
**On the consideration of the decisions of the
European Court of Human Rights by domestic institutions,
in particular German courts**

The complainant is the father of a child born illegitimate, for whom he seeks custody and a right of access. In his constitutional complaint, he challenges what he regards as the unsatisfactory implementation of the judgment of the European Court of Human Rights (ECHR) pronounced in his case and the disregard of international law by a domestic court. The complainant is essentially successful in his claim. The Second Senate of the Federal Constitutional Court (Bundesverfassungsgericht) has overturned the challenged order of the Naumburg Higher Regional Court (Oberlandesgericht) because it violates the complainant's fundamental right under Article 6 of the Basic Law (Grundgesetz) in conjunction with the principle of the rule of law. The matter is referred back for a new decision to a civil senate of the Naumburg Higher Regional Court, but the court is not restricted in its decision. It must only consider the relevant provision of the Convention as interpreted by the ECHR to the extent more precisely laid down by the Federal Constitutional Court. The other application made by the complainant for a temporary injunction to be issued is therefore disposed of.

1. Facts:

The complainant is the father of a child born illegitimate in 1999. The mother of the child gave the child up for adoption one day after the birth and declared her prior consent to adoption by the foster parents, with whom the child has been living since its birth. Since October 1999, the complainant has unsuccessfully endeavoured in a number of judicial proceedings, including a constitutional complaint, to be given custody and granted a right of access. In response to his individual application, a chamber of the Third Section of the ECHR, in a judgment of 26 February 2004, declared unanimously that the decision on custody and the exclusion of the right of access violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). It held that in cases in which the family connections to a child demonstrably existed the state had the duty to work towards the bringing together of a natural parent and his or her child. It stated that the complainant must at least be enabled to have access to his child. Thereupon, the Local Court (Amtsgericht), in accordance with the complainant's application, transferred custody to him and granted him a right of access by way of a temporary injunction of the court's own motion. The Higher Regional Court overturned the temporary injunction on the complainant's right of access. In his constitutional complaint against this, the complainant challenges the violation of his fundamental rights under Article 1, Article 3 and Article 6 of the Basic Law and of the right to fair trial. He submits that the Higher Regional Court disregarded international law and failed to recognise the binding effect of the decision of the ECHR.

2. The grounds of the decision are, in part, as follows.

A. The European Convention for the Protection of Human Rights and

Fundamental Freedoms (the Convention) and its protocols are international treaties, each of which has been incorporated into German law by the federal legislature in a formal statute (Article 59.2 of the Basic Law). The Convention and its protocols thus have the status of federal German statutes (Gesetzesrang). For this reason, German courts must observe and apply the Convention in interpreting national law. The guarantees of the Convention and its protocols, however, are not a direct constitutional basis for a court's review, if only because of the status given them by the Basic Law. But on the level of constitutional law, the text of the Convention and the case-law of the ECHR serve as interpreting aids in determining the contents and scope of fundamental rights and fundamental constitutional principles of the Basic Law, to the extent that this does not restrict or reduce the protection of the individual's fundamental rights under the Basic Law.

This constitutional importance of a treaty demonstrates the commitment of the Basic Law to international law. If possible, the constitution is also to be interpreted in such a way that no conflict arises with obligations of the Federal Republic of Germany under international law. However, the commitment to international law takes effect only within the democratic and constitutional system of the Basic Law. The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. If a violation of fundamental principles of the constitution cannot otherwise be averted, there is no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law established by international treaties.

B. The decisions of the ECHR have a particular importance for the law of the Convention as public international law. Under Convention law, the States parties have agreed that in all legal matters to which they are party they will follow the final judgment of the ECHR. For this reason, the judgments of the ECHR are binding on all parties to the proceedings, but only on those parties.

On the question of fact, the ECHR makes a declaratory judgment, without revoking the challenged measure. The binding effect of a decision of the ECHR extends to all legal bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention.

C. The nature of the binding effect of decisions of the ECHR depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. The administrative authorities and courts are bound by statute and law, and this includes a duty to take into account the guarantees of the Convention and the decisions of the ECHR as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" („Vollstreckung") of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law.

In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights. Above all in family law and the law of aliens, and also in the law of the protection of personality, it may be necessary to balance conflicting fundamental

rights by creating groups of cases and graduated legal consequences. It is the task of the national courts to integrate a decision of the ECHR carefully into the partial area of law affected.

d. The Federal Constitutional Court must if possible prevent and remove violations of international law that consist in the incorrect application of or non-compliance with duties under international law by German courts. This applies to a particularly high degree to the duties under international law arising from the Convention, which contributes to promoting a joint European development of fundamental rights. As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to the interpretation in accordance with the Convention. In any event, the Convention provision as interpreted by the ECHR must be taken into account in making a decision; the court must at least duly consider it. A complainant may challenge the disregard of this duty of consideration before the Federal Constitutional Court as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law.

e. By these standards, the decision of the Higher Regional Court challenged violates Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court should have considered in an understandable way how Article 6 of the Basic Law could have been interpreted in a manner that complied with the obligations under international law of the Federal Republic of Germany. Here it is of central importance that the Federal Republic of Germany's violation of Article 8 of the Convention established by the ECHR is a continuing violation, for the complainant still has no access to his child. The Higher Regional Court should have considered the grounds of the ECHR judgment in particular because the decision, which found that the Federal Republic of Germany had violated the Convention, was made on the matter which the Higher Regional Court had to consider again in a retrial. The duty to take the decision into account neither adversely affects the Higher Regional Court's constitutionally guaranteed independence, nor does it force the court to enforce the ECHR decision without reflection. In the legal assessment in particular of new facts, in the weighing up of conflicting fundamental rights such as those of the foster family and in particular the best interest of the child, and in the integration of the individual case in the overall context of family-law cases with reference to the law of access, the Higher Regional Court is not bound in its concrete result. However, these interrelations were not discussed in the order challenged.

Order of 14 October 2004 - 2 BvR 1481/04 -

Karlsruhe, 19 October 2004

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A full translation of the order in English will be available soon.

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