Order of the First Chamber of the First Senate of 9 February 2007
– 1 BvR 125/07 –

in the proceedings on the constitutional complaint of

F., a minor, represented by the children's guardian (curator ad litem)

- authorised representatives: 1. Lawyers…,
2. Prof. Dr. Dr. …,
3. Prof. Dr. … –

against a) the order of the Naumburg Higher Regional Court (Oberlandesgericht) of 15 December 2006 – 8 UF 84/05 (8 UF 195/05) –,

b) the order of the Wittenberg Local Court (Amtsgericht) of 14 September 2005 – 5 F 463/02 UG – and motion for a temporary injunction.

RULING:

The constitutional complaint is not admitted for decision.

This also disposes of the application for a temporary injunction.

GROUNDS:

In a constitutional complaint filed by his children's guardian (*curator ad litem*), the complainant, who was born in 1999, challenges a judicial decision on contact and, by way of a temporary injunction, seeks an order for the decision on contact to be provisionally suspended and modified. 1

I.

1. a) Immediately after his birth, the complainant was given up for adoption by his mother, and since then he has lived in a foster family. After learning of the complainant's birth and after his paternity was judicially confirmed, his natural father applied for custody of the complainant to be transferred to himself and for contact arrangements to be made for him with regard to the complainant. 2

By an order of 1 March 2001, the Local Court granted his application for custody and made arrangements for accompanied contact; after this, by an order of 20 June 2001, the Higher Regional Court overturned the decision by way of a temporary injunction. The father of the child filed a constitutional complaint against this, without success (see Federal Constitutional Court (*Bundesverfassungsgericht — BVerfG*), Third Chamber of the First Senate, Order of 31 July 2001 – 1 BvR 1174/01 –). 3

Upon the individual application of the father of the child, the European Court of Human Rights (ECHR), in a judgment of 26 February 2004, held that the Federal Republic of Germany had infringed Article 8 of the European Convention on Human Rights because the father of the child had been denied not only custody but also contact (see European Court of Human Rights no. 74969/01, Judgment of 26 February 2004, 4

Zeitschrift für das gesamte Familienrecht – *FamRZ* 2004, p. 1456).

b) Thereupon the Local Court, by way of a temporary injunction, granted the father of the child a provisional right of contact, in the first instance accompanied. In an order of 14 October 2004, the Federal Constitutional Court held that the order of the Higher Regional Court of 30 June 2004 overturning the decision of the Family Court was unconstitutional (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 111, 307). 5

By way of a temporary injunction, the Local Court again granted the father of the child contact on 2 December 2004; in an order of 20 December 2004, the Higher Regional Court suspended this too, until the decision in the main proceedings; hereupon the Federal Constitutional Court, by a temporary injunction of 28 December 2004, largely reinstated the decision on contact of the Local Court of 2 December 2004 and finally, in the decision in the main proceedings, in an order of 10 June 2005, overturned the decision of the Higher Regional Court in this respect (see Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK) 5, 316). 6

From this date on, contact took place on the basis of the provisional decision of the Local Court of 2 December 2004, which had been revived in this way, but there were considerable tensions between the parties involved in the contact arrangements. 7

By an order of 14 September 2005, the Local Court made arrangements in the main proceedings for the father of the child to exercise his right of contact. First, the court laid down four contact appointments at which the father of the child was to be accompanied by the official guardian. From January 2006, it permitted the father of the child contact on the first Saturday of January and thereafter on every second Saturday in the time between 10.00 and 18.00 hours, at first – in January – accompanied by the official guardian. In the holidays, he was allowed one weekday, after consultation with the foster parents. 8

Appeals against this were again filed by the father of the child, by the Youth Welfare Office as the official guardian and by the children's guardian (*curator ad litem*). 9

c) The father of the child once more applied for custody of the complainant to be transferred to himself, and, by an order of 19 March 2004, the Local Court granted this application; after this, the Youth Welfare Office as official guardian and the children's guardian appealed to the Higher Regional Court, and in response to the appeals the Higher Regional Court overturned this decision by an order of 9 July 2004. The father of the child filed a constitutional complaint against this, and the Federal Constitutional Court, by an order of 5 April 2005 (BVerfGK 5, 161), overturned this decision too and referred the matter back to be decided by a different senate of the Higher Regional Court. 10

d) By an order of 9 November 2005, the senate of the Higher Regional Court that was now responsible for the case consolidated the two main proceedings, for custody 11

and for contact, to be decided jointly.

On 11 June 2006, the judicially appointed independent expert presented a provisional written family psychology report, which she defined as the final report and explained in the oral hearing of 25 September 2006. In response to the question as to whether the contact should be extended, the expert stated, among other things, that the complainant was in a conflict of loyalties. She recommended that everything that intensified the competition between the parties should be avoided. The occasions of contact she had previously observed, in which the natural father and the son had played together happily and boisterously, were a good foundation. The complainant should be the guiding factor when it came to overnight stays and travel. In response to the court's question as to whether it was possible without endangering the welfare of the child for custody to be transferred to the natural father and a judicial order for the child to stay with him for a specified period of time, the expert recommended that, under the conditions existing at the time in the whole system, there should be protected contact for four hours on Saturday every two weeks. 12

She stated that the contact should take place in the presence of the official guardian, in order to ensure that the complainant was not repeatedly made uncertain again with regard to his sense of belonging to a family. It should be ensured, she said, in a manner suitable to a child, that the complainant did not need to move house, that a change of school which was feared to be imminent did not take place and that the complainant did not need to change his free-time activities and his circle of friends. 13

2. By an order of 15 December 2006, the Higher Regional Court dismissed the application of the father of the child for transfer of custody as at present unfounded, and made arrangements for the contact of the father of the child with the complainant on the basis that he would have contact with the complainant every two weeks on Saturday from 11.00 to 18.00 hours and from the weekend of 3-4 March 2007 from 11.00 hours on Saturday until 15.00 hours on Sunday. In school holidays that lasted longer than two weeks, the father could have the complainant staying with him in the first half of the holidays. 14

As the natural father (Article 6.2 sentence 1 of the Basic Law (*Grundgesetz — GG*)), the court stated, the father of the child definitely had a right to contact with the complainant, in particular since, as a result of the provisional contact arrangements of the Local Court of 2 December 2004, confirmed by the Federal Constitutional Court, contact between him and the complainant had now intensified. 15

With regard to the principle of proportionality, at present no grave endangerment of the welfare of the child as a result of the contact was apparent. The circumstance that the provisional contact arrangements of 2 December 2004 were conducted only in conditions of considerable tension and not free of constantly recurring conflicts, for which the father of the child shared part of the responsibility, did not in itself give rise to such an appreciable endangerment of the welfare of the child that it was advisable to exclude contact. Bearing in mind that contact had been excluded for many years 16

and that as a result the relationship between the complainant and his foster family had been reinforced, the tensions and conflicts that had occurred were not “quite out of the ordinary”, but fundamentally natural and understandable.

17 The senate was convinced, it stated, that, as a result of the contact carried out, a bond had now been created between the complainant, who was now seven years old, and his father, and the quality of this bond could not be regarded as irrelevant. Admittedly, this bond also comprised an element that unsettled the identity and self-esteem of the complainant. But in the contact situation, the natural father had succeeded in “reaching” his son “intuitively and with an uncomplicated self-assurance” and in giving him a “space to express his personality as a child”, as a result of which it had been possible for the two to get to know each other, and father and son had entered a “relationship” with each other in the course of their playful interaction with each other. Since the complainant had now understood that this was his natural father, breaking off the present contact arrangements would do more harm than good, and therefore it was out of the question to prohibit contact.

18 In order to achieve the aim of the contact sessions, which was to further intensify the relationship of the natural father to the complainant, it was not only necessary to significantly change the conduct of the adults. It was also necessary for there to be a fixed time schedule for the contact sessions, so that a formal structure that was perceptible to the child was created, with which all those involved had to comply, with the result that the complainant was no longer confronted with the question of an order of precedence of the “fathers”. In making arrangements for the contact, the senate said, it had oriented itself to a draft prepared by the official guardian and discussed with the father of the child and with the foster parents.

19 The serious tensions and constantly recurring conflicts when contact took place caused the senate also to make clear and binding arrangements for the times when the complainant spent the night with his father. The court stated that this decision could not be left to the complainant, since this decision, which repeatedly had to be made again, would put further pressure on him. The legal duty of the natural father and the foster parents to ensure that contact took place with as little pressure as possible may be deduced without difficulty from the provision of § 1684.2 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*).

20 At present, even paying due regard to the principle of proportionality, an extension of the contact dates was as yet out of the question. According to the report, the result of such an extension would be that the complainant’s conflict of loyalties would increase and the dangers to his emotional development would grow quite considerably, to the extent where there might be traumatic consequences. A positive intensification of the relationship between the complainant and his natural father would be possible only if on the one hand the foster parents, despite the fact that until now the complainant had regarded them as his family, tolerated the fact that the complainant had made contact with his father, and also sought this contact and would continue to seek

it, and on the other hand the family of the complainant's natural father accepted that the complainant at present still had his home with his foster family and felt rooted and secure there.

3. In his constitutional complaint, filed by the children's guardian appointed for him in the non-constitutional court proceedings, the complainant challenges the order of the Local Court of 14 September 2005 and the order of the Higher Regional Court of 15 December 2006. He challenges the infringement of his fundamental rights under Article 2.1 in conjunction with Article 1.1 of the Basic Law and under Article 6.2 and Article 20.3 of the Basic Law and Article 2.2 sentence 1 of the Basic Law and seeks an order for contact to be carried out in compliance with the recommendation of the expert, and an order that he should remain with the foster parents, and an order imposing conditions on contact. He states that his human dignity and his fundamental right to emotional and physical integrity are being violated. The report, he states, shows that he feels at risk of losing his previous life situation and being robbed of his social parents. The expert establishes, he states, that even the contact that has taken place to date led to a severe endangerment of his welfare as a child. Against the background of these serious findings, the Higher Regional Court should have taken measures to protect the complainant. The diagnosis – namely, episodes of depersonalisation with dissociative elements, the risk of onset of mental pathology in the short or long term, and suicidal developmental tendencies – should have meant that the parental right of the father of the child had lower priority than the welfare of the child, since this parental right, as a right entailing duties, must always be oriented to the welfare of the child. The court deviated from the psychological report, which means that there should have been a more detailed justification of the court's own expert knowledge. The expert recommended four hours' contact on Saturday every two weeks. In view of the fact that even the occasions of contact that have occurred to date resulted in serious symptoms, the Higher Regional Court should not have deviated from the recommendations of the expert. 21

By way of temporary injunction proceedings, the complainant applies for the temporary suspension of the order of the Higher Regional Court of 15 December 2006 and in particular seeks an order that the father of the child is to have four hours of contact on Saturday every two weeks. 22

II.

The constitutional complaint is not admitted for decision, because there is no reason to admit it under § 93a.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz — BVerfGG*). The significant constitutional questions have been decided (§ 93a.2 letter a of the Federal Constitutional Court Act). Nor is the admission of the case appropriate in order to enforce the complainant's rights (§ 93a.2 letter b of the Federal Constitutional Court Act), for the constitutional complaint has no prospect of success (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 90, 22 (24 et seq.)). 23

1. It may remain undecided whether the children's guardian appointed for the non-constitutional court proceedings can also effectively represent the complainant in the constitutional complaint proceedings. For at all events, the constitutional complaint lacks sufficient prospect of success on the merits. The challenged orders do not show the infringements of fundamental rights challenged. 24

2. a) The relationship of the parental right to the right of personality of the child is shaped by the particular structure of the parental right. This is essentially a right in the interest of the child, as follows from the very wording of Article 6.2 sentence 1 of the Basic Law, which refers to the child's right to care and upbringing and in this way makes the interest of the child part of the parental right (see BVerfGE 59, 360 (382)). If the courts are to make a decision on contact, they must take into account both the fundamental rights of the parents under Article 6.2 of the Basic Law and also the welfare of the child and his individuality as the subject of a fundamental right (see BVerfGE 31, 194 (205); 64, 180 (188)). The courts must therefore, in the individual case, attempt to achieve a concordance of the fundamental rights of parent and child. In this process, protection of the fundamental rights is also to be ensured by the structure of the proceedings (see BVerfGE 55, 171 (182)); the court proceedings, in the form they take, must be suitable and appropriate to effectively serve the implementation of the substantive fundamental rights (see BVerfGE 84, 34 (49)) and to obtain as reliable a basis as possible for a decision oriented to the welfare of the child (see BVerfGE 55, 171 (182)). Deviating from the report of a specialist psychologist therefore requires a detailed justification and the proof of the court's own expert knowledge (see Federal Constitutional Court, Third Chamber of the First Senate, Order of 2 June 1999 – 1 BvR 1689/96 –, *Zeitschrift für das gesamte Familienrecht* 1999, p. 1417). 25

b) The judicial decisions challenged satisfy these requirements. The intensification and facilitation of the development of a family relationship between the complainant and his natural father which was the aim of the extension of contact is constitutionally unobjectionable. 26

The decision of the Higher Regional Court takes account, in a comprehensible manner, both of the welfare of the complainant and of the parental right of his natural father. The extension of contact shows no infringement of the constitution. Referring to the findings of the expert's report, and with detailed and understandable reasoning, the court held that there was no grave endangerment of the welfare of the child occasioned by contact, because the father of the child had succeeded in reaching the child, and the mere circumstance that contact took place only with considerable tensions and not without constantly recurring conflicts did not justify the exclusion of contact. 27

To the extent that the complainant challenges the fact that the Higher Regional Court does not follow the recommendations of the expert's report with regard to the length of the contact sessions, it is not necessary to decide whether this is a challenge of the application and interpretation of law below the constitutional level, which 28

is not open to review by the Federal Constitutional Court (see BVerfGE 18, 85 (92-93); 95, 96 (127-128)). At all events, the complainant fails to appreciate that the court did not deviate from the psychological findings and value assessments of the expert, but made a legal assessment in the course of judicial decision-making that places the parental right of the father of the child and the welfare of the complainant in practical concordance and takes account of the relationship of the child to his natural father in the long term (see ECHR, loc. cit., *Zeitschrift für das gesamte Familienrecht* 2004, pp. 1456 et seq.). No infringement of the Constitution can be found in this.

3. Further grounds of the decision are dispensed with, § 93d.1 sentence 3 of the Federal Constitutional Court Act. 29

This decision is unappealable. 30

Judges: Papier, Hohmann-Dennhardt, Hoffmann-Riem

Bundesverfassungsgericht, Beschluss der 1. Kammer des Ersten Senats vom 9. Februar 2007 - 1 BvR 125/07

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