

THE FACTS

The facts presented by the Parties and apparently not in dispute between them may be summarised as follows:

The applicant is an Austrian citizen, born in 1938 and at present detained in prison in Krems.

On .. May 1968 the applicant was convicted by the Vienna Regional Court (Landesgericht) of robbery, attempted theft and causing damage to public property. The Court of Appeal amended the sentence to one of 12 years' and 6 months' severe imprisonment (schwerer Kerker). The applicant's term of imprisonment will end on .. April 1980.

On .. December 1967 the Regional Court granted a divorce at the request of the applicant's wife. The applicant is, according to this decision, the guilty party.

The applicant's daughter has, since her birth in 1966, been educated and brought up by her mother.

The mother's request to deprive the applicant of his parental power (väterliche Gewalt) was rejected by the District Court (Bezirksgericht) of Central Vienna. However, on .. June 1969 the mother was appointed, with the applicant's approval, as the child's tutor (Vormünderin) for the duration of the applicant's imprisonment. In September 1969 the applicant's divorced wife remarried and no longer wrote to the applicant who consequently received no more news of his daughter. The applicant therefore requested the District Court in Vienna to order his divorced wife or the Youth Officer (Fürsorgebehörde) to send him regular reports concerning the education of his daughter. The mother opposed this request. The Court rejected the request on .. August 1970 stating that only the mother was entitled to educate (erziehungsberechtigt) the girl and the father therefore had no right to interfere. He only had the right to visit his daughter (Besuchsrecht) which, however, he could not exercise because he was in prison. The Court further transferred to the District Court in Floridsdorf the handling of the guardianship matters (Pflegschaft) because both mother and child had moved and were living in the district of the latter Court.

The applicant appealed (Rekurs) against the Vienna District Court's decision insofar as it rejected his request. On .. September 1970 the Vienna Regional Court decided that the appeal was unfounded. The Court stated that, according to Article 176 of the Civil Code (ABGB), a father's right of custody (väterliche Gewalt) is inoperative (außer Wirksamkeit) if he is sentenced to imprisonment for more than one year. Therefore, the applicant could not, in fact, exercise his right of custody and there was no obligation on the part of the tutor to send him reports on his child.

The applicant then requested the District Court at Floridsdorf to give him every six months a report on the welfare and living conditions of his child. He stated that he was well aware that he had no right to interfere with his daughter's education but at least he wanted to know what was happening to her.

On .. May 1971 the District Court at Floridsdorf refused to give the applicant any information concerning his daughter. The Court stated that the applicant had no right to such information because his right of custody was inoperative while he was in prison. The Court further stated that it saw no reason to take any measures in its capacity as guardian of the applicant's daughter (pflegschaftsbehördliche Maßnahmen) because, according to a report from the Youth Office (BJA), the child's step-father was taking good care of the applicant's daughter and treated her as if she were his own child.

The applicant's appeal (Rekurs) against this decision was rejected by the Vienna Regional Court on .. August 1971. The Court confirmed the District Court's finding that the applicant had no right to claim information concerning his child. Against this decision the applicant lodged an appeal (Revisionsrekurs) to the Supreme Court (Oberster Gerichtshof). The appeal was rejected on .. November 1971 as being inadmissible. The Supreme Court stated that, according to Article 16 (1) of the Act on Non-contentious Proceedings (AussStrG) the appeal would only have been admissible if the decision appealed against was clearly in violation of the law (offenbare Gesetzeswidrigkeit). However, in the opinion of the Supreme Court the lower courts were correct in finding that there were no statutory provisions, including Article 8 of the Convention on Human Rights, from which the applicant could derive a right to be kept informed on the life of his child.

The applicant also complained to the Constitutional Court (Verfassungsgerichtshof) of the decision given by the Vienna Regional Court on .. August 1971. At the same time he applied for legal aid (Armenrecht). On ..December 1971 the Constitutional Court rejected the application stating that it had no competence to examine court decisions.

COMPLAINTS

The applicant stated that after some delay and difficulty he finally was given leave to examine the court files concerning his daughter. It was on that occasion only that he allegedly found out that the husband of his divorced wife had, nearly one year before, made an application to adopt the applicant's daughter.

He further alleged that his handcuffs were not taken off when he was taken before the District Court judge in order to examine the files and to state whether he had any objection to the adoption.

He alleged that the refusal of the authorities to give him information concerning his child violates Articles 3 and 8 of the Convention. Furthermore, he was of the opinion that he was subjected to degrading treatment because his handcuffs were not taken off when he was being questioned by the judge as to whether he had any objection to the adoption of his daughter.

Proceedings before the Commission

The Commission decided on 6 April 1973 to communicate the application to the Austrian Government for their observations on the admissibility. After receipt of these observations (15 June 1973) and the applicant's reply (2 July 1973) a Rapporteur was appointed to examine the legal situation under Austrian law.

The Rapporteur instructed the Commission's Secretary in accordance with Rule 45, 2 b) of the Commission's Rules of Procedure to ask the respondent Government for information concerning the applicant's allegation that he was not informed of the adoption proceedings. This information was received on 22 November 1973. The applicant was invited to reply. He informed the Commission's Secretary by letter of 2 December 1973 that he had arranged himself with "the adverse party" and no longer saw any reason to pursue his application. However, in a further letter of 2 February 1974 he again requested the Commission to examine his case.

Summary of the Government's submissions

1) On .. February 1971 the District Court in Florisdorf sent the files concerning the applicant's daughter to the District Court in Krems so that the applicant should have the opportunity of examining them. This was done on .. March 1971.

Following a further petition made by the applicant the District Court in Florisdorf requested the Youth Officer to give a report. On .. May 1971 the Youth Officer reported that in the present circumstances there was no necessity for the authorities to take any measures. It was also mentioned that the child did not even know that the second husband of the applicant's ex-wife was not her father.

2) The applicant's allegation that he was not informed of the adoption proceedings concerning his daughter conducted before the Florisdorf District Court is incorrect.

On .. May 1971, S., the step-father of the applicant's daughter, filed with the Florisdorf Guardianship Court (Pflegerische Gerichtsbarkeit) an application for authorization of the adoption contract concluded on .. April 1971. The Florisdorf District Court, on .. May 1972, forwarded to the District Court of Krems the guardianship files together with a request to allow the applicant to inspect the files and "to ask him, on rogatory commission, whether he agreed to an adoption of the minor girl by S. ... as to the adoptive father ... in accordance with Article 181, paragraph 1, sub-paragraph 1, of the Civil Code, or to state any justified reasons he had to put forward for his refusal.

On .. June 1972 the applicant was again allowed to inspect the files, and he was asked whether he agreed to the envisaged adoption. He emphatically refused to do so. Thereupon he was given a warning of his rights by informing him of the relevant rules of the Civil Code, and he said that he would state in writing the reasons for his refusal to consent.

In an extensive submission to the District Court in Florisdorf of .. June 1972, the applicant stated his reasons which, in his view, were telling against an authorization of the adoption contract by the Court. Pursuant to Article 181, paragraph 3, of the Civil Code this Court will have to examine, among other things, whether those reasons justify the applicant's refusal to consent to the adoption. So far no decision has been rendered concerning an authorization of the adoption contract.

3) The impossibility of living with his child or obtaining information about her is a necessary consequence of the applicant's lawful detention and does not violate Articles 8 or 3 of the Convention.

4) The Convention gives protection against certain interventions by the State (staatliche Eingriffe) but it does not guarantee a right of an individual to ask the State to take certain action in his interest (positive Tun).

The child's mother is herself not obliged to give the applicant the reports requested by him. Such an obligation cannot be derived from the Convention which only imposes obligations on the States.

If Articles 3 and 8 of the Convention were interpreted in the sense that these provisions oblige States to interfere actively and change situations which are inhuman or contemplated adversely to affect family life this would have far reaching consequences. The State would then be obliged to arrange for adequate housing for all who live in inhuman conditions in flats which are in a state of disrepair or which are too small for a family.

5) Apart from that the District Court has sufficiently informed the applicant about his daughter as he was repeatedly given the opportunity to examine the court files concerning his daughter especially the reports of the Youth Officer which were in those files. He also had the opportunity to copy these documents. The applicant therefore has no reason to complain as there is no right to request information in the form of periodical reports concerning his daughter.

6) Each violation of any of the rights guaranteed by the Convention is an inhuman treatment. Article 3 therefore only applies when there is no violation of any other article of the Convention. In the present case the alleged inhuman treatment allegedly violates Article 8. Article 3 consequently does not apply.

7) Even if it were to be assumed that the State has to reserve family life by active measures there is no violation of Article 8 in the present case because the applicant's situation is the normal consequence of his lawful conviction and sentence. The execution of the sentence is justified under Article 8 (2) even if it infringes the applicant's right to family life.

8) Insofar as the applicant complains that he was taken handcuffed before the District Court judge he did not exhaust domestic remedies as he could have lodged a complaint (Beschwerde) against this measure (Articles 103 and 120 of the Austrian Code of Criminal Procedure).

Summary of the applicant's reply

The Government have only mentioned those facts which make him appear to be a dangerous criminal. They did not mention that in the first instance he was sentenced to five years' severe imprisonment only. The applicant considers unjust and too severe the decision of the Court of Appeal which amended his sentence to one of twelve years' and six months' imprisonment.

The applicant states that during his divorce proceedings he had a nervous breakdown and was therefore not in a position to defend his case. His requests for a rehearing were rejected.

He alleges that he was only given permission to examine the court files concerning his daughter after he had made various requests and petitions.

He fears that he will lose his daughter completely if the new husband of his ex-wife is given leave to adopt her.

As regards his complaint that he was taken handcuffed to the court the applicant alleges that this was only done after he had made repeated requests to be informed about his daughter.

He further alleges that he complained to the Public Prosecutor and was then no longer handcuffed.

THE LAW

1) The applicant has complained that the Austrian authorities refuse either to order his wife, or themselves to arrange to give him information concerning his child and in this context he also alleged that he was not promptly informed of the adoption proceedings.

It is true that Article 8 (Art. 8) of the Convention secures to everyone the right to respect for his family life. However, this provision is primarily negative in the sense that it gives protection against unjustified interference with family life by public authorities, but does not oblige the State positively to re-establish conditions of family life already impaired, as in the present case, by divorce and the suspension of the rights of custody of the father.

The applicant's complaint that the judicial authorities neither ordered his wife, nor themselves arranged, to provide him with reports on his child can therefore not be regarded as a violation of Article 8 (Art. 8) of the Convention.

As regards the adoption proceedings, the Government have submitted

copies of the records of the court hearings which show the applicant had, in accordance with Article 181 of the Austrian Civil Code, been requested to consent to the adoption. He was also informed that according to Article 181 (3) of the Civil Code, the competent court could give its consent to the adoption if he gave no valid reasons for refusing his own consent. He was then given the opportunity to submit in writing his objections against the adoption. It is clear therefore that the applicant had full knowledge of the impending adoption proceedings.

An examination by the Commission of these complaints as they have been submitted, including an examination made *ex officio*, does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in the above Article.

2) The applicant has further complained that he was taken handcuffed to the court when he was first given the opportunity to examine the files concerning his daughter. However, under Article 26 (Art. 26) of the Convention, the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant failed to lodge an appeal against the security measures in question and has, therefore, not exhausted the remedies to him under Austrian law. Moreover, an examination of the case as it has been submitted, including an examination made *ex officio*, does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and his application must in this respect be rejected under Article 27 (2) (Art. 27-2), of the Convention.

For these reasons, the Commission declares this application
INADMISSIBLE