

THE FACTS

The facts of the case as submitted by the applicant may be summarised as follows:

The applicant is a German citizen, born in 1925 and resident in H..

He first wrote to the Commission on 10 December 1967 complaining of certain proceedings before the courts in H. and C. relating to his divorce and, in particular, of the evidence given by several witnesses during these proceedings. The Commission's Secretary replied by letter of 13 December 1967 explaining the conditions for lodging an application under Article 25 of the Convention and inviting the applicant to submit further explanations regarding his complaints. No further communication was received from the applicant until he submitted, by letter of 7 September 1969, a complaint against the respondent Government concerning the custody of his children. Following further correspondence the present application was registered on 12 November 1969.

From his statements and from documents submitted by the applicant it appears that he was married in 1956 and that five children, H., E., U., L., and S., were born of this marriage in 1957, 1958, 1960, 1962 and 1963 respectively. It further appears that on .. November 1962 the applicant's wife had brought an action for divorce but had withdrawn her complaint three days later.

In June 1965 the applicant's wife brought again an action for divorce in the Regional Court (Landgericht) of H. as a result of which the marriage was separated by decision of .. April 1966. The Court further decided that both parties were responsible for the breaking up of the marriage. The applicant appealed (Berufung) against that decision to the Court of Appeal (Oberlandesgericht) at C. which dismissed the appeal on .. November 1967 but decided that the plaintiff, i.e. the wife, was predominantly responsible for the breaking up of the marriage. It appears that this decision was communicated to the applicant's lawyer in C. on .. November 1967 and was received by his lawyer in H. on .. December 1967. The decision acquired the force of res judicata three days later.

Subsequently, the courts were called upon to determine the question of custody of the children, both parents claiming such custody of all children. It appears that, while the divorce proceedings were still pending, the mother had considered to remarry and had corresponded with one Mr. P., a German residing in Spain, who was allegedly between 70 and 80 years of age and whom she intended to join in Spain with the children. However, the District Court (Amtsgericht), acting on an application by the applicant, made a provisional order (einstweilige Anordnung) on .. March 1968 enjoining the mother from removing the children without the consent of the guardianship court (Vormundschaftsgericht), pending the decision regarding custody.

Such decision was taken by the H. District Court on .. August 1968. The Court decided that the applicant should have custody of all five children but the right of care (Personensorgerecht) and the right of determining the children's residence (Aufenthaltsbestimmungsrecht) should be exercised by the H. Youth Office (Jugendamt) acting as guardian ad litem (Pfleger).

Both the applicant and his ex-wife appealed (Beschwerde) against the decision of the Regional Court of H.. On .. May 1969 the Court decided that full custody of the children H., E. and U. should be granted to the applicant, whereas the mother should have full custody of L. and S..

The Court found that the situation had changed since the District

Court's decision of .. August 1968 which had refused custody to the wife on the ground of her unbalanced state of mind. This had been caused mainly by an over-production of the thyroid gland, an illness which, according to a medical opinion of the H. Public Health Office dated .. April 1969, had been cured by a successful operation. Moreover, both parents had employment now and resided in separate flats thereby showing the existence of adequate conditions for the upbringing of the children.

The Regional Court further had in mind the children's well-being. According to the Court, it was not possible for the applicant to bring up five children in addition to exercising his profession. This finding was supported by the two reports of the H. Youth Office dated .. August 1968 and .. January 1969. The Court relied in particular on the report of August 1968 which contained a psychological opinion on four of the children. It emerged from this report that L. was closely attached to her mother, and so was S. according to the confirmation obtained from her sisters. Moreover, the separation of the five sisters would not cause any undue emotional stress on them, as no child was alone each having at least one sister as a companion. The Court concluded that in any event, the disadvantages of the present solution were less than those which would arise if all children remained with one parent who was otherwise already over-occupied. Both parents then lodged with the Court of Appeal at C. a further appeal (weitere Beschwerde) against the Regional Court's decision, the applicant with regard to the custody of L. and S., and the mother with regard to the custody of U.. However, on .. August 1969, the Court of Appeal rejected both appeals finding that there had been no violation of the evidence or its appreciation of the well-being of the children.

It appears that the applicant continues his efforts to regain the custody of his two youngest daughters. He submits various letters to the H. District Court and Regional Court requesting that his children, L. and S. should be returned to his custody. He also submits photocopy of a letter from the children to the guardianship court, dated .. September 1969, stating that they did not want to visit their mother any more but wished to stay with their father. It appears, however, that another letter was sent on .. September 1970 by the children H., E. and U. to the effect that they liked to visit their mother and would rather stay with her. The applicant alleges that the children had been forced by their mother to write this letter.

Complaints

The applicant now complains that the courts wrongly considered him as being partly responsible for the breaking up of the marriage. He alleges that he did not want a divorce and that it was entirely his wife's unbalanced state of mind that caused the marriage to break up. Nevertheless, he had been considered partly responsible as a result of false evidence given by a doctor and of the judge's biased opinions. In fact, the Regional Judge had told him privately in September 1969 that in most divorce cases both parties were at fault, and this was ample proof of the judge's bias.

The applicant further complains that the courts wrongly refused him custody of two of his children. He relies on opinions prepared by the Youth Office and the Public Health Office which allegedly considered that granting custody to the mother would not be in the interest of the children's well-being. In fact, this had been recognised by the District Court which granted him custody of all five children. According to the applicant, the presiding judge of the Regional Court of H., Dr. D., made an agreement with his wife's lawyer in accordance with which the children should be separated and this was accomplished by that court's decision of .. May 1969. Furthermore, the Court of Appeal confirmed that decision on illogical grounds and without clarifying matters further. The applicant contends that the mother is in no way able to bring up the children who are thus in an immediate

danger regarding their physical and moral well-being.

The applicant alleges violations of Articles 3, 5 (1), 6 (1), 7 and 8 of the Convention. He requests a decision to the effect that the courts in the Federal Republic of Germany should reconsider the decisions taken against him, keep an exact record of the proceedings and refrain from making insulting remarks to him. They should also bring together his five children who are presently separated.

The applicant also claims damages for himself in the amount of 100,000 DM and for his children L. and S. in the amount of 50,000 DM each.

THE LAW

Whereas, in regard to the applicant's complaints relating to the court proceedings concerning his divorce, it is to be observed that, 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; and whereas the applicant failed to make an appeal the Federal Court (Bundesgerichtshof) against the Court of Appeal's decision of .. November 1967; whereas, therefore, he had not exhausted the remedies available to him under German law; whereas, moreover, an examination of the case as it has been submitted, including an examination 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;

Whereas, therefore, the condition as to the exhaustion of domestic remedies laid down in Articles 26 and 27 (3) (Art. 26, 27-3) of the Convention has not been complied with by the applicant;

Whereas the applicant further complains that he was refused the custody of his daughters S. and L..

Whereas it is true that Article 8 (1) (Art. 8-1) of the Convention guarantees generally the right to respect for private and family life;

Whereas, however, paragraph (2) of Article 8 (Art. 8-2) provides "that 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 for the protection of health and morals or for the protection of the rights and freedoms of others".

Whereas the Commission finds that the family life of the parents with their children does not cease owing to the divorce of the parents; Whereas furthermore, the award of custody of the children to one parent inevitably interferes with the family life of the other parent (see application No. 2808/66, X v. the Federal Republic of Germany);

Whereas, however, the Commission has stated in a number of cases (for instance Application No. 911/60, Collection of Decisions, Vol. 7, p. 7) that the terms of paragraph (2) of Article 8 (Art. 8-2) of the Convention left a considerable measure of discretion to the domestic authorities or courts in taking into account factors in the case which might appear to them to be critical for the protection of the health and morals of the child concerned; whereas nevertheless the Commission has ultimately the duty to judge whether the interference complained of was justified under the provisions of paragraph (2) (Art. 8-2);

Whereas, in the present case, the German courts have based their decisions on the ground that it was not possible for the applicant continually to occupy himself with the bringing up of all his five children in addition to exercising his profession; that the applicant's daughter L. was closely attached to her mother and so was his youngest

daughter S.; that the separation of the five sisters would not cause any undue emotional stress on them as no child was alone each having at least one sister as a companion; that, in any event, the disadvantages of separating the children were less than those which would arise if all children remained with one parent who was otherwise already over-occupied;

Whereas the Commission finds that the decisions taken by the appropriate authorities in this respect were reasonable and in no way exceeded the "margin of appreciation" as regards the measures necessary in the circumstances for the protection of the health and morals of the children concerned within the meaning of Article 8 (2) (Art. 8-2) of the Convention;

Whereas it follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 27, paragraph (2) (Art. 27-2), of the Convention.

Now therefore the Commission DECLARES THIS APPLICATION INADMISSIBLE