FEDERAL CONSTITUTIONAL COURT

– 1 BvR 2790/04 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

of Mr G…,

– authorized representative: Rechtsanwältin Azime Zeykan,
Herner Straße 79, 44791 Bochum –

against a) the Order of the Naumburg Higher Regional Court (*Oberlandesgericht*) of 20 December 2004 – 14 WF 234/04 –,

b) the Order of the Naumburg Higher Regional Court of 8 December 2004 – 14 WF 236/04 –

here: application for a preliminary injunction

the Third Chamber of the First Senate of the Federal Constitutional Court

with the participation of Justices

President Papier,

Steiner,

Hohmann-Dennhardt

decided unanimously on 28 December 2004 pursuant to § 32(1) in conjunction with § 93d(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) in the version published on 11 August 1993 (Federal Law Gazette, *Bundesgesetzblatt* –BGBl I p. 1473):

1. **The effect of the decision of the Naumburg Higher Regional Court (Order of 20 December 2004 – 14 WF 234/04) excluding the access of the complainant to his son is suspended until the decision on the constitutional complaint.**

The decision on access of Wittenberg Local Court of 2 December 2004 – 5 F 463/02 UG – applies, subject to the following: a) The access begins on 8 January 2005 (see no. 1). b) The development report on the child must be filed by 6 January 2005 (see no. 2). c) The warning of an administrative fine does not apply to the fourth party (Youth Welfare Office – *Jugendamt*) and the fifth party (administrative district of Wittenberg) (see no. 5).

2. **The *Land* (state) Saxony-Anhalt is ordered to reimburse the complainant the necessary expenses of the preliminary injunction proceedings.**

R e a s o n s :

I.

In his constitutional complaint, the complainant challenges the exclusion of the right of access to his child. 1

1. The child, who was born in August 1999, was born to the complainant and the mother of the child, who were not married. Immediately after the birth, the mother consented to the adoption of the child, who has since lived with foster parents. In the year 2000, at the instigation of the complainant, the complainant's paternity was judicially established. After the Local Court had granted the complainant a right of access or transferred custody, the Fourteenth Civil Senate of the Naumburg Higher Regional Court (Third Senate for Family Matters) overturned these decisions in the year 2001. 2

Thereupon, the European Court of Human Rights, in its judgment of 26 February 2004 (*Zeitschrift für das gesamte Familienrecht – FamRZ* 2004, p. 1456), upon the complaint of the complainant, ruled *inter alia* that the complainant's right under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) had been violated by the Higher Regional Court in its exclusion of the right of access. The decision of the Higher Regional Court, it held, had made every form of reuniting of the family and the construction of every more extensive form of family life impossible. It stated that the complainant must at least be enabled to have access to his child. 3

Following this, the Local Court, in an order of 19 March 2004, issued a preliminary injunction making arrangements for access, and the Naumburg Higher Regional Court again overturned this injunction in an order of 30 June 2004. 4

2. The complainant filed a constitutional complaint challenging this order, and thereupon, in an order of 14 October 2004 –2 BvR 1481/04 – (reprinted in *FamRZ* 2004, p. 1857), the Federal Constitutional Court (*Bundesverfassungsgericht*) overturned the above decision and referred the matter to another civil senate of the Naumburg Higher Regional Court; the Higher Regional Court, it held, had not taken sufficient account of the judgment of the European Court of Human Rights. 5

After the Eighth Civil Senate of the Naumburg Higher Regional Court, which was now called upon to decide, stated that a complaint against the preliminary injunction issued by the Local Court was not admissible, the official guardian and the children's guardian withdrew their complaints. 6

3. On the application of the complainant, the Local Court, on 2 December 2004, once more made arrangements for access. A decision in the preliminary injunction proceedings was necessary to clarify the situation, since the last contact in the form of access had been two years earlier and the building up of a father-son relationship had been frustrated to date by the foster parents, supported by the official guardian. The court granted the complainant the right to have access to his child every Saturday in the time from 15.00 to 17.00 hours. For the first four access dates, the Local Court appointed an access guardian, in order to supervise the access. 7

Upon the appeals against this filed by the official guardian and the children's guardian, the Naumburg Higher Regional Court, now once more through its Fourteenth Civil Senate (Third Senate for Family Matters – hereinafter referred to as Higher Regional Court), in an order of 8 December 2004, suspended the enforcement of the local court order. 8

4. After the constitutional complaint filed by the complainant against this, together with the application for the issue of a preliminary injunction, had been served on those entitled to make a statement, the Higher Regional Court reversed the above order on 20 December 2004 – 14 WF 236/04 – "because the complaint of failure to act filed in the main action on the right of access is now ripe for judgment". 9

In an order of the same date, upon the complaint of failure to act filed by the official guardian and the foster parents, it ordered the Local Court to proceed with the principal proceedings on access "with extreme dispatch and bring them to a conclusion". In addition to giving specific instructions on the further course of the proceedings, and altering the preliminary injunction of the Local Court of 2 December 2004, it excluded access between the complainant and his son under § 620.b.1 sentence 1 and 620.b.3 sentence 1 in conjunction with §§ 620.a.4 sentence 2 and 621.g of the Code of Civil Proceedings (*Zivilprozessordnung – ZPO*) until the final decision of the Local Court in the principal proceedings. It stated that contrary to the opinion of the European Court of Human Rights, the decision in the principal proceedings could not be made without an interim clarification of the facts. Access had had to be excluded "in order to avoid endangerment of the best interests of the child, which might otherwise occur" following the "application of the official guardian and the foster parents", which was "at least impliedly made, or alternatively was to be assumed by analogy to § 140 of the Civil Code (*Bürgerliches Gesetzbuch – BGB*) by way of reinterpreting to this effect the complaint, which in this context is of lower priority in the statutory procedural system and therefore is inadmissible". 10

5. Thereupon, the complainant filed a constitutional complaint against this order too; in the complaint, he challenges *inter alia* a violation of his rights under Article 3 of the 11

Basic Law (*Grundgesetz*), Article 6 of the Basic Law and de facto under Article 101.1 sentence 2 of the Basic Law. He submitted that the decision of the Higher Regional Court was arbitrary. In excluding access in the decision on the complaint of failure to act it had circumvented the provisions of the Code of Civil Procedure, which did not admit a complaint in preliminary injunction proceedings relating to access. In addition, there had been no application for this. Finally, the Higher Regional Court had not implemented the decision of the European Court of Human Rights.

At the same time, the complainant upheld his original application for the issue of a preliminary injunction. In addition, he stated that the cause of the constitutional complaint against the order of the Higher Regional Court of 8 December 2004 had ceased to exist. 12

The *Land* government of Saxony-Anhalt, the children's guardian, the foster parents and the official guardian were given an opportunity to give an opinion on the original application for the issue of a preliminary injunction. 13

II.

The application for the issue of a preliminary injunction is granted. 14

Under § 32.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz — BVerfGG*), the Federal Constitutional Court, in a case of dispute, may provisionally provide for a situation by preliminary injunction if this is advisable for the public welfare in order to avert serious detriment, to prevent imminent violence or for another compelling reason. Here, the reasons that are submitted to show that the act of state challenged is unconstitutional must in principle be disregarded unless the constitutional complaint appears from the outset to be inadmissible or patently unfounded (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE), 88, 185 (186); established case-law). Where the outcome of the principal proceedings is open, the consequences that would occur if the preliminary injunction were not issued but the constitutional complaint were later successful must be weighed against the disadvantages that would occur if the preliminary injunction desired were issued but the constitutional complaint were unsuccessful (see BVerfGE 88, 185 (186); established case-law). 15

1. The constitutional complaint is not inadmissible (a) and also not patently unfounded (b), with regard at all events to the order challenged, which excludes the right of access and to which the application for the issue of a preliminary injunction solely relates (no. II of the order of 20 December 2004 – 14 WF 234/04). 16

a) In particular, neither the requirement that all legal remedies have been exhausted in the narrower sense under § 90.2 sentence 1 of the Federal Constitutional Court Act (aa) nor the principle of subsidiarity – derived from this requirement – (bb) stands in the way of the admissibility of the constitutional complaint. 17

aa) It is true that the complainant, under § 621.g in conjunction with § 620.b.2 of the 18

Code of Civil Procedure, could have made an application for an oral hearing, since the Higher Regional Court – at all events as far as can be seen – decided in written proceedings. At all events, the exhaustion of all legal remedies is unreasonable or superfluous if previous decisions already indicate the result of the exhaustion of all legal remedies that in theory is necessary (see BVerfGE 38, 105 (110); see also BVerfGE 9, 3 (7-8). This is the case here. In view of the previous course of the proceedings, and giving consideration to the fact that the Higher Regional Court in the grounds of the decision challenged unmistakably expressed that access is not to take place before an opinion by a judicially appointed independent expert is obtained and before the decision in the principal proceedings, the complainant can no longer be expected to make yet another application under § 620.b.2 of the Code of Civil Procedure.

19 bb) Nor does it run counter to the admissibility of the constitutional complaint that the decision challenged – to the extent that it relates to the exclusion of the right of access – is a preliminary injunction under § 621.g in conjunctions with §§ 620.a et seq. of the Code of Civil Procedure. The principle of subsidiarity may make it advisable for all legal remedies to be exhausted in the principal matter. However, the requirement for this is that this is acceptable for the complainant in the individual case (see BVerfGE 79, 275 (279)). That is not the case here. Firstly, the complainant submits that the expedited judgment violated his own fundamental rights, in particular because it violated the prohibition of arbitrariness and substantively also violated Article 101.1 sentence 2 of the Basic Law. For this reason alone, it is not necessary to exhaust all legal remedies in the principal proceedings (see BVerfGE 79, 275 (279)). In addition, the decision imposes a lasting legal disadvantage on the complainant merely by excluding his right of access, which could not be completely removed (with regard to the exclusion of enforcement, see also , Federal Constitutional Court, Order of 14 October 2004, loc. cit., p. 1858).

20 b) The constitutional complaint is also not patently unfounded. On the contrary: there are many indications that the Higher Regional court violated Article 101.1 sentence 2 of the Basic Law in conjunction with Article 3.1 of the Basic Law (aa). In addition, the Higher Regional Court in all probability once again failed to give sufficient consideration to the instructions of the European Court of Human Rights, and thus violated the complainant’s right under Article 6.2 of the Basic Law in conjunction with Article 20.3 of the Basic Law (bb).

21 aa) (1) There is a violation of Article 101.1 sentence 2 of the Basic Law *inter alia* if a decision of the court, in interpreting and applying a provision on jurisdiction, deviates so far from the constitutional principle that no one may be removed from the jurisdiction of his lawful judge that it is incapable of justification, that is, arbitrary (see BVerfGE 3, 359 (363-364); 29, 45 (49)).

22 (2) It is likely that these requirements are satisfied in the present case. The objective course of the proceedings to date strongly supports the assumption that in its decision the Higher Regional Court allowed itself to be influenced by irrelevant consider-

ations when it (a) examined the substantive decision of the Local Court on access, which is not part of the complaint of failure to act, which was the subject of the proceedings, and (b) in this way circumvented the provision of § 621.g in conjunction with § 620.c sentence 2 of the Code of Civil Procedure, which provides that a complaint against a temporary ruling on access is not admissible.

23 (a) The Higher Regional Court altered the decision on access of the Local Court to the detriment of the complainant without giving comprehensible reasons to show why it is entitled to do this in the proceedings relating to the complaint of failure to act. In its decision, the court relied on § 621.g in conjunction with § 620.b.1 of the Code of Civil Procedure, under which the court may overturn or alter the preliminary injunction "on application". But the Higher Regional Court did not even begin to show why it is competent to make a decision under § 621.g in conjunction with § 620.b.1 of the Code of Civil Procedure in the proceedings relating to the complaint of failure to act. However, it should have considered itself bound to do this, not only by reason of the nature of the complaint of failure to act as an extraordinary legal remedy (aa). An explanation of this nature would also have been advisable because the complainants in the complaint of failure to act clearly themselves did not proceed on the assumption that § 620.b.1 of the Code of Civil Procedure applied; they did not make the necessary application – at all events not expressly (bb).

24 (aa) The complaint of failure to act – which is not governed by statute either in the Code of Civil Procedure or in the Act on Non-Contentious Matters (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG*) – was created by case-law as an extraordinary legal remedy. It serves the sole purpose of guaranteeing the right of the parties to the proceedings to effective legal protection (see Karlsruhe Higher Regional Court, *FamRZ* 2004, p. 53 (54); Dresden Higher Regional Court, *FamRZ* 2000, pp. 1422-1423; Saarbrücken Higher Regional Court, *Neue Juristische Wochenschrift – Rechtsprechungs-Report Zivilrecht – NJW-RR* 1999, pp. 1290-1291; Gummer, in: Zöller, *ZPO*, 24th ed. § 567 marginal no. 21; Reichhold, in: Thomas/Putzo, *ZPO*, 26th ed., § 567 marginal no. 10). The subject of the proceedings is exclusively the failure of the court of first instance to act, but not the review of a decision that has already been pronounced (see Gummer, loc. cit., marginal nos. 21, 21.a). However, the court of appeal acquires jurisdiction under § 621.g in conjunction with § 620.b.3 and § 620.a.4 of the Code of Civil Procedure if the subject of the preliminary injunction corresponds to the subject of the proceedings pending there, taking into account the nature of the legal protection applied for; correspondence here means direct concurrence (see Hüßtege, in: Thomas/Putzo, *ZPO*, 26th ed., § 620.a marginal no. 15). Precisely this is not the case here. Instead, the access ruling made is the opposite of failure to act. Finally, if the complaint of failure to act is well-founded, then according to the case-law of the nonconstitutional courts and the literature, the courts may merely be instructed to continue the proceedings (see Karlsruhe Higher Regional Court, *FamRZ* 2004, p. 53 (54); Saarbrücken Higher Regional Court, NJW-RR 1999, pp. 1290-1291; Gummer, loc. cit., marginal no. 21.a).

(bb) In this factual and legal situation, it is impossible to follow the remarks of the Higher Regional Court that the application required under § 620.b.1 of the Code of Civil Procedure is to be assumed to have been made “at least impliedly ... or alternatively was to be assumed by analogy to § 140 of the Civil Code by way of reinterpreting to this effect the complaint, which in this context is of lower priority in the statutory procedural system and therefore is inadmissible”. 25

(b) In addition, in view of the course of the proceedings to date, it appears not to be out of the question that the Higher Regional Court, in making the ruling challenged, intended to circumvent the provision of § 620.c sentence 2 of the Code of Civil Procedure. In its order of 8 December 2004, the Higher Regional Court had already effectively excluded the complainant’s access to his child when, in response to the complaint filed against the temporary access ruling of the Local Court, it suspended the enforcement of that ruling. However, the Higher Regional Court was not authorised to do this, for the complaint against a preliminary injunction on access, under § 621.g in conjunction with § 620.c of the Code of Civil Procedure, is patently inadmissible (see Cologne Higher Regional Court, *FamRZ* 2003, p. 548; Dresden Higher Regional Court, *FamRZ* 2003, pp. 1306-1307; Naumburg Higher Regional Court (First Family Senate), *Justiz-Ministerialblatt für Sachsen-Anhalt* 2003, p. 346; Philippi, in: Zöller, *ZPO*, 24th ed., § 620.c marginal no. 4 and § 621.g marginal no. 5; Hüßtege, in: Thomas/Putzo, *ZPO*, 26th ed., § 620.c marginal no. 4 and marginal no. 7; Motzer, *FamRZ* 2003, p. 793 (802)). Despite the unambiguous statutory provision, the Higher Regional Court did not even begin to show, in that order, why it proceeded on the basis that the complaint was admissible. The Fourteenth Senate should have seen all the more reason to give such a justification in that shortly earlier, the Eighth Senate of the Naumburg Higher Regional Court, in the same access proceedings, had expressly stated that the complaint was inadmissible (with regard to the earlier preliminary injunction; see also the statement of the Federal Constitutional Court in its order of 14 October 2004, loc. cit., p. 1863). 26

Admittedly, the Higher Regional Court reversed the order that the enforcement should be suspended after the service on those entitled to make a statement of the constitutional complaint filed against this order together with the application for the issue of a preliminary injunction and shortly before the period for submitting opinions expired, on 20 December 2004, on the grounds that the complaint of failure to act was “now ripe for judgment”. But the Higher Regional Court made no mention whatsoever in its grounds that it had not been entitled to make this order at all because the complaint was inadmissible. Instead, on the same day, in its order on the complaint of failure to act, the Higher Regional Court once more temporarily excluded the complainant’s access to his child when it now in these proceedings, and not in the proceedings on the complaint against the order at first instance, amended that order to this effect. 27

bb) In addition, it is likely that the complainant’s rights under Article 6.2 in conjunction with Article 20.3 of the Basic Law were violated. The European Court of Human 28

Rights held that the complainant's right under Article 8 of the European Convention on Human Rights was violated by the exclusion of the right of access and that he should at least be guaranteed access to his child (see European Court of Human Rights, *FamRZ* 2004, p. 1456 (1460, no. 64)). According to the order of the Federal Constitutional Court (see Federal Constitutional Court, Order of 14 October 2004, loc. cit., pp. 1858-1859) that was pronounced in response to this decision, the binding effect of a decision of the European Court of Human Rights extends to all state bodies and in principle imposes on them an obligation to terminate a continuing violation of the European Convention on Human Rights and create a situation that complies with the Convention within the scope of their jurisdiction and without violating the binding force of statute and law (Article 20.3 of the Basic 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 this process, the court must consider, in a comprehensible form, how the fundamental right affected (in this case Article 6 of the Basic Law) can be interpreted in a way that complies with the obligations of the Federal Republic of Germany under public international law (see Federal Constitutional Court, Order of 14 October 2004, loc. cit., p. 1863).

29 The Higher Regional Court once again patently did not comply with these requirements. In particular, it did not even begin to consider the question as to how the complainant can succeed in reuniting the family at all if he remains prohibited from building up any contact with his child at all. Nor did the Higher Regional Court sufficiently consider the deliberations of the European Court of Human Rights, under which it is in the best interests of the child to maintain the family relationships, since breaking off such connections means separating the child from his roots, which is justified only in quite extraordinary circumstances. The Higher Regional Court gave as little consideration to the fact that the endangerment of the best interests of the child, indiscriminately postulated by the Higher Regional Court and supported by no concrete facts, may be averted by the presence of a trained person at the meetings, ordered by the Local Court, as it did to the fact that access is planned only for a period of two hours per week in any case. The "specialist medical assessments" mentioned by the Higher Regional Court in its order are not suitable to give rise to an endangerment of the best interests of the child as a result of these very brief access contacts. Thus, for example, the opinion of the paediatrician states that the boy would suffer severe psychological harm if he "is torn out of his family surroundings". In the case of access of two hours per week, however, there can be no question of such a "tearing out".

30 2. The weighing of consequences that is therefore required results in more weight being given to the reasons that favour the issue of a preliminary injunction that guarantees that access takes place.

31 a) If there were no preliminary injunction, but the constitutional complaint were later successful, the complainant would continue to be excluded from contact with his

child. Until the complainant could actually have access, taking into account the duration of the constitutional complaint proceedings and the duration of the proceedings in the nonconstitutional courts that would follow if the case were possibly rejected as unfounded, up to six months might pass. This is a considerable period of time if one considers that the complainant has made efforts in this respect since the child was born and in view of the increasing age of the child has increasingly less possibility of sharing in the child's development. In addition, the longer the exclusion of access continues, the more unlikely it becomes that the family can be reunited. Moreover, it is of decisive importance here that the European Court of Human Rights has already decided in this matter that the complainant must be granted access to his child (see European Court of Human Rights, *FamRZ* 2004, p. 1456 (1460, no. 64)), and that this decision, by the order of the Federal Constitutional Court of 14 October 2004 (loc. cit., p. 1857), must also in principle be respected.

b) If, on the other hand, the preliminary injunction applied for were issued but the constitutional complaint later had to be refused, the complainant would have access to his child for two hours a week until the decision on the constitutional complaint, and the first four contact sessions would take place with a trained person present. The Higher Regional Court is of the opinion that this would give rise to a severe endangerment of the best interests of the child; this is not apparent. It should not be overlooked that precisely in cases of the present kind the child may experience conflicts as a result of the behaviour of the foster parents on the one hand and the natural parent on the other. However, in its preliminary injunction the Local Court counteracted this insofar as it ordered the parties to avoid all statements, in particular derogatory statements, in the presence of the child that might have negative effects on the relationship to the complainant, but also on the relationship to the foster parents. Another argument against an endangerment of the best interests of the child is the fact that the five-year-old child, who has grown up in the home of the foster parents since he was four days old, must have developed a stable relationship to the foster parents that enables him also to enter into contact with people who are not (so) familiar with the child, without his psychological state being endangered (see, for example, Koechel, *Kindeswohl im gerichtlichen Verfahren*, 1995, pp. 23-24, with further references). 32

In addition, it is not imperative that the access would have to be terminated on the date of the decision on the constitutional complaint. For the courts must orient themselves on the best interests of the child in every stage of the proceedings. If the court came to the conclusion that breaking off the access that had been taking place might be harmful to the child, the necessary measures would therefore have to be taken. 33

c) The injunction of the Local Court should be brought up to date with regard to the instructions as to times (see no. 1 letters a) and b) of the operative part of the judgment), *inter alia* in order to allow the parties to prepare themselves appropriately. In addition, the Youth Welfare Office and the administrative district of Wittenberg were to be exempted from the threat of an administrative fine (see Zimmermann, in: Kei- 34

del/Kuntze/Winkler, *FGG*, 15th ed., § 33 marginal no. 16).

3. The judicial order of the Federal Constitutional Court that the access ruling made by the Local Court was to be observed means that the Local Court ruling continues in force for the duration of the preliminary injunction issued by the Federal Constitutional Court failing a change of the factual situation and therefore is not for this time open to a judicial review by the Higher Regional Court. 35

4. The decision on the reimbursement of expenses is based on § 34.a.3 of the Federal Constitutional Court Act (see BVerfGE 82, 310 (315)). 36

Papier Steiner Hohmann-Dennhardt

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 28. Dezember 2004 - 1 BvR 2790/04

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 28. Dezember 2004 - 1 BvR 2790/04 - Rn. (1 - 36), http://www.bverfg.de/e/rs20041228_1bvr279004en.html

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