

Order of the First Chamber of the First Senate of 9 February 2007
– 1 BvR 217/07, 1 BvQ 2/07 –

in the proceedings

I. on the constitutional complaint

of Mr. G.,

- authorised representative: Lawyer ..., –

against the order of the Naumburg Higher Regional Court (Oberlandesgericht) of
15 December 2006 – 8 UF 84/05 (8 UF 195/05)

– 1 BVR 217/07 –,

II. on an application for the applicant to be granted, by way of a temporary injunction, temporary contact to his son F., continuing the agreement made with the guardian of 16 November 2006

– applicant: Mr. G.,

- authorised representative: Lawyer ..., -

– 1 BVQ 2/07 –.

RULING:

The proceedings 1 BvR 217/07 and 1 BvQ 2/07 are consolidated, to be decided jointly.

The constitutional complaint is not admitted for decision.

This also disposes of the application for a temporary injunction.

FOUNDATIONS:

In his constitutional complaint 1 BvR 217/07, the complainant challenges a decision of the Naumburg Higher Regional Court on contact and custody with regard to his son, who was born in 1999. In the proceedings 1 BvQ 2/07, he seeks a temporary extension of his contact to his son, by way of the issuing of a temporary injunction. 1

I.

1. a) Since his paternity was judicially confirmed, the complainant has been endeavouring to have the custody of his child, born in 1999, transferred to himself and to be granted contact with his child. Immediately after his birth, the child was given up for adoption by his mother, and since then he has lived in a foster family. 2

By an order of 1 March 2001, the Local Court granted the father's application for custody and made arrangements for accompanied contact; after this, by an order of 20 June 2001, the Higher Regional Court overturned the decision by way of a temporary injunction. The constitutional complaint filed against this was unsuccessful (see Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*), Third Chamber 3

of the First Senate, Order of 31 July 2001 – 1 BvR 1174/01 –).

Upon the individual application of the complainant, the European Court of Human Rights (ECHR), in a judgment of 26 February 2004, held that the Federal Republic of Germany had infringed Article 8 of the European Convention on Human Rights because the father of the child had been denied not only custody but also contact (see European Court of Human Rights no. 74969/01, Judgment of 26 February 2004, *Zeitschrift für das gesamte Familienrecht -- FamRZ* 2004, p. 1456).

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b) Thereupon the Local Court, by way of a temporary injunction, granted the complainant a provisional right of contact, in the first instance accompanied. In an order of 14 October 2004, the Federal Constitutional Court held that the order of the Higher Regional Court of 30 June 2004 overturning the decision of the Family Court was unconstitutional (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 111, 307).

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By way of a temporary injunction, the Local Court again granted the complainant contact on 2 December 2004; in an order of 20 December 2004, the Higher Regional Court suspended this too, until the decision in the main proceedings; hereupon the Federal Constitutional Court, by a temporary injunction of 28 December 2004, largely reinstated the decision on contact of the Local Court of 2 December 2004 and finally, in the decision in the main proceedings, in an order of 10 June 2005, overturned the decision of the Higher Regional Court in this respect (see Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts – BVerfGK*) 5, 316).

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From this date on, contact took place on the basis of the provisional decision of the Local Court of 2 December 2004, which had been revived in this way, but there were considerable tensions between the parties involved in the contact arrangements.

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By an order of 14 September 2005, the Local Court made arrangements in the main proceedings for the complainant to exercise his right of contact. First, the court laid down four contact appointments at which the father of the child was to be accompanied by the official guardian. From January 2006, it permitted the complainant contact on the first Saturday of January and thereafter on every second Saturday in the time between 10.00 and 18.00 hours, at first – in January – accompanied by the official guardian. In the holidays, he was allowed one weekday, after consultation with the foster parents.

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Appeals against this were again filed by the complainant, by the Youth Welfare Office as the official guardian and by the children's guardian (*curator ad litem*).

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c) The complainant once more applied for custody of the child to be transferred to himself, and, by an order of 19 March 2004, the Local Court granted this application; after this, the Youth Welfare Office as official guardian and the children's guardian appealed to the Higher Regional Court, and in response to the appeals the Higher Regional Court overturned this decision by an order of 9 July 2004. The complainant

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filed a constitutional complaint against this, and the Federal Constitutional Court, by an order of 5 April 2005 (BVerfGK 5, 161), overturned this decision too and referred the matter back to be decided by a different senate of the Higher Regional Court.

d) By an order of 9 November 2005, the senate of the Higher Regional Court that was now responsible for the case consolidated the two main proceedings, for custody and for contact, to be decided jointly.

On 11 June 2006, the judicially appointed independent expert presented a provisional written family psychology report, which she defined as the final report and explained in the oral hearing of 25 September 2006.

2. By an order of 15 December 2006, the Higher Regional Court dismissed the application of the complainant for transfer of custody as at present unfounded, and made arrangements for the contact of the complainant with the child on the basis that the complainant would have contact with the child every two weeks on Saturday from 11.00 to 18.00 hours and from the weekend of 3-4 March 2007 from 11.00 hours on Saturday until 15.00 hours on Sunday. In school holidays that lasted longer than two weeks, the father could have the child staying with him in the first half of the holidays.

As the natural father (Article 6.2 sentence 1 of the Basic Law (*Grundgesetz* -- GG)), the court stated, the complainant definitely had a right to contact with his child, in particular since, as a result of the provisional contact arrangements of the Local Court of 2 December 2004, confirmed by the Federal Constitutional Court, contact between him and his child had now intensified.

With regard to the principle of proportionality, at present no grave endangerment of the welfare of the child as a result of the contact was apparent. The circumstance that the provisional contact arrangements of 2 December 2004 were conducted only in conditions of considerable tension and not free of constantly recurring conflicts, for which the complainant shared part of the responsibility, did not in itself give rise to such an appreciable endangerment of the welfare of the child that it was advisable to exclude contact. Bearing in mind that contact had been excluded for many years and that as a result the relationship between the complainant and his foster family had been reinforced, the tensions and conflicts that had occurred were not “quite out of the ordinary”, but fundamentally natural and understandable.

The senate was convinced, it stated, that, as a result of the contact carried out, a bond had now been created between the child, who was now seven years old, and the complainant, and the quality of this bond could not be regarded as irrelevant. Admittedly, this bond also comprised an element that unsettled the identity and self-esteem of the child. But in the contact situation, the natural father had succeeded in “reaching” his son “intuitively and with an uncomplicated self-assurance” and in giving him a “space to express his personality as a child”, as a result of which it had been possible for the two to get to know each other, and father and son had entered a “relationship” with each other in the course of their playful interaction with each other.

Since the child had now understood that this was his natural father, breaking off the present contact arrangements would do more harm than good, and therefore it was out of the question to prohibit contact.

In order to achieve the aim of the contact sessions, which was to further intensify the relationship of the natural father to the child, it was not only necessary to significantly change the conduct of the adults. It was also necessary for there to be a fixed time schedule for the contact sessions, so that a formal structure that was perceptible to the child was created, with which all those involved had to comply, with the result that the child was no longer confronted with the question of an order of precedence of the “fathers”. In making arrangements for the contact, the senate said, it had oriented itself to a draft prepared by the official guardian and discussed with the complainant and with the foster parents.

The serious tensions and constantly recurring conflicts when contact took place caused the senate also to make clear and binding arrangements for the times when the child spent the night with the complainant. The court stated that this decision could not be left to the child, since this decision, which repeatedly had to be made again, would put further pressure on him. The legal duty of the natural father and the foster parents to ensure that contact took place with as little pressure as possible may be deduced without difficulty from the provision of § 1684.2 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*).

At present, even paying due regard to the principle of proportionality, an extension of the contact dates was as yet out of the question. According to the report, the result of such an extension would be that the child’s conflict of loyalties would increase and the dangers to his emotional development would grow quite considerably, to the extent where there might be traumatic consequences. A positive intensification of the relationship between the child and his natural father would be possible only if on the one hand the foster parents, despite the fact that until now the child had regarded them as his family, tolerated the fact that the child had made contact with his father, and also sought this contact and would continue to seek it, and on the other hand the family of the child’s natural father accepted that the child at present still had his home with his foster family and felt settled and secure there.

The court admitted the appeal on a point of law to the extent that it refused to transfer custody.

3. In his constitutional complaint, which challenges the order of the Higher Regional Court, the complainant requests the extension of contact in compliance with an agreement for the year 2007 made on 16 November 2006 between himself and the official guardian, according to the complainant’s submissions. The document of 16 November 2006 submitted by the complainant provides for such agreed contact dates in general every two weeks from 11.00 a.m. on Saturday until 12.00 noon on Sunday, and also contact in the winter and summer holidays, at Whitsun and at Christmas. In particular, the complainant challenges a violation of Article 6.2 sen-

tence 1 of the Basic Law.

He submits that the court should not have ignored the contact agreement of 16 November 2006. No reasons are given for the lack of arrangements for public holidays. The complainant states that he always takes part in church events at Whitsun and on St. John the Baptist's Day. The fact that the complainant is a Muslim and would like to spend time with his child on the two high Islamic holidays (bayram) is completely disregarded. 22

The complainant also applies for extended contact, continuing the agreement made with the official guardian of 16 November 2006, by way of temporary injunction proceedings – 1 BvQ 2/07 –. 23

II.

The constitutional complaint is not admitted for decision, because there is no reason to admit it under § 93a.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). The significant constitutional questions have been decided (§ 93a.2 letter a of the Federal Constitutional Court Act). Nor is the admission of the case appropriate in order to enforce the complainant's rights (§ 93a.2 letter b of the Federal Constitutional Court Act), for the constitutional complaint has no prospect of success (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 90, 22 (24 et seq.)). 24

1. The constitutional complaint is inadmissible to the extent that the complainant challenges the rejection of his application for the transfer of custody to himself. The complainant has not exhausted his legal remedies in the non-constitutional courts (§ 90.2 of the Federal Constitutional Court Act). The Federal Court of Justice (*Bundesgerichtshof*) has yet to decide on the appeal on a point of law that has been filed. 25

2. To the extent that the complainant challenges the contact arrangements, there are doubts as to whether the constitutional complaint even satisfies the requirements for substantiation under § 23.1 sentence 2 and § 92 of the Federal Constitutional Court Act. 26

a) For this purpose, the complainant must state the infringement of a fundamental right in a substantiated and logical manner, by designating the right that is alleged to have been infringed and the event that is alleged to have comprised the infringement. In doing this, the complainant must also set out how far the designated fundamental right is claimed to have been infringed by the challenged measure (see BVerfGE 99, 84 (87); established case-law). In particular, this also presupposes a substantiated critical consideration of the grounds of the challenged decision (see BVerfG, Third Chamber of the Second Senate, Orders of 27 April 2000 – 2 BvR 1990/96 and 2 BvR 75/94 –, *Neue Juristische Wochenschrift – NJW* 2000, 3556-3557). 27

b) The constitutional complaint does not satisfy these requirements. The complainant seeks contact with his child in compliance with an agreement of 16 Novem- 28

ber 2006 made with the official guardian, without for his part critically considering the fact that the court, according to its statements, oriented itself to a “concept” developed by the official guardian and discussed with the complainant, and deviated from the ideas of the complainant in the scope and duration of contact only to such a trivial extent that this deviation does not even approach a restriction of contact under § 1684.4 of the Civil Code.

This also applies to the objection that the custody arrangements contain no arrangements for public holidays. The complainant neither states which public holidays in the calendar – in particular with regard to the Islamic holidays – are affected and to what extent they are not covered by the contact arrangements already made, nor does he set out what infringement of a fundamental right is claimed to follow from this. 29

3. At all events, the constitutional complaint has no prospect of success on the merits. 30

The order of the Higher Regional Court of 15 December 2006 does not infringe the complainant’s constitutional right under Article 6.2 sentence 1 of the Basic Law. 31

a) The right of contact of the parent of a child without custody is protected by Article 6.2 sentence 1 of the Basic Law. It enables the parent to satisfy himself regularly as to the child’s physical and mental condition and the child’s development by seeing the child and having a conversation with the child, to maintain the family relation to the child and to preempt alienation, and to do justice to the need of both parties for love (see BVerfGE 31, 194 (206)). If the court is to make a decision on the exercise of the right of contact, it must take into account both the fundamental rights of the parent that are affected and the welfare of the child and his individuality as the subject of a fundamental right (see BVerfGE 31, 194 (205-206); 64, 180 (187-188)). 32

b) The contact arrangements of the Higher Regional Court satisfy these requirements. It is constitutionally unobjectionable that the court, by reason of the serious tensions and constantly recurring conflicts when contact took place, was prompted also to make clear and binding arrangements for the times when the child spent the night with the complainant, the duration of which does not indicate any infringement of the constitution. 33

Against the background of the custody arrangements made, the decision encourages the intensification and facilitation of the development of a family relationship between the complainant and his child. Contact is extended to overnight stays of the child with the complainant and is organised for an indefinite period of time on the basis of clearly defined appointments, in order in this way to give the child a firm and binding time framework, which the court regards as necessary and which is to relieve the child of conflicts of loyalty. 34

With reference to the expert’s report obtained, the court gives reasons in an understandable manner for its refraining from extending the contact sessions beyond this, stating that this would have the consequence that the conflict of loyalties in which the 35

child finds itself would increase and the dangers to the child's emotional development would grow quite considerably, to the extent where there might be traumatic consequences.

4. Further grounds of the decision are dispensed with, § 93d.1 sentence 3 of the Federal Constitutional Court Act. 36

This decision is unappealable. 37

Judges: Papier, Hohmann-Dennhardt, Hoffmann-Riem

**Bundesverfassungsgericht, Beschluss der 1. Kammer des Ersten Senats vom
9. Februar 2007 - 1 BvR 217/07**

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