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 –

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 10 June 2005:

1. **The order of the Naumburg Higher Regional Court of 20 December 2004 – 14 WF 234/04 – violates the complainant's fundamental rights under Article 101.1 sentence 2 in conjunction with Article 3.1 of the Basic Law (*Grundgesetz – GG*) and under Article 6.2 sentence 1 in conjunction with Article 20.3 of the Basic Law, to the extent that, in altering the preliminary injunction of the Wittenberg Local Court (*Amtsgericht – AG*) of 2 December 2004 – 5 F 463/02 UG – , it excludes contact between the complainant and his son until the final decision of the Local Court on the right of contact in the principal proceedings (number II of the operative part). To this extent the order is reversed.**

2. **In other respects the constitutional complaints are not admitted for decision.**

3. **The *Land* (state) Saxony-Anhalt is ordered to reimburse the complainant the necessary expenses of both constitutional complaints filed by him.**

R e a s o n s :

I.

The constitutional complaints relate to the exclusion of the right of the complainant to have contact 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 agreed to the adoption of the child; since that time, the child has been living with foster parents who wish to adopt it. 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 contact 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

Following this, the European Court of Human Rights, in its judgment of 26 February 2004 (*Zeitschrift für das gesamte Familienrecht – FamRZ* 2004, p. 1456), upon the complainant's individual application, ruled *inter alia* that the exclusion of contact ordered by the Higher Regional Court violated 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). 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 contact to his child. 3

Following this, the Local Court, in an order of 19 March 2004, issued a preliminary injunction making arrangements for contact, 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 – (*Zeitschrift für das gesamte Familienrecht* 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 (Second Senate for Family Matters) 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 6

Youth Welfare Office, which was the official guardian, and the children's guardian withdrew their complaints.

3. On the application of the complainant, the Local Court, on 2 December 2004, once more made arrangements for contact. A decision in the preliminary injunction proceedings was necessary to clarify the situation, since the last contact had been approximately 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 contact to his child every Saturday in the time from 15.00 to 17.00 hours. For the first four contact dates, the Local Court appointed a contact guardian, in order to supervise the contact. 7

Upon the appeals against this filed by the Youth Welfare Office, the children's guardian and the foster parents, 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 – 14 WF 236/04 –, 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, and the Higher Regional Court had been informed of it, the Higher Regional Court reversed the above decision by order of 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". Thereupon the complainant declared that the remedy sought in his constitutional complaint, the reversal of the order of the Higher Regional Court of 8 December 2004, was disposed of, made an application for reimbursement of costs and sought a declaration that the decision of the Naumburg Higher Regional Court of 8 December 2004 had been unconstitutional. He submitted that the Higher Regional Court had, *inter alia*, violated Article 6 and Article 20.3 of the Basic Law. In addition, he stated, it had violated his rights to effective legal protection and to a fair trial. The court had acted arbitrarily because it had not dismissed the complaint as inadmissible. Moreover, the Higher Regional Court had, once more, not implemented the decision of the European Court of Human Rights. 9

5. In addition, the Higher Regional Court, in response to the complaint of failure to act of the official guardian and the foster parents, also in an order of 20 December 2004 – 14 WF 234/04 –, ordered the Local Court to proceed with the principal proceedings on contact "with extreme dispatch and bring them to a conclusion"; in this connection, it gave the Local Court concrete instructions on the further course of the proceedings (number I of the operative part). It also excluded contact between the complainant and his son, altering the preliminary injunction of the Local Court of 2 December 2004 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 (number II of the operative part). It stated that, contrary to the opinion of the Eu- 10

ropean Court of Human Rights, the decision in the principal proceedings could not be made without an interim clarification of the facts. 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”, contact had had to be excluded “in order to avoid endangerment of the best interests of the child, which might otherwise occur”.

6. 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 Basic Law, 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 contact 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 contact. 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. 11

7. Hereupon, the Federal Constitutional Court, by way of preliminary injunction, essentially reinstated the decision on contact made by the Local Court (see Order of the Third Chamber of the First Senate of 28 December 2004, *Zeitschrift für das gesamte Familienrecht* 2005, p. 173). 12

The official guardian, the foster parents and the children’s guardian filed objections to this; these objections were dismissed as inadmissible by the Federal Constitutional Court (see Order of the First Chamber of the First Senate of 1 February 2005, *Zeitschrift für das gesamte Familienrecht* 2005, p. 429). 13

8. The Land (state) government of Saxony-Anhalt and the children’s guardian, the foster parents and the official guardian (Youth Welfare Office) have been given the opportunity to express an opinion. 14

II.

The Chamber does not accept the constitutional complaints for decision to the extent that the complainant seeks the cancellation of preliminary injunctions granted in the order of the Higher Regional Court of 20 December 2004 – 14 WF 234/04 – under number I of the operative part and to the extent that in his original constitutional complaint he seeks a declaration that the order of the Higher Regional Court of 8 December 2004 was unconstitutional (1). Apart from this, the Chamber grants the relief sought by the constitutional complaint directed against the order of the Higher Regional Court of 20 December 2004 (2). 15

1. The partial non-admission for decision under § 93.a and § 93.b sentence 1 of the 16

Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) is ordered because in this respect the complainant lacks the necessary legitimate interest in legal action and therefore the constitutional complaints are not admissible.

a) In the operative part, at number I, of the order of 20 December 2004 there is a direction to the Local Court to expedite the proceedings; this – irrespective of the question as to whether it is justified – is in the properly understood interest of the complainant. Even if it affected the judicial independence of the judge at first instance, this would not – at least not directly – affect the complainant's constitutional rights. 17

b) To the extent that the complainant, in the constitutional complaint filed against the order of the Higher Regional Court of 8 December 2004, seeks a declaration that the order was unconstitutional, he also lacks the necessary legitimate interest in legal action. 18

aa) Admittedly, the case-law of the Federal Constitutional Court holds that the legitimate interest in legal action may continue even if the relief sought by the constitutional complaint is granted. But this presupposes that otherwise a constitutional question of fundamental importance would fail to be clarified and the encroachment upon fundamental rights challenged is particularly serious; the legitimate interest in legal action also continues in effect if it is to be feared that the measure challenged will recur or the measure that has become irrelevant will continue to affect the complainant (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 49, 24 (52); 81, 138 (140); 91, 125 (133); established case-law). 19

bb) These requirements are not satisfied in the present case. There is neither a constitutional question of fundamental importance to be clarified (on this, see the remarks below on number II.2), nor is a recurrence of the measure challenged to be expected, since the judges of the Fourteenth Civil Senate who have acted in the matter previously have now been successfully challenged by the complainant on grounds of bias (see Order of the Naumburg Higher Regional Court of 14 March 2005 – 14 WF 9/05). Finally, by reason of the preliminary injunction granted by the Federal Constitutional Court of 28 December 2004 (*Zeitschrift für das gesamte Familienrecht* 2005, p. 173) and the decision on the merits to be made here, which also both relate to the decision of the Higher Regional Court of 8 December 2004, it is not to be feared that the injunction which has become irrelevant will cause continuing detriment to the complainant. 20

2. In other respects, the Chamber accepts the constitutional complaint against the Order of the Higher Regional court of 20 December 2004 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. 21

The acceptance of the constitutional complaint for decision is appropriate in order 22

to enforce the fundamental rights of the complainant under Article 101.1 sentence 2 in conjunction with Article 3.1 of the Basic Law and 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 constitutional questions that are relevant in evaluating the constitutional complaint have already been decided by the Federal Constitutional Court; this applies both to the arbitrary disregard of a jurisdiction provision (see BVerfGE 3, 359 (363-364); 29, 45 (49)) and to the question of the binding effect of a decision of the European Court of Human Rights (see BVerfG, Order of 14 October 2004, *Zeitschrift für das gesamte Familienrecht* 2004, p. 1857).

a) The challenged decision of the Higher Regional Court of 20 December 2004 (number II of the operative part) violates Article 101.1 sentence 2 of the Basic Law in conjunction with Article 3.1 of the Basic Law – aa) – and also violates the complainant's right as a parent under Article 6.2 sentence 1 of the Basic Law in conjunction with Article 20.3 of the Basic Law – bb). 23

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 which governs that Article, the 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 (364); 29, 45 (49)). 24

(2) These requirements are satisfied in the present case. The evaluation of the files of the original proceedings, which are now available, has confirmed the evaluation that was at first made only summarily in the order of the Federal Constitutional Court of 28 December 2004 (see BVerfG, *Zeitschrift für das gesamte Familienrecht* 2005, p. 173 (174-175)). Neither the opinions, in particular that of the official guardian, nor the "clarifying statement" of the Fourteenth Civil Senate itself, which the latter addressed to the Federal Constitutional Court after the preliminary injunction of 28 December 2004 was granted, give cause to deviate from this evaluation. 25

(a) The Higher Regional Court altered the decision on contact of the Local Court to the detriment of the complainant without giving convincing 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 in particular on § 621.g in conjunction with § 620.b.1 sentence 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. An explanation of this nature was also necessary because the complainants in the proceedings on failure to act at first instance clearly did not themselves proceed on the assumption that § 620.b.1 of the Code of Civil Procedure applied. 26

(aa) As already set out in the order of 28 December 2004 (see BVerfG, *Zeitschrift* 27

für das gesamte Familienrecht 2005, p. 173 (174) with further references), the subject of the proceedings in the complaint of failure to act – which is not defined 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*) – is solely the failure to act of the court (of first instance), not the examination of a decision that has already been made, which is the function of the means of appeal provided for this by the Code of Civil Procedure (see Gummer, in: Zöller, *ZPO*, 24th ed., *§ 567*, marginal nos. 21, 21.a). 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 only 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). But this is not the case here. Instead, the contact ruling made is the opposite of failure to act. 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, in the last instance, only be instructed to continue the proceedings (see BVerfG, *Zeitschrift für das gesamte Familienrecht* 2005, p. 173 (174) with further references; but coming to a different result, Naumburg Higher Regional Court (Fourteenth Civil Senate), *Praxis der Freiwilligen Gerichtsbarkeit – FGPrax* 2005, p. 26).

This restrictive judicial approach to the complaint of failure to act supports in particular the requirement that means of appeal should be clear, which derives from the principle of the rule of law. This is the principle that the forms of appeal must be defined in the written legal order and their requirements must be plain to the citizens (order of the Plenum of the Federal Constitutional Court of 30 April 2003, BVerfGE 107, 395 (416)). The requirement of the rule of law that state actions should be measurable and foreseeable gives rise to the requirement that the person seeking justice should be clearly shown the path to the review of judicial decisions (see BVerfGE 49, 148 (164); 87, 48 (65); 107, 395 (416)). The legal structure of the appeal should in particular enable the citizen to examine whether and in what circumstances it is admissible (see BVerfGE 107, 395 (416)). In particular, the official guardian, and also the Fourteenth Civil Senate, failed to recognise this. It is doubtful whether the complaint of failure to act, which is not provided by statute for proceedings before the family courts, is capable of satisfying the above requirements, but it is unjustifiable from any conceivable legal point of view if the Higher Regional Court, as a kind of appendage to the complaint, affirms its entitlement to review a decision that, by the will of the legislature, is non-appealable under § 621.g in conjunction with § 620.c sentence 2 of the Code of Civil Procedure. 28

(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 sentence 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 rein- 29

terpreting to this effect the complaint, which in this context is of lower priority in the statutory procedural system and therefore is inadmissible", as was already stated in the order of 28 December 2004 (BVerfG, *Zeitschrift für das gesamte Familienrecht* 2005, p. 173 (174)). The files of the original proceedings show that the Higher Regional Court, in the proceedings on the complaint of failure to act, had received neither an application for the exclusion of the right of contact nor an application for alteration of the decision on contact of the Local Court under § 620.b.1 sentence 1 of the Code of Civil Procedure. On the contrary, applications for the exclusion of the right of contact were made only in the proceedings against the preliminary injunction of the Local Court, file number 14 WF 236/04.

Admittedly, the official guardian, in his opinion, and also the Higher Regional Court, in the "clarifying statement", correctly stated that the alteration of a preliminary injunction under § 621.g in conjunction with § 620.b.1 sentence 2 of the Code of Civil Procedure may also be made by the court of its own motion if the injunction was granted without the Youth Welfare Office first being heard. Even if one were to presume that the Local Court made its decision without such a hearing, and judging from the files this is doubtful, this would ultimately in no way change the result that the Fourteenth Civil Senate itself regards the requirement of an application as authoritative and expressly based its decision on § 621.g in conjunction with § 620.b.1 sentence 1 and § 620.3 sentence 1 of the Code of Civil Procedure. In addition, in the challenged order of 20 December 2004, the court did not state at any point that a decision of the court's own motion was appropriate because the Youth Welfare Office had not been heard. 30

(b) After the evaluation of the files of the nonconstitutional courts, it was confirmed that the Higher Regional Court, in the temporary exclusion of contact based on § 620.b.1 sentence 1 of the Code of Civil Procedure, circumvented the provision of § 620.c sentence 2 of the Code of Civil Procedure (see also BVerfG, *Zeitschrift für das gesamte Familienrecht* 2005, p. 173 (174-175)). In its order of 8 December 2004, the Higher Regional Court had already effectively excluded the complainant's contact to his child when, in response to the complaint filed against the temporary contact 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 contact, under § 621.g in conjunction with § 620.c sentence 2 of the Code of Civil Procedure, is patently inadmissible (see BVerfG, *Zeitschrift für das gesamte Familienrecht* 2005, p. 173 (174) with further references). To the extent that under § 620.c sentence 1 of the Code of Civil Procedure an immediate appeal may be admissible at all, for example against a provisional decision on custody, it is admissible only if the preliminary injunction was granted on the basis of an oral hearing (Philippi, in: Zöller, loc. cit., *§ 620.c*, marginal no. 8). But in fact the Local Court decided in written proceedings. Despite these unambiguous statutory provisions, the Higher Regional Court did not even begin to show, in that order, on what basis the complaint, in its opinion, was admissible. The Fourteenth Civil Senate should have seen all the more reason to give such a justification in that, shortly earlier, the Eighth 31

Civil Senate of the Naumburg Higher Regional Court, in the same contact 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, *Zeitschrift für das gesamte Familienrecht* 2004, p. 1857 (1863).

Even if the Higher Regional Court justified the discharge of the order on the suspension of enforcement of 8 December 2004 because the complaint of failure to act was "now ripe for judgment", one cannot help suspecting, in particular after evaluating the files of the nonconstitutional courts, that the Fourteenth Civil Senate wanted to remove this order from review under constitutional law. It can scarcely otherwise be explained why the Higher Regional Court discharged its order on the very day on which, through the notification of receipt of the Federal Constitutional Court, it learnt of the constitutional complaint and the application for a preliminary injunction, but at the same time once again suspended the decision on contact of the Local Court. Significantly, although the Higher Regional Court immediately notified the Federal Constitutional Court of the discharge of its order challenged by the constitutional complaint, it did not notify it of the new exclusion of the right of contact. 32

bb) The challenged decision of the Higher Regional Court (number II) also violates the complainant's right as a parent under Article 6.2 sentence 1 of the Basic Law in conjunction with Article 20.3 of the Basic Law. The court did not take sufficient account of the judgment of the European Court of Human Rights, in accordance with which the complainant must be granted contact to his child. 33

(1)The European Court of Human 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 contact and that he should at least be guaranteed contact to his child (see European Court of Human Rights, *Zeitschrift für das gesamte Familienrecht* 2004, p. 1456 (1460, no. 64)). According to the order of the Federal Constitutional Court (see BVerfG, *Zeitschrift für das gesamte Familienrecht* 2004, p. 1857 (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 an understandable manner, how the fundamental right affected can be interpreted in a way that complies with the obligations of the Federal Republic of Germany under public international law (see BVerfG, *Zeitschrift für das gesamte Familienrecht* 2004, p. 1857 (1863)). 34

(b) In proceedings before the Federal Constitutional Court, a complainant, with reference to the fundamental right whose scope of protection is affected in conjunction with the principle of the rule of law, may make a challenge that state bodies disregarded a decision of the European Court of Human Rights or did not take it into account (see BVerfG, *Zeitschrift für das gesamte Familienrecht* 2004, p. 1857 (1859, 1863)). 35

(2) The Higher Regional Court fundamentally misunderstood in what way it was legally bound. 36

(a) In the challenged decision, it did not merely fail to take into account the judgment of the European Court of Human Rights, but reversed its terms of reference. 37

Instead of working towards making an order for a right of contact and putting it into effect, the Higher Regional court, outside its competence and in violation of the binding force of statute and law (Article 20.3 of the Basic Law) ended a right of contact that had already been ordered (by the Local Court) and thus, without being competent to decide, ended a situation that was in compliance with the Convention. Admittedly, in the legal assessment in particular of new facts, in the weighing-up of the conflicting fundamental rights and in the integration of the individual case in the overall context of family-law cases relating to the right of contact, the Higher Regional Court would not have been bound in its particular conclusion (see BVerfG, *Zeitschrift für das gesamte Familienrecht* 2004, p. 1857 (1863)). But this can only become significant to the extent that the court is permitted to make a decision on the merits, which was clearly not the case here. For this reason, the considerations already made in the order of 28 December 2004 (see BVerfG, *Zeitschrift für das gesamte Familienrecht* 2005, p. 173 (175)) that the Higher Regional Court also did not adequately consider the questions raised by the European Court of Human Rights need not be pursued further. However, it should not be overlooked that in particular the grounds submitted by the foster parents, which, in their opinion, argue against giving the complainant a right of contact, do not justify deviating from the decision of the European Court of Human Rights. This applies above all to the submission that the anticipated adoption prevents contact. On the contrary, the conduct shown by the foster parents to date gives rise to doubts as to whether the adoption they desire would even be appropriate from the point of view of the welfare of the child. 38

(b) Contrary to the opinion in particular of the official guardian and the foster parents, the complainant may also rely on the right of a parent protected by Article 6.2 sentence 1 of the Basic Law for himself and thus in conjunction with Article 20.3 of the Basic Law challenge that insufficient account was taken of the decision of the European Court of Human Rights. Since he has had his paternity judicially established under § 1592 no. 3 and § 1600.d of the Civil Code, he is not only the natural father, but also the legal father. He need not rely on a social and family relationship in order to be able to claim parental rights for himself such as the right of contact, on which his claim in the present case for consideration of his rights is based (see BVerfGE 39

108, 82).

b) The challenged decision of 20 December 2004 (number II of the operative part) is based on the violations of fundamental rights set out above. It can be assumed that the court, if it had taken sufficient account of the constitutional rights of the complainant under Article 101.1 sentence 2 in conjunction with Article 3.1 of the Basic Law and 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 result. 40

3. Since the challenged order of 20 December 2004 (number II of the operative part) violates the complainant's rights under Article 101.1 sentence 2 in conjunction with Article 3.1 of the Basic Law and under Article 6.2 sentence 1 in conjunction with Article 20.3 of the Basic Law, the question as to whether the other violations of fundamental rights challenged by the complainant can be established need not be answered. 41

4. Under § 95.2 of the Federal Constitutional Court Act, the decision is to be overturned to the extent that its unconstitutionality has been established. The matter will not be referred back for a new decision under § 95.2 of the Federal Constitutional Court Act. This comes into question only if the nonconstitutional courts have scope for a decision of their own (see BVerfGE 35, 202 (244); 79, 69 (79)). That is not the case here. The Higher Regional Court – as stated – is not authorised to review the non-appealable preliminary injunction of the Local Court. Since no applications for this were made in the proceedings on the complaint of failure to act, no further decision of the nonconstitutional courts is necessary either. Finally, no referral back is necessary with regard to the decision on costs (on this, see for example BVerfGE 35, 202 (245); 79, 69 (79)), since this is not affected by the overturning. 42

5. Upon the decision in the principal proceedings, the preliminary injunction granted by the Federal Constitutional Court of 28 December 2004 becomes irrelevant. The applications and suggestions relating to this injunction are thus disposed of. 43

6. The decision on the reimbursement of the complainant's necessary expenses is based on § 34.a.2 and § 3 of the Federal Constitutional Court Act. 44

a) To the extent that the constitutional complaint directed against the order of the Higher Regional Court of 20 December 2004 is not accepted for decision, the relief sought by the complainant is of subordinate importance, and therefore, under § 34.a.2 of the Federal Constitutional Court Act, his necessary expenses are to be reimbursed in full (see BVerfGE 32, 1 (39)). 45

b) With regard to the constitutional complaint against the order of the Higher Regional Court of 8 December 2004, the decision on the reimbursement of costs under § 34.a.3 of the Federal Constitutional Court Act is based on considerations of equity (see BVerfGE 85, 109 (114); 87, 394 (397)). 46

If the state power voluntarily cancels the act challenged by the constitutional com- 47

plaint, then, if no conflicting reasons are apparent, it may be assumed that it itself regarded the relief sought by the complainant as justified. In this case it is equitable to hold the state to its opinion without further review and to grant the complainant the reimbursement of his expenses in the same way as if the relief sought by his constitutional complaint had been granted (see BVerfGE 85, 109 (115); 87, 394 (397)).

Consequently, the *Land* Saxony-Anhalt is to be ordered to reimburse the costs. For the Higher Regional Court voluntarily cancelled the challenged act, and it did this immediately after it had notice of the constitutional complaint. The fact that the complainant was unsuccessful in seeking a declaration that the reversed decision was unconstitutional is not in conflict with this. For the reason for this was essentially that his further constitutional complaint, which in effect pursued the same aim of protection of rights, was predominantly successful. 48

Papier Hohmann-Dennhardt Hoffmann-Riem

Bundesverfassungsgericht, Beschluss der 1. Kammer des Ersten Kammers vom 10. Juni 2005 - 1 BvR 2790/04

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