

Family Matters: European Court of Human Rights Finds German Parenting Rights Decisions to be in Violation of Article 8 of the Convention

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I. Introduction

[1] The fourth section of the, European Court of Human Rights (ECHR) in Strasbourg, in a judgment from 26 February 2002, (1) held that the German authorities, in a case involving the revocation of parenting rights, violated Article 8 of the European Convention on Human Rights. (2) The circumstances of the case are compelling: the painful separation of parents and children ordered by the German authorities in the interests of the children, followed by several years of hard-fought litigation as the parents struggled to reestablish their parenting rights over their children and to restore their natural family. The Court concluded that the interference in the right of private and family life was not proportionate to the legitimate aim pursued by the German authorities.

II. Factual Background and Procedures in Germany

[2] The applicants' (hereafter, "parents") two daughters grew up on a farm in Badbergen, Germany (near Osnabrück), with their parents and grandparents. The parents had, as children, attended a *Sonderschule für Lernbehinderte* (special school for persons with learning disabilities). This fact was taken as an argument by the German authorities for claiming that the parents' intellectual capacities were insufficiently developed to permit them to raise their children.

[3] From a very early stage the two daughters were examined and diagnosed with physical and mental developmental disabilities. With the assistance of doctors, the parents took measures in order to stimulate their daughters' development. For example, the girls were placed in specialized schools, including a *Heilpädagogischer Kindergarten*. In 1995, when the daughters were four and two years old, a social worker from the *sozialpädagogische Familienhilfe* (social/pedagogical family aid services) spent ten hours each week with the family at the family's home. The relationship between the social worker and the parents degraded progressively and became very strained. The difficult relationship with the social worker culminated in a very negative report issued by the social worker drawing the attention of the *Kreisjugendamt* (District Office of Youth) to the parents' intellectual deficiencies. On the basis of this report the *Vormundschaftsgericht* (Court of Guardianship) was asked to revoke the parents' rights of guardianship over their daughters.

[4] After receiving expert psychological testimony and hearing from the parents and grandparents, the Court of Guardianship decided (in 1997) to revoke, by provisional measures: (a) the parents' *Aufenthaltsbestimmungsrecht* (right to determine the domicile of their children); and (b) *Recht zur Bestimmung über ärztliche Maßnahmen* (the right to decide on medical measures). The Court of Guardianship expressed concern about the parents' ability to correctly evaluate their children. (3) A few months later the two children, now respectively six and four years old, were placed in the care of a *Verein für familienorientierte Sozialpädagogik* (private association for family assistance) which formed part of the *Gesellschaft für familienorientierte Sozialpädagogik* (Society of Family Assistance). The President of the Society of Family Assistance petitioned the Court for the revocation of the parents' guardianship rights claiming that the children would have a better chance to develop normally with new parents. On the basis of the claims made in the President's petition and the report of a psychological expert in the area of parental care, the Court revoked the parents' guardianship rights. Among other bases for its decision, the Court especially expressed concern about the parents' ability to raise their children, even in the absence of bad faith on the part of the parents (*unverschuldet erziehungsunfähig*). Furthermore, the Court explained that the parents were not collaborating with and taking full advantage of the available social services. In application of this decision the two children were separated and placed with two anonymous families (the so called *Incognito-Pflege*). The parents' doctors, however, in three letters requested/recommended the return of the children to their family.

[5] Against the decision revoking their guardianship rights, the parents filed a *Berufung* (demand for *de novo* review) with the *Landgericht* (Regional Court) Osnabrück. Meanwhile, a number of developments pointed in favor of returning the children to their parents. First, the mother passed a qualification seminar for providing day-care. Second, an expert of the *Deutscher Kinderschutzbund* (German Association for the Protection of Children) expressed an opinion in favor of returning the children, as long as the return was accompanied by additional measures of pedagogical assistance. The Regional Court asked a second psychological expert to give a report on the parents' ability to provide parental care. The expert report presented to the Regional Court reached a conclusion similar to that of the expert report presented to the Court of Guardianship in the previous proceedings: the parents were not fit to provide parental care. However, where the first report pointed out the intellectual deficiencies of the parents and the attendant risk that

the children would probably not develop normally under those conditions, the second report focused on the emotional deficiencies of the parents. The psychological expert reporting to the Regional Court concluded that the parents were only satisfying the most basic necessities, e.g. food and clothing, with respect to raising their children. This alone, the expert report suggested, would sufficiently justify the revocation of parental guardianship rights in order to protect the children from danger. The expert found the new developments in the case (the support of the Association for the Protection of Children and the mother's qualification as a day-care provider) insufficient to alter the report's conclusions.

[6] The Regional Court held that, taken together, the two expert reports that had been presented in the case justified the revocation of the parents' guardianship rights; the conditions for the application of sections 1666 and 1666a of the German Civil Code otherwise being fulfilled. (4) The Regional Court concluded that there was no basis for overturning the decision of the Court of Guardianship.

[7] The *Oberlandesgericht* (Higher Regional Court) Oldenburg did not admit the parents' appeal, having held that no violation of the law could be invoked. The Higher Regional Court emphasized that the lower courts had taken every element into consideration, including the two expert reports, the opinion of the parents' doctors and the report of the Association for the Protection of Children.

[8] Before the *Bundesverfassungsgericht* (Federal Constitutional Court) also found the parents' constitutional complaint in admissible.

[9] Three days after the Federal Constitutional Court issued its decision not to admit the parents' constitutional complaint, an expert privately retained by the Association for the Protection of Children rendered a private report that concluded that there was no detectable danger to the children were they to be allowed to live with their parents. The report found the parents fully capable of raising their children. Furthermore, the report affirmed that the intellectual disabilities of the children could largely be balanced by measures of simple assistance.

[10] Throughout the proceedings concerned with parental guardianship rights, the parents were also litigating their visiting rights. In the six first months after the placement of the children with two separate, anonymous families, the parents were denied all visiting rights with their children. Later, following the decision of the Regional Court (ordering the revocation of the parental guardianship rights), the parents were granted very restrictive visiting rights consisting of one hour per month. Contrary to the terms of the decision of the Court of Guardianship, the Regional Court ordered that these visits be supervised by eight persons from social services. Other visits, e.g. at Christmas, were refused by the Youth Office as well as by the Court of Guardianship. The parents were, however, allowed to attend the program associated with their oldest daughter's entry into school. In 2001, visiting rights were extended to two hours per month.

[11] Furthermore, the parents' request to meet with the children's tutor (from the Youth Office) in order to discuss and monitor the physical and psychological development of their children were frustrated by the tutor's refusal to meet with the parents. The tutor took the position that the parents could accomplish these goals through the observations they made during their monthly, two-hour visits. The parents' request for the assignment of a new tutor was rejected by the Guardianship Court.

III. Legal Findings by the European Court of Human Rights

[12] Before the European Court of Human Rights, the parents challenged the necessity of the drastic measures enforced against their family. (5) In a first step, they argued that if their intellectual capacity constituted a sufficient criteria for the revocation of parental guardianship rights, then 30 per cent of all parents would have to be separated from their children. In a second step, they argued that alternative measures that would not have required the total revocation of parental guardianship rights had not been fully considered in their case, in spite of the fact that the German Civil Code requires the consideration of alternatives to revocation of parental guardianship rights. (6) For these reasons, the parents alleged a violation of Article 8 of the Convention.

[13] As with Article 6.1, the Court has found that even if Article 8 does not explicitly require procedural safeguards, measures leading to an interference with family rights must come as a result of a fair decision-making process. (7) Thus, the first part of the Court's analysis in the present case focused on the fairness of proceedings leading to the alleged interference with the protected rights.

[14] The Court then considered whether the existence of interference with the protected rights was in doubt. Citing its former jurisprudence, the Court recalled that it has recognized that the unity of the family is an essential part of the protections of family life provided by Article 8. Further defining the content of the protection provided by Article 8, the Court recalled that the Convention does not only protect the individuals from arbitrary interference from the state but

also includes positive obligations on the part of the State to assure the respect of the family. (8) When a familial-link exists, the Court explained, the State is generally obligated to act so as to permit a full development of this link between parents and children. (9) However, the Court conceded that the frontier between positive and negative obligations (action and abstention) as well the balance of interests cannot be clearly defined, therefore the authorities of the State have a certain discretion in taking measures.

[15] As it was not contested that the measures were prescribed by law and that the legitimate interest as required by Article 8.2 of the Convention had not been contested, the Court concentrated on judging the necessity of the measures taken by the German authorities. (10)

[16] Article 8 permits interference with the right to family only if a necessity for such measures is established. The necessity has to be analyzed as a "pressing social need" (*besoin social impérieux*) and it has to be proportionate to the threatened harm. (11)

[17] Conceding that the national authorities have a closer connection to the social values related to family issues in the Convention States, the Court underlined that the Convention system is not meant to substitute for the national authorities on this issue. But, taking into account the gravity of the measures that can be taken, the Court again asserted its jurisprudence which has found that measures taken by national authorities should be submitted to review regarding the necessity of the measures being taken, especially in the context of the separation of parents and children. The Court also returned to its prior case law which held that national authorities should seek to provide assistance to parents in order to facilitate a return of children to their family of origin.

[18] In the case at hand, the Court found inadequate the claim that the separation of the children and parents was required to provide a more appropriate developmental environment for the children. Even in the face of a certain risk to the development of the children, the Court found that the separation measures and the circumstances of execution in the present case did not rise to the level of the required necessity. (12) The Court noted that the reports of the court-appointed experts gave different reasons for recommending separation and that other experts had disagreed with these conclusions. In addition, the children had never been victims of physical neglect. Therefore, the Court found that the drastic measure of placing the children with two separate and anonymous families along with the restrictive visitation rights were not imposed with a view towards eventual return of the children to their parents. The Court stressed that complete revocation of parental guardianship rights should be seen only as a temporary measure. (13) Furthermore, the Court was not satisfied that the German authorities had seriously taken into consideration the possibility of measures of lesser impact. (14) Concretely, the Court criticized the placement of the children with two different and anonymous families, which not only violated the protected family rights of the parents but also inhibited any contact between the children. The Court also underlined the fact that the children had never been heard by the courts in the national proceedings.

[19] Having considered all these elements, the Court ruled that the total revocation of the parents' guardianship rights, and the circumstances of the execution of this measure, constituted a deprivation of parental care that did not satisfy the condition of proportionality. As a result, the Court held that Article 8 of the Convention had been violated. (15)

[20] The Court awarded non-pecuniary damages in the amount of 15. 000 Euros for the moral injury suffered by the applicants as a result of the separation from their daughters and the restrictions imposed regarding their visitation rights.

IV. Conclusion

[21] The decision of the European Court of Human Rights is the most recent in a series of rulings from the Court finding Germany in violation of Article 8 of the ECHR. In two previous cases the Court found violations related to the denial of the rights of access for fathers of children born out of wedlock. (16) In those cases the legal provisions of the German Civil Code (17) determined that the biological father of children born out of wedlock could only exercise a right of access if the mother agreed or the Court of Guardianship so ordered. That provision gave a less protected position to those fathers than to divorced fathers. The Court found this provision discriminatory with respect to the application of the rights protected by Article 8 of the Convention. (18) While the cases were pending before the European Court of Human Rights, a legislative reform of that right was undertaken. (19) Therefore one could not affirm that the decisions lead to a change of legislation.

[22] In the present case, a change of legislation may not be necessary. The Court clearly based its legal findings on *in concreto* elements of the case. This, however, is probably the judgment's shortcoming; it fails to provide the German authorities with a clear set of standards for the application of the national law regarding parental separation.

Especially in light of the Court's heavy activity in German family over the last year, one could have expected to get some more details from the Court.

(1) ECHR, 26 February 2002, *Kutzner v. Germany*, Request no. 46544/99. Only the French version of the judgment is available under <http://hudoc.echr.coe.int>.

(2) The parents based their application on Articles 6 and 8 of the Convention. The Court, however, limited its ruling, finding only a violation of Article 8. Article 6 reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..." Article 8 reads as follows: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(3) ". . . die Kindeseltern sind intellektuell nicht in der Lage, ihre Kinder ordnungsgemäß zu erziehen".

(4) **Section 1666 Civil Code [Jeopardy to the welfare of the child]:**

1. If the physical, mental or spiritual welfare of the child is in jeopardy due to the abuse of parental care, neglect toward the child, by reason of failure of the parents without fault, or because of the conduct of a third person, the Guardianship Court shall, if the parents are unwilling or unable to avert jeopardy, take steps necessary for the elimination of the jeopardy. The Court may take steps which are effective also against a third person.

2. The Court may substitute declarations of the parents or of one of the parents.

3. The Court may also deprive either parent of the care of property if he violated the right of the child to receive maintenance and there is reason to fear that the future maintenance is in jeopardy.

Section 1666a Civil Code [Separating the child from the parental family; total deprivation of the care for the person]:

1. Measures which involve the separation of the child from parental family, are only permissible, if the jeopardy may not be countered in another manner, even with public assistance.

2. The complete care for the person may only be withdrawn, if other measures failed or if there is reason to assume that they are not adequate for the avoidance of the jeopardy.

[Translation: S. L. Goren, *The German Civil Code*, 1994].

(5) *Kutzner*, paras 54 to 55.

(6) Cf. note 3, Section 1666a of the German Civil Code.

(7) *Kutzner*, para. 56. Citing *Mc Michael v. UK*, 24 February 1995, A No. 307-B, p. 55 para. 87; *Ignaccolo-Zenide v. Rumania*, Request No. 31679/96, para 99.

(8) See also, Frowein/Peukert, *EMRK Kommentar*, p. 349.

(9) *Kutzner*, para 61.

(10) *Id.*, para. 65.

(11) *Id.*, para. 60.

(12) *Id.*, para 70.

(13) *Id.*, para. 76.

(14) *Id.*, para. 75.

(15) *Id.*, para. 81.

(16) ECHR (Fourth Section), *Sommerfeld v. Germany*, 11. October 2001, EuGRZ 2001, 588. ECHR (Fourth Section), *Sahin v. Germany*, 11. October 2001, EuGRZ 2002, 25.

(17) Section 1705 [Parental authority of the mother]:

The illegitimate child is placed under the parental authority of the mother as long as he is minor. The provisions on parental authority over legitimate children apply mutatis mutandis to the relationship between the illegitimate child and his mother, to the extent that the provisions of this title do not indicate otherwise.

Section 1711 [Personal contact between father and he child]:

1. *The person who is entitled to care for the person of the child decides the nature of the contact between a child and his father. (...)*

2. *If the contact with the father serves the welfare of the child, the Guardianship Court may rule that the father be entitled to personal contact with the child. (...)*

(18) *Sahin*, para. 61.

(19) Cf. E. Benda, *Verkehrtes Verkehrsrecht*, EuGRZ, 2002, p. 1 seq.