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

FOURTH SECTION

CASE OF SAHIN v. GERMANY

(Application no. 30943/96)

JUDGMENT

STRASBOURG

11 October 2001

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
…

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 Sahin 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, S*ection 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. 30943/96) 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 Asim Sahin ("the applicant"), on 16 June 1993.

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. The applicant was, exceptionally, granted leave to represent himself (Rule 36 of the Rules of Court).

3. The applicant alleged, in particular, that the German court decisions dismissing his request for access to his child, 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 invoked Articles 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 partly admissible.

7. The applicant and the Government each filed supplementary observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, born in 1950, was a Turkish national at the time of the events complained of; he subsequently obtained German nationality.

9. The applicant is the father of the child G. N., born out of wedlock on 29 June 1988. In a document dated 15 June 1988, he acknowledged paternity of the unborn child, and, in a further document dated 15 August 1988, he acknowledged paternity and undertook to pay maintenance.

10. The applicant met the child's mother, Ms D., in 1985 and in December 1987 he moved into her flat where they lived together until at least July 1989 or, as stated by the applicant, until February 1990. In any event, the applicant still visited the child and her mother until February 1990, and between end of July and October 1990 he regularly fetched G.N. for visits. As from November 1990 Ms D. prohibited any contacts between the applicant and the child.

11. On 5 December 1990 the applicant applied to the Wiesbaden District Court for a decision granting him a right of access to his daughter on every Sunday from 10.00 a.m. until 6.00 p.m. as well as on the second public holiday at Christmas and at Easter.

12. On 5 September 1991 the District Court dismissed the applicant's request.

The court, referring to section 1711 of the Civil Code (*Bürgerliches Gesetzbuch*), observed that the mother, in the exercise of her right to custody, determined the child's relations with third persons, and that 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 noted that the Wiesbaden Youth Office and the parties had been heard and that several witnesses had been questioned at a hearing in March 1991. The court considered that the applicant's wish to see his daughter resulted from his sincere bonds and true affection. Nevertheless, the court reached the conclusion that access was not in the child's interest as Ms D. had taken such a strong dislike to the applicant and opposed any contacts so firmly that the child would be put into a situation of antipathy and tensions which would probably considerably affect her well-being.

The court saw no special circumstances which, nevertheless, could render such contacts beneficial for the child. The relations which had developed between the applicant and his child during the period of cohabitation could not possibly be of such importance as to take the risk that the child be irritated on account of the mother's feelings of dislike. The witnesses, nurses in the day-nursery frequented by the child, had stated that, following the separation and the disruption of contacts with the applicant, the child's behaviour had been without any or at least without any significant or lasting peculiarities and that G.N. was a well-balanced, happy and open-minded child. The applicant's assertion that she missed him and, after the disruption of contacts, had repeatedly inquired after him, had therefore not been proven.

13. On 12 March 1992 the applicant appealed to the Wiesbaden Regional Court.

14. On 12 May 1992 the Regional Court ordered a psychological expert opinion on the question whether contacts with the applicant were in G.N.'s interest. On 8 July 1992, following a first conversation with the expert, the applicant challenged her for bias. He also requested that another expert be appointed on the ground that the expert's scientific approach did not reflect the latest state of research. On 9 September 1992 the Regional Court dismissed the applicant's request, finding that, taking into account the expert's explanations of 8 August 1992, there were no reasons to doubt her impartiality or her capabilities.

15. On 17 December 1992 the applicant requested the Regional Court to progress with the proceedings. He further applied for a provisional order granting him the right to have access to G.N. during one afternoon every week and prohibiting her mother from obstructing such contacts.

16. On 23 December 1992 the Regional Court dismissed the applicant's request for a provisional order of access. The Regional Court found that there was no urgency and that the applicant could be requested to await the outcome of the main proceedings. Furthermore, such an order would anticipate the possible terms of a final decision. The disadvantages for the child, should a provisional order be issued and the request be eventually dismissed in the main proceedings, were more serious than those for the applicant in continuing with the prevailing situation.

17. In her opinion dated 25 February 1993, the expert noted that she had visited the applicant's family in June 1992 and again heard the applicant, the child's mother and the child on several occasions between November 1992 and February 1993. She reached the conclusion that a right of access without prior conversations to overcome the conflicts between the parents was not in the interest of the child's well-being.

18. By letter of 8 March 1993, the Regional Court, noting that the District Court had omitted to hear the child, inquired with the expert about whether hearing the child in court on her relationship with her father would

be a psychological strain for her. In her reply of 13 March 1993, the expert indicated that she had not directly asked the child about her father. The risk inherent in questioning her about whether she wished to see her father was that, in this conflict between the parents, the child might have the impression that her statements were decisive.

19. At a court hearing on 30 April 1993, the applicant and the child’s mother entered into an agreement. Under the terms of this agreement, the applicant declared not to have resort to any court proceedings, to refrain from any inquiries in the mother’s personal environment and not to exercise the right of custody obtained under Turkish law on the condition that they would undertake a parental therapy. The proceedings were suspended until termination of this therapy.

20. On 1 June 1993 the applicant requested that the proceedings be resumed as the child’s mother had not approved of the two institutions for family therapy proposed by the applicant and had failed to react to his suggestion that she should make a proposal.

21. On 25 August 1993 the Wiesbaden Regional Court dismissed the applicant’s appeal.

The Regional Court considered that personal contacts with his child born out of wedlock were supposed to enable the father to verify the development and the well-being of his child and to maintain existing natural bonds. Section 1711 and section 1634 of the Civil Code thus pursued the same purpose, however, the conditions were different. While, pursuant to section 1634 of the Civil Code, the parent not having custody and care had the right to personal contact with the child born in wedlock, section 1711 did not grant such a right to the father of a child born out of wedlock. Rather, the person having custody, as a rule the mother, determined if and to what extent the father was entitled to have contacts with his child. Only if contacts were in the interest of the child could the competent court grant a right of access. This weaker legal position resulted from the different social position of the father of a child born out of wedlock. Referring to case-law of the Federal Constitutional Court of 1971 and 1981, the Regional Court found no reason to doubt the constitutionality of section 1711 of the Civil Code. The court added that while, for considerations of legal policy, there was an urgent need for a reform of the law on children born out of wedlock, it was bound by the law in force.

The Regional Court considered that such contacts could be ordered only if this was advantageous and beneficial for the child’s well-being. It could be assumed that, as a rule, such contacts were ordered as regular contacts between a father and his child offered the possibility of a normal development and facilitated the forming of the child’s own personality. In applying these principles in the applicant’s case, the court found that the applicant applied for access on the ground of true love for his daughter. However, such responsible motives could not result in granting a right of

access which would have to be enforced. The child would suffer from the existing tensions between the parents on the occasion of every contact and her further development would be disturbed. There were no particular circumstances to conclude that contacts would nevertheless be favourable to the child. In this respect, the court found that there had already been tensions between her parents during the period of cohabitation. Furthermore, the expert had established that the child had repressed her memories concerning the applicant and did not talk about this subject in order to protect herself. She did not suffer from the situation.

The Regional Court further considered that the expert opinion was reliable and could not be objected to. The finding that the parents had to start a therapy with a view to overcome their conflicts before the child could have contacts with both of them was independent of the question of responsibility for the said situation. The court finally found that it had not been required to hear the child on her relations to her father as this would have amounted to a psychological strain.

22. On 21 September 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 alleged unfairness of the taking of expert evidence. The First Chamber of the Federal Constitutional Court acknowledged receipt on 29 September 1993.

By letter of 26 April 1994 the applicant inquired with the Constitutional Court about the state of proceedings and urged a speedy decision. On 16 May 1994 the Constitutional Court informed him that in a similar case which had been registered at an earlier date a decision was envisaged for the first six months of 1995.

On 26 November 1995 the applicant addressed a letter to the President of the Federal Constitutional Court complaining that the examination of his constitutional complaint had been postponed until the first six months of 1996. In her reply of 15 February 1996 the Judge dealing with the applicant's case informed the applicant that, due to the heavy workload of the Federal Constitutional Court in 1995 no decision could be taken. A decision was envisaged for 1996. Having regard to the importance of the subject matter, such a decision required careful preparation.

23. On 1 December 1998 the Federal Constitutional Court, sitting as a panel of three judges, refused to entertain the applicant's constitutional complaint.

II. RELEVANT DOMESTIC LAW

A. Legislation on family matters currently in force

24. 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.

25. 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."

26. 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

27. 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*."

28. 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

29. 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*).

30. 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.

In proceedings regarding access, the competent youth office has to be heard prior to the decision (section 49 § 2 (k)).

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.

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 he had a family relation with his child.

Considering recent findings on family matters, the contact between a natural father and his child were generally advantageous, he maintained that the decisions dismissing his request for access were necessarily not in the interest of his child's well-being. He also referred to the contradiction of the Government's arguments and the change of the relevant legislation. Owing to the long period of time that had elapsed since the last contact, the child had become alienated from him.

33. The Government admitted that the relationship between the applicant and his child comes within the notion of family life under Article 8 § 1.

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. However, the Government conceded that the German court decisions in the applicant's 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 under Article 8 of the Convention

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. In the present case, the applicant lived with his child from her birth in June 1988 to July 1989 and, in the applicant's submission, even until February 1990. He continued to see his child until November 1990. The subsequent decisions refusing the applicant access to his child 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 competent national courts, when refusing the applicant's request for a visiting arrangement, relied on the statements made by the applicant and the child's mother, witnesses and the comments of the Wiesbaden Youth Office and on expert advice, took into account the strained relations between the parents and found that contacts were not in the child's interest.

44. The Court does not doubt that these reasons were relevant. However, it must determine 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; *Elsholz v. Germany* cited above, § 52; and *T.P. and K.M. v. the United Kingdom* cited above, § 72).

45. The Court notes that the District Court heard the local Youth Office, the parties and it took evidence from several witnesses on the issue of the child's development following the parents' separation.

The Regional Court, which had full power to review all issues relating to the request for access, ordered a psychological expert opinion on the question whether contacts between the applicant and his child were in the latter's interest. The expert, having heard the applicant, the child and the child's mother, advised against such contacts. The applicant's motion to challenge the expert and his criticism concerning her scientific approach were to no avail.

46. The Court notes that at no stage of the proceedings had the child been heard in court.

The Regional Court sought clarification from the expert on whether questioning the child, aged about five at the relevant time, at a hearing in court would be a psychological strain for her. The expert explained that she had not directly asked the child about her father. In her view, the risk in hearing the child in court on her relationship with her father and any direct questioning in this respect was that, in this conflict, the child might have the impression that her statements were decisive. The Regional Court, regarding the expert's opinion as reliable, refrained from hearing the child, finding that such questioning would have amounted to a psychological strain.

47. In the Court's opinion, the German courts' failure to hear the child reveals an insufficient involvement of the applicant in the access proceedings. It is essential that the competent courts give careful consideration to what lies in the best interest of the child after having had direct contact with the child. The Regional Court should not have been satisfied with the expert's vague statements about the risks inherent in

questioning the child without even contemplating the possibility to take special arrangements in view of the child's young age.

48. In this context, the Court attaches importance to the fact that the expert indicated that herself she had not asked the child about her father. Correct and complete information on the child's relationship to 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.

49. Having regard to all circumstances, the Court concludes that the national authorities overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention.

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

50. 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."

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

52. 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.

53. 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).

54. 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. The Regional Court added that while, for reasons of legal policy, there was an urgent need for a reform of the law on children born out of wedlock, it was bound by the law in force. Thus, while admitting the sincerity of the applicant's motives for wishing access to his child, they regarded the will of the mother and her feelings towards the applicant as determining factors in deciding against access which would have to be enforced.

55. 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 contacts between a child and the 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. The mother's negative attitude and the inevitable tensions between the parents in a situation of dispute, irrespective of the father's responsible motives, being thereby decisive for refusing access, there are reasons 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.

56. 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).

57. 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).

58. 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.

59. Such considerations did not apply in the applicant's case. He had in fact been living with the mother at the child's birth in June 1988 and had maintained contacts with her until October 1990. He had acknowledged paternity and undertaken to pay maintenance. More important, he had continued to show concrete interest in contacts with her for sincere motives.

60. 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).

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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."

63. The applicant requested the Court to direct the Government to set aside the German court decisions of 5 September 1991 and 27 August 1993.

The Court, however, is not empowered to make directions of this kind (see, *mutatis mutandis*, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 23, § 54; the Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 28, § 65).

The applicant also sought compensation for pecuniary and non-pecuniary damage, as well as the reimbursement of costs and expenses, claiming that certain of these amounts should be increased by interest at the statutory rate.

A. Damage

64. The applicant sought 3 million Euro for pecuniary and non-pecuniary damage. He pointed to the distress he had felt as a result of the separation from his child and the psychological strain which had prevented his return to professional life.

65. The Government did not comment.

66. As regards pecuniary damage, the Court considers that the applicant has not produced concrete evidence in support of his allegation.

67. As to the non-pecuniary damage, the Court considers that the applicant undoubtedly sustained such damage. While it cannot be said on the evidence that the applicant would probably have been granted access to his child had the violations of Articles 8 and 14 of the Convention not occurred, at least he lost the opportunity to ensure his interests in the access proceedings. The Court has found that the applicant was the victim of procedural defects in these proceedings as well as of discrimination, both aspects being intimately related to the interference with one of the most fundamental rights, namely, that of respect for family life. The Court further notes that it appears that since November 1990 the applicant has no longer seen his child. It can reasonably be presumed that those circumstances taken as a whole have caused the applicant substantial suffering.

68. 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 50,000.

B. Costs and expenses

69. The applicant further claimed a total of DEM 13,046.17 for costs and expenses before the German courts.

70. According to the Government, the applicant is claiming part of his lawyer's fees twice, namely a payment of DEM 2,000. Moreover, it was not clear from several of the receipts whether they referred to the access proceedings at issue in the present case or to other proceedings. Unspecified costs and expenses could not therefore be reimbursed.

71. 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).

72. The Court, having regard to the inadequacy of part of the applicant's statements on expenses and of the vouchers supplied by him, considers that only part of the costs and expenses are shown to have been actually and necessarily incurred in the context of the access proceedings. Accordingly, the Court can only, on an equitable basis, award the applicant DEM 8,000 under this head.

C. Default interest

73. 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* by five votes to two that there has been a 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 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, together with any value-added tax that may be chargeable;
      (i) 50,000 (fifty thousand) German marks in respect of non-pecuniary damage;
      (ii) 8,000 (eight thousand) German marks in respect of costs and expenses;
   (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;

4. *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 dissenting opinion of Mr Pellonpää joined by Mrs Vajić is annexed to this judgment.

A.P.R.
V.B.

DISSENTING OPINION OF JUDGE PELLONPÄÄ JOINED BY JUDGE VAJIĆ

I am unable to subscribe to the opinion of the Chamber that there has been a violation of Article 8, both read alone and in conjunction with Article 14.

I agree with the general principles put forward in paragraph 40 of the Judgment, namely that "it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned " and 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..." Application of these principles to the circumstances of the present case, however, in my view should not lead to the finding of a violation.

The majority has based the violation of Article 8 on the narrow ground that "the German courts' failure to hear the child reveals an insufficient involvement of the applicant in the access proceedings" (paragraph 47). There appears to be no other criticism of the domestic proceedings.

This is not surprising, as the proceedings *prima facie* appear to have been in full conformity with the procedural requirements of Article 8 (and even with the requirements of Article 6 which, as a rule, are stricter). Thus there were court proceedings involving oral hearings and extensive taking of evidence on two judicial levels. The first instance court, the Wiesbaden District Court, dismissed the applicant's access request on 5 September 1991, following a previously held oral hearing at which it heard the Wiesbaden Youth Office, both parties and several witnesses. Considering that the child was three years old at the relevant time, I do not find it surprising that she was not heard directly by the court.

The proceedings continued before the Wiesbaden Regional Court to which the applicant had appealed. The Court ordered an expert opinion of a psychologist, and again an oral hearing was held. Noting that the child had not been heard by the District Court, the Regional Court also considered whether it would be possible to hear her at the appellate level. Before making this procedural decision the court - very correctly, considering that the child was only five years of age - asked the court appointed expert to give her opinion as to whether hearing the child would put her under psychological strain. After having received that opinion the court decided not to hear the child.

I respectfully disagree with the majority's conclusion that this decision violated Article 8 of the Convention.[1] There are obvious reasons for courts to entrust the examination of the wishes of very small children to experts. In the present case the Wiesbaden Regional Court proceeded to its decision not to hear the child after having specifically sought expert advice. For the European Court of Human Rights to say that the domestic court should not have based itself on that advice in my view runs counter to the above-mentioned principle "that the Court's task is not to substitute itself for the domestic authorities". In the circumstances of the present case the conclusion that "the national authorities overstepped their margin of appreciation" (paragraph 49) amounts to leaving practically no margin of appreciation at all to the domestic courts which, after all, are in a much better position than this Court to make the type of sensitive decisions as the one at issue here.

I also disagree with the conclusion that there has been a violation of Article 14 in conjunction with Article 8. The Chamber attempts to make a distinction between the present 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 53 of the present judgment).

I am not convinced by the alleged distinguishing features. In paragraph 54 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 element, 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 55 of the present judgment the "crucial point is that the courts did not 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." 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, *inter alia*, that the provisions "concerning the father's right to personal contact with his child born out of wedlock ... was conceived as an

[1] This is not decisive for my opinion, but I find somewhat surprising the criticism according to which the Regional Court should not have satisfied itself with the expert opinion "without even contemplating the possibility to take arrangements in view of the child's young age" (paragraph 47). I find it hard to imagine that the court, when addressing the question of whether to hear the child, could have done this without specifically considering her age.

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, in which the Regional Court concluded its reasoning by emphasizing the importance of looking at the situation from the point of view of the child ("*Denn massgeblich ist stets eine Betrachtung aus der Sicht des Kindes*.").

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.