FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1664/04 –

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 the Order of the Naumburg Higher Regional Court (*Oberlandesgericht*)
of 9 July 2004 – 14 UF 60/04 –

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

with the participation of Justices

President Papier,

Hohmann-Dennhardt

Hoffmann-Riem

decided unanimously on 5 April 2005:

1. **The order of the Naumburg Higher Regional Court of 9 July 2004 – 14 UF 60/04 – violates the complainant's fundamental right under Article 6.2 sentence 1 in conjunction with Article 20.3 of the Basic Law (*Grundgesetz – GG*) to the extent that, in reversing the order of the Wittenberg Local Court (*Amtsgericht – AG*) of 19 March 2004 – 5 F 741/ 02 SO – , it rejects as unfounded the petition of the complainant for custody (number 1 of the operative part of the order). The order is therefore also reversed with regard to the arrangements for costs (number 3 of the operative part). The matter is referred back to a different family senate of the Naumburg Higher Regional Court.**
2. **In other respects the constitutional complaint is not admitted for decision.**

3. **The *Land* (state) Saxony-Anhalt is ordered to reimburse the complainant his necessary expenses.**

R e a s o n s :

I.

In his constitutional complaint, the complainant challenges a decision on custody of the Naumburg Higher Regional Court. 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 agreed to the adoption of the child; since that time, the child has been living with foster parents. In the year 2000, at the instigation of the complainant, his paternity was established by judicial decision. 2

After the Local Court had awarded the complainant a right of contact and had also transferred custody, the Fourteenth Civil Senate (Third Senate for Family Matters) of the Naumburg Higher Regional Court, by an order of 20 June 2001, rejected the complainant's petition for custody and excluded the complainant's right of contact until 30 June 2002. The complainant filed a constitutional complaint with regard to this; the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*), by order of 31 July 2001 – 1 BvR 1174/01 – did not accept this constitutional complaint for decision. By judgment of 26 February 2004 (*Zeitschrift für das gesamte Familienrecht – FamRZ* 2004, pp. 1456 ff.), the European Court of Human Rights, in response to the complainant's individual application, found that there had been a violation of Article 8 of the Convention on Human Rights (the Convention). Thereupon, the Local Court again awarded the complainant the right of contact and custody. 3

The children's guardian and the Youth Welfare Office (official guardian) filed an appeal against this, and thereupon the Higher Regional Court made an order – challenged by the constitutional complaint – reversing the decision on custody and dismissing the complainant's petition for custody. In addition, it dismissed the complainant's applications to divest the official guardian and the children's guardian of their functions. It also dismissed the application for legal aid. As grounds, the Fourteenth Civil Senate stated *inter alia* that neither the Convention nor the Basic Law contained an obligation to accord to a judgment of the European Court of Human Rights an effect that removed the finality and non-appealability of the decision challenged or required proceedings that have been finally and non-appealably completed to be reopened. The judgment of the European Court of Human Rights, it held, did not alter the domestic legal position, nor did it have a binding effect in the sense that it amended the case-law of the supreme federal courts. The court said that it was not possible to establish "even an indirect binding effect, the existence of which might at most be discussed" resulting from a violation of Article 8 of the Convention. 4

The Regional Court (*Landgericht – LG*) has not yet decided on the appeal filed by the complainant against the order of the guardianship court by which the court gave 5

prior consent to the adoption of the child in substitution for the consent of the complainant.

2. In his constitutional complaint, the complainant challenges *inter alia,* on the merits, a violation of his right under Article 6.2 sentence 1 of the Basic Law (*Grundgesetz – GG*) in conjunction with Article 20.3 of the Basic Law. If the Higher Regional Court had observed the interpretation of the law of the European Court of Human Rights, it would have had to transfer custody to the complainant in order to carefully reacquaint the child with its father. Because it did not feel it was bound by the decision of the European Court of Human Rights and did not implement the judgment of that court, the Higher Regional Court had violated public international law. In addition, the complainant seeks a determination that the adoption of the child is “unlawful”. 6

3. The constitutional complaint has been served on the Saxony-Anhalt *Land* (state) government, the foster parents, the official guardian (Youth Welfare Office) and the child’s guardian. The *Land* government did not give an opinion, but the other persons entitled to make a statement have submitted that the relief sought by the constitutional complaint should not be granted. 7

II.

To the extent that the complainant challenges the adoption proceedings and the rejection – made by the order of the Higher Regional Court that is appealed against – of his secondary petitions, the Chamber does not accept the constitutional complaint for decision because it is inadmissible (1). In other respects, the Chamber grants the relief sought by the constitutional complaint (2). 8

1. a) Even if one were to interpret the petition filed with regard to the adoption proceedings as meaning that the complainant seeks a declaration that an adoption of the child would be unconstitutional and in connection with this challenges the order of the Local Court substituting his consent, the petition still fails. Not least, § 90.2 sentence 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG)* prevents this: it provides that, before the constitutional complaint is filed, all legal remedies must be exhausted. The Regional Court has not yet made a decision on the complaint filed against the order of the Local Court. Moreover, in the last instance it will not be able to make a decision on the complaint until the custody proceedings are concluded. In addition, the complainant might file yet another complaint to the Higher Regional Court against a decision of the Regional Court that is disadvantageous to him (see Cologne Higher Regional Court, *Zeitschrift für das gesamte Familienrecht* 1999, p. 889). Finally, the substitution of the father’s consent does not effect the actual adoption. On the contrary, only after the substitution proceedings have been finally and non-appealably concluded may the order of adoption be pronounced (see Hamm Higher Regional Court, *Zeitschrift für das gesamte Familienrecht* 1991, p. 1230 (1232)). 9

b) To the extent that the complainant, who according to his petition seeks a ruling 10

that the order challenged is overturned in its entirety, also appeals against the rejection of the applications in which he sought the removal of the official guardian and the children's guardian (number 2 of the operative part) and the grant of legal aid (number 4 of the operative part), the constitutional complaint lacks adequate substantiation.

2. In other respects, the Chamber accepts the constitutional complaint for decision and grants the relief sought by it under § 93.c.1 sentence 1 in conjunction with § 93.a.2 letter b of the Federal Constitutional Court Act. 11

It is appropriate to accept the constitutional complaint for decision to enforce the complainant's fundamental right under Article 6.2 sentence 1 in conjunction with Article 20.3 of the Basic Law (§ 93.a.2 letter b of the Federal Constitutional Court Act). The requirements for a chamber decision granting the relief sought by the constitutional complaint are satisfied (§ 93.c of the Federal Constitutional Court Act). 12

To the extent that the subject of the constitutional complaint is the question of the binding effect of the decision of the European Court of Human Rights, the element of fundamental importance ceased to exist as a result of the decision of the Second Senate (see Order of 14 October 2004 – 2 BvR 1481/04 –, reprinted in *Zeitschrift für das gesamte Familienrecht* 2004, pp. 1857 ff.). Apart from this, the Federal Constitutional Court has answered the question as to the relationship in which the parental right stands to the fundamental right of the child under Article 2.1 in conjunction with Article 1.1 of the Basic Law or to the constitutionally protected rights of the foster family under Article 6.1 of the Basic Law (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 24, 119 (144); 60, 79 (88-89); 61, 358 (372); 68, 176 (188); 75, 201 (218); 79, 51 (63-64); 88, 187 (195-196)). Similarly, the question of the protection of fundamental rights by the further refining and application of procedural law by the Federal Constitutional Court has already been answered (see BVerfGE 53, 30 (65); 55, 171 (182)).

a) The challenged decision of the Naumburg Higher Regional Court (number 1) violates the complainant's fundamental right under Article 6.2 sentence 1 of the Basic Law in conjunction with Article 20.3 of the Basic Law. The Naumburg Higher Regional Court did not take sufficient account of the judgment of the European Court of Human Rights – pronounced in connection with the custody proceedings, on which the Naumburg Higher Regional Court had to decide – which held that the rejection of the petition for custody is a violation of Article 8 of the Convention. 13

aa) In principle, a national court must take account of the case-law of the European Court of Human Rights (1). Nor does this in the present case lead to results that are incompatible with the Basic Law (2). 14

(1) Occasioned by the decision of the European Court of Human Rights of 26 February 2004, the Federal Constitutional Court made an order to the effect that the binding effect of a decision of the European Court of Human Rights extends to all state 15

bodies and in principle obliges them, where this is within their jurisdiction and does not violate the principle of the binding force of law and justice (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and create a state of affairs that is in compliance with the Convention (see Federal Constitutional Court, loc. cit., pp. 1858-1859). 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 (see Federal Constitutional Court, loc. cit., p. 1859). In doing this, the court must consider in an understandable manner how the fundamental right affected (in this case Article 6.2 sentence 1 of the Basic Law) may be interpreted in a way that corresponds to the obligations of the Federal Republic of Germany under public international law (see Federal Constitutional Court, loc. cit., p. 1863). The courts must take notice of the Convention provision as interpreted by the European Court of Human Rights and apply it to the case, provided the application does not violate prior-ranking law, in particular constitutional law (Federal Constitutional Court, loc. cit., p. 1862).

(2) Applying the convention provision (here Article 8 of the Convention) as interpreted by the European Court of Human Rights to the matter would not violate constitutional law in the present case. 16

The European Court of Human Rights stated that the Higher Regional Court should have examined whether there were possibilities of bringing the father and the child together that were less onerous for the welfare of the child. In addition, it should have taken into account the long-term effects of separating the child from its natural father (see European Court of Human Rights, loc. cit., p. 1459). Measures taken with this in mind comply with the Basic Law; at all events, the Basic Law may be interpreted in this connection in a manner conforming with the obligations of the Federal Republic of Germany under public international law. 17

(a) When the decision is made as to the conditions under which a child may be removed from a foster family in order to move it to its natural parent, account must be taken – under the case-law of the Federal Constitutional Court too – both of the parental right under Article 6.2 sentence 1 of the Basic Law and of the fundamental right of the child under Article 2.1 in conjunction with Article 1.1 of the Basic Law. Finally, the fundamental right of the foster family under Article 6.1 of the Basic Law must also be taken into account (see BVerfGE 68, 176 (187); 79, 51 (60)). As part of the necessary weighing of interests, when statutory provisions in the area of Article 6.2 of the Basic Law are interpreted, in the same way as in the case of decisions of the legislature, it must be borne in mind that the welfare of the child must in the last instance be the decisive factor (see BVerfGE 68, 176 (188); 75, 201 (218); see also BVerfGE 79, 51 (64)). Even if the separation from the persons to whom it directly relates is normally a considerable emotional burden for the child (see BVerfGE 75, 201 (219)), this alone may not be regarded as sufficient to refuse to release the child, because otherwise bringing a child and its parents together would always be excluded 18

if the child had found its “social parents” (see BVerfGE 75, 201 (219-220)). With regard to the welfare of the child affected, on the contrary, a distinction must be made depending on whether the child is to move from the foster family to the household of its parents or to another foster home. In the former case, the limits of risk are to be defined more generously, whereas in the latter case an endangerment of the child’s welfare must be excluded with sufficient certainty (see BVerfGE 75, 201 (217, 220); 79, 51 (64)).

(b) Finally, the protection of fundamental rights also to a large extent affects the drafting and application of procedural law (see BVerfGE 53, 30 (65); 55, 171 (182)). Article 6.2 sentence 2 of the Basic Law transfers to the state community the duty to monitor the care and upbringing of the child; this gives rise to the influence of constitutional law on procedural law and its treatment by the courts in custody proceedings (see BVerfGE 55, 171 (182)). Admittedly, in proceedings based on the principle of official investigation, it must be left to the court of decision which way, within the scope of statutory provisions, it considers appropriate to make the findings necessary for its decision (see BVerfGE 79, 51 (62)). But the proceedings must in principle be appropriate to achieve a basis that is as reliable as possible for a decision oriented on the child’s welfare (see BVerfGE 55, 171 (182)). 19

bb) The challenged decision of the Naumburg Higher Regional Court did not satisfy these requirements. 20

(1) The Higher Regional Court did not take sufficient account of the judgment of the European Court of Human Rights in its decision. The Fourteenth Civil Senate evidently takes the view that the pronouncement of the European Court of Human Rights does not bind it and that the national courts, in particular, cannot be bound by its decision, either in interpreting the Convention or in interpreting national fundamental rights. 21

(2) In addition, the Higher Regional Court failed to understand that in the present case no significance attaches to the question – which the court answered in the negative – as to whether the decision of the European Court of Human Rights is to be accorded an “effect that removes the finality and non-appealability of the decision challenged or requires proceedings that have been finally and non-appealably completed to be reopened”. Decisions on custody do not acquire the force of a final judgment (see Federal Court of Justice(*Bundesgerichtshof – BGH*), *Neue Juristische Wochenschrift – Rechtsprechungs-Report Zivilrecht – NJW-RR* 1986, p. 1130; Diederichsen, in: Palandt, *BGB*, 64th ed., 1696 marginal no. 5; Zimmermann, in: Keidel/Kuntze/Winkler, *FGG*, 15th ed., § 31 marginal no. 22.a at end). Custody proceedings do not admit the plea of res judicata. The care of the minor always has priority over the finality of a decision once taken (see Federal Court of Justice, loc. cit.). § 1696.1 of the Civil Code (*Bürgerliches Gesetzbuch*) contains a substantive power of amendment which serves not only to adapt the arrangement adopted to a change in the factual circumstances that are decisive for the decision, but also permits the court 22

to take into account such facts as already existed at the time when the decision was made but were not known to the court (see Diederichsen, loc. cit.).

§ 1696.1 of the Civil Code provides that an amending decision requires cogent reasons that have a long-term effect on the welfare of the child; this is equally little an obstacle to taking the decision of the European Court of Human Rights into account. The Higher Regional Court correctly pointed out that an amendment under § 1696.1 of the Civil Code imposes particular requirements on the examination of the child's welfare (see Diederichsen, loc. cit., marginal no. 16). However, the court failed to recognise that this provision of ordinary law may be interpreted in the light of the constitution and therefore in a manner – which at all events to this extent does not contradict the constitution – that complies with the duties of the Federal Republic of Germany under public international law. In addition, the case-law of the non-constitutional courts and the literature recognise that an amendment of case-law may create a reason for amendment in the meaning of § 1696.1 of the Civil Code (see Diederichsen, loc. cit., marginal no. 20 with further references). If the Higher Regional Court treated the decision of the European Court of Human Rights as an exception to this, it failed to realise that, according to the above statement, the non-constitutional courts too must take the decisions of the European Court of Human rights into account. 23

(3) The Higher Regional Court did not in principle exclude an indirect binding effect. However, at the same time it raised the objection that this could "not be established" for lack of plausible reasoning. In this the court – once more – failed to realise that according to the above statements it should have applied the provision of the Convention as interpreted by the European Court of Human Rights to the case. 24

(a) It is not apparent that the Higher Regional Court considered how Article 6.2 sentence 1 of the Basic Law could have been interpreted in a manner complying with the duties of the Federal Republic of Germany under public international law (on this, see Federal Constitutional Court, loc. cit., p. 1863). 25

(aa) The Higher Regional Court did not sufficiently consider the question raised by the European Court of Human Rights as to what long-term effects a permanent separation of the child from the complainant might have (on this, see European Court of Human Rights, loc. cit., p. 1459). In this respect, it restricted itself to the mere statement that these effects (in contrast to an endangerment of the child's welfare threatened as a result of removing the child from the foster family) were "certainly to be categorised as less grave, and immaterial from the point of view of custody" if "the foster parents inform C. at the appropriate time and appropriately for the child's age about its origins". However, the court did not in this respect make any determinations that bear up to investigation. 26

(bb) The Higher Regional Court also failed to take into account the further guideline of the European Court of Human Rights. Under this, it would have been necessary to consider whether there are possibilities of bringing the child and the complainant to- 27

gether in circumstances in which the burden for the child would be less.

If it had taken sufficient account of this guideline, the Higher Regional Court would at least have had to consider whether it might not have been able in a different way to counteract a possible endangerment of the welfare of the child by an immediate removal of the child from the foster family, which in the opinion of the court was intended by the complainant. Thus, for example, it would have been conceivable – as a less forceful intervention – to transfer custody to the complainant, but at the same to link it to an order for the child to remain with the foster family – under § 1632.4 of the Civil Code such an order may also be made by the court of its own motion (on this, see BVerfGE 88, 187 (195-196)). 28

(cc) The Higher Regional Court correctly pointed out that § 1672 and § 1678.2 of the Civil Code, which apply under § 1751.1 of the Civil Code, permit a transfer of custody only if “this serves the welfare of the child”. But since the Fourteenth Civil Senate did not sufficiently consider whether there are possibilities of bringing the child and its father together that are less onerous for the welfare of the child and what long-term effects a separation of the child from its natural father has, it was also not able to resolve definitively whether the transfer of custody in the meaning of § 1672 and § 1678.2 of the Civil Code serves the welfare of the child. The Higher Regional Court equally little considered whether the above provisions may be interpreted in a way that conforms with the provisions of the Basic Law and is at the same time in compliance with the Convention. 29

(b) Finally, it is not apparent that the Higher Regional Court initiated the necessary investigations in order to be able to answer the questions raised by the European Court of Human Rights. On the contrary, the proceedings conducted by the Higher Regional Court were not suited to achieve a foundation as reliable as possible for a decision oriented to the welfare of the child. The Fourteenth Civil Senate based its decision on the opinion of the educationalist K.; this in itself is to be criticised because the educationalist based her findings on general academic knowledge without specifically applying this to the case in question by way of an exploration of the complainant or an observation of the interaction of father and child. As far as can be seen, she did not include the complainant himself in her investigations. In addition, this was an opinion commissioned by the Youth Welfare Office (which was appointed official guardian) from the *Land* Youth Welfare Office, and it must therefore be defined as a party opinion. For this reason, it would have been advisable in the present case – from the point of view of constitutional law too – to obtain an independent expert’s report, all the more so since it cannot be seen from the grounds of decision that the court itself has enough expert knowledge of its own. Moreover, the Higher Regional Court decided in written proceedings, without hearing the parties in person; as far as the records of the case reveal, the Fourteenth Civil Senate – unlike the Local Court, which heard the parties several times in person – at no time obtained a personal impression of the parties. 30

b) The decision challenged is based on the violation of a fundamental right set out above. It cannot be excluded that the court, if it had taken sufficient account of the decision of the European Court of Human Rights and if it had taken sufficient account of the complainant's parental right under Article 6.2 sentence 1 of the Basic Law in conjunction with Article 20.3 of the Basic Law, would have reached a different conclusion. 31

3. Since the order challenged (number 1 of the operative part) violates the complainant's fundamental right under Article 6.2 sentence 1 of the Basic Law in conjunction with Article 20.3 of the Basic Law, the question as to whether the other violations of fundamental rights asserted by the complainant exist may remain unanswered. 32

4. Under § 95.2 of the Federal Constitutional Court Act, the decision is to be overturned to the extent that it is established as being unconstitutional; this – necessarily – also includes the decision on costs (number 3 of the operative part). The matter is to be referred back to the Higher Regional Court, and it appears advisable to refer it back to a different family senate. 33

5. The decision on the reimbursement of the complainant's necessary expenses is based on § 34.a.2 of the Federal Constitutional Court Act. To the extent that the constitutional complaint is not accepted for decision, the relief sought by the complainant is of subordinate importance. His necessary expenses must therefore be reimbursed in full (see BVerfGE 32, 1 (39)). 34

Papier Hohmann-Dennhardt Hoffmann-Riem

Bundesverfassungsgericht, Beschluss der 1. Kammer des Ersten Kammers vom 5. April 2005 - 1 BvR 1664/04

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