had remained decisive (paragraphs 50-52).

78. As regards the justification of that difference in treatment, the Chamber, considering the particular circumstances of the instant case, was not persuaded by the Government's argument that in general, fathers of children born out of wedlock lacked interest in contact with their children and might leave a non-marital relationship at any time, and concluded that there had been a breach of Article 14 of the Convention, taken together with Article 8 (paragraphs 53-58).

2. The parties' submissions

(a) The applicant

79. The applicant considered that a difference in treatment between fathers of children born in wedlock and fathers of children born out of wedlock could not be justified. In his submission, the general and abstract argument that fathers of children born out of wedlock often showed no

interest in contact with their children did not apply to him and, in any event, given the growing number of unmarried partnerships, it no longer corresponded to present-day conditions.

80. As regards the exclusion of the possibility of a further appeal, the decisive issue was the difference in treatment between fathers of children born in wedlock and fathers of children born out of wedlock. In the applicant's submission, the Federal Constitutional Court's decision referred to by the Government was outdated and did not accord with the currently recognised constitutional obligation to create for children born out of wedlock the same conditions for their physical and mental development in society as for children born in wedlock.

(b) The Government

81. The Government argued that, in the past, fathers of children born out of wedlock had frequently shown no interest in their children. Section 1711 § 2 of the Civil Code had not therefore been regarded as discriminatory (*Glaichauf v. Germany*, application no. 9530/81, Commission decision of 14 May 1984, unreported). The German legislature had reacted to recent changes in social attitudes with the Law of December 1997 on Family Matters. Notwithstanding this reform, section 1711 of the Civil Code had been compatible with the Convention.

82. In any event, as in the *Elsholz* case (*Elsholz,* cited above, §§ 59-61), the application of section 1711 in the applicant's case had not amounted to discrimination. In this connection, the Government referred to the District Court's reasoning, as endorsed by the Regional Court, that an enforceable right of access was not in the child's interest, if she was opposed to contact and her mental and psychological well-being would be endangered thereby. Accordingly, the German courts had based their decisions not only on the ground that access would not serve the child's well-being, but on the much stronger reason that it was incompatible with the child's well-being.

83. The Government further considered that the exclusion of the possibility of a further appeal in access proceedings concerning a child born out of wedlock was justified (former section 63a of the Act on Non-Contentious Proceedings). They referred to the reasoning of the Federal Constitutional Court in a decision of 27 April 1989 (1 BvR 718/88), according to which the factual and legal situations of children born in wedlock and children born out of wedlock and those of their fathers were not comparable, as children born in wedlock were, as a rule, covered by the constitutional protection of existing marriages from the moment of their birth, which was not the case for children born out of wedlock. Accordingly, the legislature could reasonably give the family courts special jurisdiction in all disputes relating to marriage. In any event the differences were negligible, two levels of jurisdiction being available in both cases and the

further appeal constituting the exception in access proceedings, which should be determined speedily.

3. *The Court's assessment*

(a) Main principles

84. Article 14 only complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to that extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 35, § 71, and *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, p. 32, § 22).

The Court finds that the facts of the instant case fall within the scope of Article 8 of the Convention (see paragraph 44 above) and that, accordingly, Article 14 is applicable.

(b) Section 1711 § 2 of the German Civil Code

85. As to the situation of divorced fathers of children born in wedlock in comparison with that of fathers of children born out of wedlock, the Court observes at the outset that, at the material time, the relevant provisions of the German Civil Code, namely section 1634 § 1 regarding parents not having custody of children born in wedlock and section 1711 § 2 regarding fathers of children born out of wedlock, contained different standards (see paragraphs 30-31 above). The former category of parent had a legal right to access which could be restricted or suspended if necessary in the child's interest, whereas the latter's personal contact depended on a favourable decision by the child's mother or on a court ruling finding such contact to be in the child's interest.

86. In cases arising from individual applications it is, however, not the Court's 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, 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 of the Convention. The question to be decided by the Court is whether the application of section 1711 § 2 of the Civil Code in the present case led to an unjustified

difference in the treatment of the applicant in comparison with the case of a divorced couple (see *Elsholz*, cited above, § 59).

87. The conclusion of the Chamber was that the German courts had discriminated against the applicant. It reasoned as follows:

> “51. 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 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. Even if the District Court’s decision contains the formulation that there was a risk to the child’s mental and psychological well-being if she had to take up contact with the applicant against her wish, the mother’s initial prohibition of further contact and her influence on the child remained decisive. 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.
>
> 52. 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.
>
> 53. 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).
>
> 54. 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 *Camp and Bourimi v. the Netherlands*, cited above, § 38).
>
> 55. 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 contact with their children and might leave a non-marital relationship at any time.
>
> 56. 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 concrete interest in contact with her for sincere motives.
>
> 57. 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 legislative reform. Complaints challenging the constitutionality of this legislation were pending before 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*, *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, p. 18, § 44).”

88. The Grand Chamber has found above, under Article 8 of the Convention, that the German court decisions refusing access were taken in the child’s interest. In this connection the Court noted the courts’ reasoning that the then thirteen-year-old girl had expressed the clear wish not to see the applicant and had done so for several years, so that forcing her to see him would seriously disturb her emotional and psychological balance. The Court also accepted that the decision-making process provided the applicant with the requisite protection of his interests.

89. The Court must therefore determine whether the interference with the applicant’s right to family life, which was in itself permissible under paragraph 2 of Article 8, occurred in a discriminatory manner (see the *case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), judgment of 23 July 1968, Series A no. 6, pp. 33-34, § 9; *National Union of Belgian Police v. Belgium,* judgment of 27 October 1975, Series A no. 19, p. 19, § 44; *Rekvényi v. Hungary* [GC], no. 25390/94, ECHR 1999-III, § 67; see also *East African Asians v. the United Kingdom*, no. 4626/70 et al., Commission’s report of 14 December 1973, Decisions and Reports 78, p. 67, § 226).

90. The Court agrees with the Chamber that there are elements distinguishing the present case from the *Elsholz* case (cited above, §§ 60-61). In the *Elsholz* case the Court noted that it could not be said on the facts of that case that a divorced father would have been treated more favourably. In that connection it observed that the German courts’ decisions were clearly based on the danger to the child’s development if he had to resume contact with his father, the applicant, contrary to the will of the mother, and on the finding that contact would negatively affect the child. Moreover, the Federal Constitutional Court had confirmed that the ordinary courts had applied the same test as would have been applied to a divorced father.

91. In the present case the German courts rejected the applicant’s argument that access was always in the child’s interest and held that a court ruling under section 1711 § 2 of the Civil Code depended on the circumstances. In examining the relevant facts, the courts, having regard to the statements made by the then thirteen-year-old child in court, held that she had been able to make up her own mind and had clearly rejected the

idea of establishing contact with the applicant father. When reaching the conclusion that forcing her to see him against her will could not be justified, as her emotional and psychological balance would be seriously disturbed, the courts *prima facie* appeared to apply a test similar to that which would have been applied to a divorced father. Nevertheless, they explicitly adhered to the standard of whether access was "in the best interest of the child". In doing so, they gave decisive weight to the mother's initial prohibition on access and placed a burden on the applicant father which was heavier than the one on divorced fathers under section 1634 § 1 of the Civil Code.

92. As is well established in the Court's case-law, a difference in treatment is discriminatory for the purposes of Article 14 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. 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 *Abdulaziz, Cabales and Balkandali*, cited above, pp. 35-36, § 72).

93. The Court has already held that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of or within wedlock can be regarded as compatible with the Convention (see *Mazurek v. France,* no. 34406/97, § 49, ECHR 2000-II, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, §§ 37-38, ECHR 2000-X). The same is true for a difference in the treatment of the father of a child born of a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship. The Court discerns no such reason in the instant case.

94. There has accordingly been a violation of Article 14 of the Convention, taken together with Article 8, in respect of the application of section 1711 § 2 of the Civil Code in the instant case.

(c). Section 63a of the Act on Non-Contentious Proceedings

95. In finding a breach of Article 14, taken together with Article 8 of the Convention, the Chamber also considered the procedural difference, namely the exclusion of the possibility of filing a further appeal under the Act on Non-Contentious Proceedings in the version in force at the relevant time (see paragraph 87 above, and § 52 of the Chamber's judgment).

96. The Grand Chamber, like the Chamber, notes that, in the instant case, the applicant was deprived by law of the possibility of lodging a further appeal against the Regional Court's decision refusing access to his daughter. The possibility of a further appeal, to which a father not having custody of a child born in wedlock would have been entitled, was excluded on account of the applicant's status as the father of a child born out of wedlock, and this difference in treatment was expressly provided for in

former section 63a of the Act on Non-Contentious Proceedings (see paragraph 36 above).

97. For the same reasons as those set out above in respect of the application of section 1711 § 2 of the Civil Code in the instant case, this difference in treatment cannot be regarded as compatible with the Convention.

98. Accordingly, there has also been a violation of Article 14 of the Convention, taken together with Article 8, in that the possibility of a further appeal in the access proceedings was excluded under section 63a of the Act on Non-Contentious Proceedings.

IV. ALLEGED VIOLATION OF ARTICLE 6 ALONE AND TAKEN TOGETHER WITH ARTICLE 14 OF THE CONVENTION

99. In relation to his above complaints about the German court proceedings concerning his request for access to M. and the alleged discrimination against him, the applicant also relied on Article 6 § 1 of the Convention. In so far as relevant, Article 6 § 1 reads:

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

100. In the light of its above findings under Article 8 alone and taken together with Article 14 (see paragraphs 74-75, 94 and 98 above), the Court does not find it necessary to examine separately the applicant's complaints under Articles 6 and 14 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. 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

102. The applicant originally claimed 65,000 German marks (DEM - about EUR 32,500) for non-pecuniary damage.

103. The Chamber awarded DEM 55,000 (about EUR 28,120) by way of compensation for non-pecuniary damage in respect of the violations it found of Articles 8 and 14, as he had at least lost the opportunity to ensure his interests in the access proceedings and had been the victim of procedural defects and discrimination.

104. In the present proceedings the Government submitted that the Chamber, in assessing the non-pecuniary damage sustained by the applicant, had overlooked the fact that the interruption of contact prior to his second request for access had not been attributable to the Federal Republic of Germany.

In the applicant's submission, the Chamber's reasoning related solely to the second set of access proceedings. In any event, he had not voluntarily withdrawn his request for access in the first set of proceedings.

105. The Grand Chamber has found a violation of Article 14 of the Convention, in conjunction with Article 8, but no violation of the substantive right to respect for family life under Article 8 itself. The discrimination in the enjoyment of the application's right to respect for his family life must have caused him some distress and frustration, which the finding of a violation cannot on its own adequately compensate. Making an assessment on an equitable basis, the Court awards the applicant the sum of EUR 20,000 by way of compensation.

B. Costs and expenses

106. The applicant originally claimed DEM 5,000 (about EUR 2,556) for costs and expenses incurred before the German courts. Having been granted legal aid, he did not claim additional costs and expenses in respect of the proceedings before the Convention institutions.

107. The Chamber, in the absence of any receipts or other supporting documents, was not persuaded that the applicant had incurred costs and expenses in the amount claimed and awarded him DEM 2,500 (about EUR 1,278).

108. The parties have not addressed this matter in the present proceedings. The grant of legal aid continued to apply for the purposes of the Article 43 proceedings.

109. Costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, necessarily incurred and also reasonable as to quantum (see Sunday Times *v. the United Kingdom* (Article 50), judgment of 6 November 1980, Series A no. 38, p. 13, § 23). Furthermore, legal costs are only recoverable in so far as they relate to the violation found (*Beyeler v. Italy* (Just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002).

110. The Court has found a violation of Article 14 in relation to the applicant's claim under Article 8, considering that the German court proceedings were discriminatory. Deciding on an equitable basis, it awards the applicant the sum of EUR 2,500.

C. Default interest

111. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by fourteen votes to three that there has been no violation of Article 8 of the Convention;

2. *Holds* by ten votes to seven that there has been a violation of Article 14 of the Convention, taken together with Article 8, in respect of the application of section 1711 § 2 of the Civil Code in the instant case;

3. *Holds* unanimously that there has been a violation of Article 14 of the Convention, taken together with Article 8, in that the possibility of a further appeal in the access proceedings was excluded under section 63a of the Act on Non-Contentious Proceedings;

4. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint under Article 6 of the Convention, whether taken alone or in conjunction with Article 14;

5. *Holds* by thirteen votes to four
   (a) that the respondent State is to pay the applicant, within three months, the following amounts plus any tax that may be chargeable:
      (i) EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

(a) Joint partly dissenting opinion of Mr Wildhaber, Mrs Palm, Mr Lorenzen, Mr Jungwiert, Mrs Greve, Mr Levits and Mrs Mularoni.

(b) Partly dissenting opinion of Mr Ress joined by Mr Pastor Ridruejo and Mr Türmen;

L. W.
P.J.M.

JOINT PARTLY DISSENTING OPINION OF JUDGES WILDHABER, PALM, LORENZEN, JUNGWIERT, GREVE, LEVITS AND MULARONI

1. To our regret we are unable to join the majority in their finding of a violation of Article 14 in conjunction with Article 8. We see no reason to depart from the Court's findings in the *Elsholz* case, where the Court found *no violation* of Article 14 in conjunction with Article 8.

2. We have a different understanding of the findings of the national courts. As a basic point we agree with the majority that the national courts *when reaching their conclusions* appeared to apply a test similar to that which would have been applied to a *divorced* father (see paragraph 91 of the judgment).

3. The majority then cite the reference in the national courts' judgments to section 1711 § 2 of the Civil Code and their recourse to the formula of "in the child's interest" as it appears in that provision.

In our view that is an overly formalistic approach. The Court's task is not to examine the domestic legislation *in the abstract* but to examine the manner in which the legislation was *applied* to the applicant in the particular circumstances (see paragraph 86 of the judgment). That means that the formal reference to a particular provision of the Civil Code and the particular formulas used in the domestic judgments are not decisive. What is decisive is the *substance* of the national court judgment – namely, whether the *treatment* of the applicant as the father of a child born out of wedlock was different in comparison with that of a divorced father.

4. In the present case, the German courts found that forcing a thirteen-year-old girl to see the applicant against her will, which had been stated clearly and for a long time, would "seriously disturb her emotional and psychological balance" (paragraph 23). The courts, having regard to the child's best interest, concluded that the only justifiable decision was not to grant access.

In such circumstances, we are not persuaded that those courts placed a burden on the applicant which was heavier than the one on divorced fathers under section 1634 § 1 of the Civil Code. In both cases access would not be granted. This means that there was no difference in treatment between the applicant and a divorced father.

5. Having regard to the above considerations, we find that the application of section 1711 § 2 of the Civil Code in the instant case did not give rise to a breach of Article 14 of the Convention, taken together with Article 8.

6. On the other hand we agree with the majority that the exclusion of the possibility of a further appeal under section 63a of the Act on Non-Contentious Proceedings amounted to discrimination against the applicant

and was therefore in breach of Article 14, taken together with Article 8 (see paragraphs 95-98 of the judgment).

PARTLY DISSENTING OPINION OF JUDGE RESS JOINED BY JUDGES PASTOR RIDRUEJO AND TÜRMEN

1. As in the case of *Sahin v. Germany*, we regret that we cannot agree with the majority's opinion that there has been no violation of Article 8 in relation to the procedural requirements implicit in this Article of the Convention.

On the other hand, we share the opinion of the Grand Chamber which endorsed the view of the Fourth Section that there was no substantive violation of Article 8. The reasons given by the German courts to justify their decisions refusing access, namely that the then thirteen-year-old girl had expressed the clear wish not to see her father, the applicant, and had done so for several years, so that forcing her to see him would seriously disturb her emotional and psychological balance, are convincing and not arbitrary and, as we agree, the relevant decisions were indeed taken in the interest of the child. It is not for this Court to supervise the national courts' findings in relation to the interests of a child except in cases where their reasoning is clearly arbitrary and would in the end harm the child's health and development. We fully agree with the reasoning of the Grand Chamber in paragraphs 57 to 60 of the judgment and we would like to stress that it is completely wrong to assume that the Court has increasingly entered into the material elements of the best interests of children in the field of parental rights of access.

2. The fundamental issue raised by this case under Article 8 concerns the procedural requirements implicit in this Article, requirements which the Court has already developed and clarified on many occasions. It is one of the basic requirements in relation to parents' rights of access to their children that there exist legal safeguards designed to secure the effective protection of the rights of parents and children to respect for their family life (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII; *Kutzner v. Germany*, no. 46544/99, §§ 65-66, ECHR 2002-I; and *Covezzi and Morselli v. Italy*, no. 52763/99, 9 May 2003). A decisive element of these "parental rights of access" resides in the question whether the level of involvement of the applicant in the decision-making process, seen as a whole, provided him with the requisite protection of his interests. The procedural rule should be that first established in *Elsholz* (cited above), namely that the domestic courts should assess the difficult question of the child's best interest on the basis of a reasoned and up-to-date psychological report, and that the child, if possible, should be "heard" by the psychological expert and the court.

3. As the Chamber rightly stated, the District Court which heard the child and the parents had only the psychologist's rather superficial submissions to hand, which had been prepared in the context of the first set of proceedings two years previously; it did not have at its disposal any new psychological

expert evidence in order to evaluate the child's seemingly firm wishes. The procedural requirement to have up-to-date psychological expert evidence in order to obtain correct and complete information on the child's relationship with the applicant as the parent seeking access to the child would seem an indispensable prerequisite for establishing a child's true wishes and thereby striking a fair balance between the interests at stake. This procedural requirement is endorsed even more by recent research on the so-called parental alienation syndrome ("PAS"), which has been described by Richard A. Gardner in the *American Journal of Forensic Psychology* (2001, pp. 61-106) under the title "Should courts order PAS children to visit/reside with the alienated parent? A follow-up study", and which has received an increasing amount of attention. Courts should therefore address the question whether parental alienation syndrome is present and what specific consequences such a syndrome could have on the child's development and – as the Chamber put it – on the establishment of "a child's true wishes". It is also noteworthy that the psychologist who was heard by the District Court in the first set of proceedings in 1992 had tried to arrange a meeting between the applicant and his child, which, however, had been cancelled by the child's stepfather (paragraph 16 of the judgment). It is true that the District Court judge, in the second set of proceedings, heard the thirteen-year-old M., who stated that she did not wish to talk to or see the applicant. However, since the last and only psychological expert opinion (a one-page submission) was submitted in April 1992, there was no other opinion about the truthfulness of the wishes expressed by the child and the question how far and how strongly she was influenced by her mother and her stepfather. To give the applicant the chance of effective participation in the proceedings, we would prefer to have adhered to the normal rule taken from *Elsholz* that an up-to-date psychological expert opinion is necessary to evaluate the child's statements and to establish whether she is able to make up her own mind. The statements of a ten- or thirteen-year-old girl, whether she is heard in court or not, cannot always be decisive or even indicative of her true wishes. In such a complex situation, where the alienation of the child from her natural father by the strong influence of her mother and her stepfather can be perceived, a more thorough approach has to be taken and an effective and genuine chance of participation has to be given to the natural father.

4. As can be seen from the reasoning of the District Court in its judgment of 1 June 1994 and the Rostock Regional Court's judgment of 17 June 1994, the law in force in the material time – that is, section 1711 (1) and (2) – strongly influenced the whole reasoning and procedure. Under German law it was the mother, having sole custody, who determined the father's access. Only if it was in the child's interest to have personal contact with the father could the guardianship court decide that the father had the right to such contact. It seems that this led both courts, the District Court

and the Regional Court, to place substantial, if not decisive, emphasis from the very beginning on the wishes expressed by the child. This application of section 1711 of the Civil Code placed the whole burden of proof on the applicant, requiring him to show that even against the clearly stated will of his daughter, personal contact with her biological father would be in her interest. Such proof could only be established by a thorough psychological expert opinion, which would have to include the questions whether the child had really expressed her own wishes or more or less those of her mother and her stepfather, and whether a meeting with her biological father, such as the one that the psychologist had tried to arrange in 1992, would be useful for the development of relations between the child and her biological father. The absence of a new psychological expert opinion was a clear result of the disadvantages of the legal situation of children born out of wedlock at the material time. We agree that this legislation violated Article 8 in conjunction with Article 14 of the Convention and we furthermore conclude that this violation had a direct impact on the denial of the applicant's procedural rights inherent in Article 8 of the Convention itself.