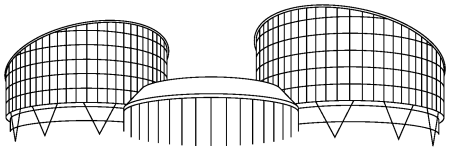

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MOOG v. GERMANY

(Applications nos. 23280/08 and 2334/10)

JUDGMENT

STRASBOURG

6 October 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Moog v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Ganna Yudkivska, *President,*
Angelika Nußberger,
Erik Møse,
André Potocki,
Yonko Grozev,
Carlo Ranzoni,
Mārtiņš Mits, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 6 September 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 23280/08 and 2334/10) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Claus Moog ("the applicant"), on 30 April 2008 and 24 December 2009 respectively. The applicant lodged the second application also on behalf of his son, D.

2. The applicant was represented by Ms E. Kieromin, a lawyer practising in Hamburg. The German Government ("the Government") were represented by their Agent, Mr H. J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged, in particular, that the decisions on contact with his son violated his right to respect for his family life.

4. On 21 November 2012 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Claus Moog, was born in 1972 and lives in Cologne.

A. Background to the case

6. The applicant's son, D., was born on 18 July 1998. The applicant and D.'s mother, Ms K., separated in 1999. D. has been living with his mother ever since.

7. Since 1999, the parents have been in dispute over contact and custody. On 18 May 1999, upon the applicant's request, the Cologne Family Court ("the Family Court") granted the applicant two visitation periods per week. This decision was modified on 24 March 2000 by a settlement according to which the applicant had a right of contact for eight hours every Saturday. Following an application by the applicant to have his contact time increased, the Family Court held on 16 January 2001 an oral hearing, joined the proceedings on contact to the proceedings on custody rights previously initiated by Ms K. in 1999, and commissioned an expert opinion with regard to the custody of D. On 1 October 2001 the applicant requested that the Family Court impose a fine on Ms K., because she was not cooperating. On 16 November 2001, after the appointed psychology expert had informed the Family Court that he considered that contact with the father was in the child's best interest, the parties concluded an in-court settlement according to which contact between the applicant and his son should be re-established. By the end of 2001, the applicant had visited the child twice in kindergarten.

8. On 7 January 2002 the applicant renewed his request to have a fine imposed, because Ms K. was not cooperating. Subsequently, the Family Court issued an interim decision concerning the applicant's contact rights. Following that, the applicant visited his son once in kindergarten. On 20 March 2002 the Family Court warned Ms K. that it would impose a fine amounting to 2,000 euros (EUR) if she did not comply with her obligations under the settlement concluded on 16 November 2001.

9. On 28 July 2002 the court-appointed expert, Dr K., having examined the situation of both parents and their child, submitted her report regarding custody. She considered that the child enjoyed contact with his father. However, both parents tended to instrumentalise the child in the pursuit of their own interests. They did not communicate. Accordingly, there was no basis for joint custody. A transfer of custody to the father would not solve the problem, only shift it. On 22 October 2002 the Family Court granted Ms K. custody while rejecting her prior application for a suspension of contact; it granted the applicant contact with his son for six hours each week. Furthermore, it appointed a contact facilitator (*Umgangspfleger*) charged with facilitating contact periods between the applicant and his son, but declined to appoint a guardian *ad litem* (*Verfahrenspfleger*) on the grounds that the child's interests were sufficiently safeguarded by the court-appointed expert.

10. On 18 February 2003 the Cologne Court of Appeal dismissed Ms K.'s related appeal. It held that Ms K. had "intentionally sabotaged" the

applicant's contact with his son. If she did not ensure implementation of the applicant's contact, the attribution of custody might have to be reconsidered.

11. On 6 August 2003 the applicant again applied to have the Family Court impose a fine because Ms K. was not cooperating. On 12 August 2003 the Family Court ordered Ms K. to ensure the applicant's right to contact, failing which a fine could be imposed. Ms K. lodged an appeal. On 2 December 2003 the Cologne Court of Appeal quashed the decision. It found that, according to Ms K.'s submissions and a report by the treating paediatrician and psychotherapist Dr D., the child showed mental abnormalities after contact with the applicant. According to the doctor this was caused by the conflict between the parents. There was thus no doubt that enforcement of the applicant's right to contact would be harmful to the child.

B. The proceedings at issue

12. On 20 June 2005 Ms K., after having been informed that the applicant had visited D. in his kindergarten, applied for the suspension of contact.

13. On 15 November 2005 the Family Court heard testimony from the child, who declared that he did not wish to see his father anymore.

14. On 18 January 2006 the applicant once again applied for contact.

15. On 30 January 2006 the Family Court decided to obtain an affidavit (*eidesstattlich versicherte schriftliche Zeugenaussage*) from Dr D., the child's paediatrician.

16. On 11 March 2006 Dr D. submitted her affidavit stating that the child had been deeply traumatised by being separated from his mother for forced contact with the applicant from the age of ten months, and by the increasingly hostile relationship between his parents. In 2003, contact with his father was followed by extremely aggressive outbursts. D. was in need of psychotherapy, which could not yet be initiated because of his young age and lack of maturity.

17. On 19 May 2006 the Family Court granted the applicant three contact meetings with the child under the supervision of two court-appointed psychological experts.

18. On 13 September 2006 the experts informed the Family Court that they had been unable to supervise contact because Ms K.'s counsel had informed them that both Ms K. and the child had been advised not to talk to the applicant on medical grounds.

19. On 18 December 2006 the Family Court decided to take a witness statement from the director of D.'s kindergarten as to the child's behaviour and his relationship with the applicant and with his mother.

20. On 13 March 2007 the director of the kindergarten submitted a witness statement. She considered that the contact between the applicant

and the child which had taken place in June 2005 had been beneficial. She strongly recommended continuing contact visits because the child lived in a rigid world out of touch with reality, highly controlled by his mother and without being able to freely choose his playmates or games. The child reacted to this excessive control in a violent manner. To strengthen the development of the child's own personality and to let the child experience the real world, a counterbalancing authority figure outside of the child's mother's family was greatly needed.

21. On 30 March 2007 the applicant lodged a fresh application for custody to be transferred to him.

22. On 24 April 2007 the Family Court issued an interim decision and provisionally granted the applicant contact with the child for seven hours once a month. The court furthermore ordered the mother to prepare D. for contact and to refrain from influencing the child against his father. It found that D. had been pleased when he had met his father. If he had appeared to react emotionally, this had presumably been provoked by his mother. Contact between the applicant and his son was in the child's best interest. The Family Court furthermore announced that it would impose a fine if Ms K. did not cooperate.

23. On the first visit, scheduled for 2 June 2007, the son refused to leave with the applicant.

24. In its statement dated 22 June 2007 the Youth Office gave an account of its conversations with Ms K., the child's paediatrician Dr D., the child's school teacher, the applicant and the child. According to this report Dr D. highly recommended family therapy in order to prepare contact between the child and the applicant. The child declared that he wanted to be left in peace and did not want to see his father. He could imagine visits if his parents stopped quarrelling and if his father did not oblige him to go to the Youth Office. According to the child's school teacher the child needed respite from the legal situation and the applicant lacked empathy. The Youth Office concluded that, with regard to the discrepancy between these submissions, expert opinion was necessary.

25. On 9 July 2007 the Family Court imposed a coercive fine of EUR 3,000 on Ms K. on the ground that she had failed to meet her obligations under the court order of 24 April 2007.

26. On 8 January 2008, in the proceedings regarding custody, the Family Court heard testimony from the child, who declared that he did not want to live with his father and that he did not want to go to court anymore. He added that he only saw his paediatrician rarely.

27. On 8 February 2008, following an appeal by Ms K., the Cologne Court of Appeal quashed the decision to fine her on the grounds that there were serious doubts as to whether Ms K. was able to cooperate in preparing D. for contact with the applicant. According to a medical certificate issued by a psychologist dated 7 January 2008, Ms K. suffered from post-traumatic

stress disorder manifesting itself in uncontrollable agitation patterns, palpitations, feelings of panic, trembling, nausea and feelings of helplessness and despair. This clinical picture raised serious doubts as to her ability to properly prepare the child for contact meetings between himself and the applicant. Moreover, in the custody proceedings the child had stated that he had not wanted to have contact with his father at that time. It was not reasonable to act counter the child's wishes; it was preferable to initiate therapeutic measures. The court further considered that the question of custody rights had to be clarified with regard to Ms K.'s psychological problems and that the hearing of expert opinion in the parallel proceedings on custody rights was indispensable.

28. On 20 March 2008 the Family Court informed the parties that it did not appear possible to implement contact. Accordingly, it would suspend the contact proceedings pending the proceedings on custody rights, in which an expert opinion would be commissioned. Subsequently, during the custody proceedings the Family Court appointed an expert to examine whether it was in the child's best interest that his mother maintained custody.

29. On 25 November 2008 the Family Court held a hearing at which the applicant and the mother's counsel were present.

30. On 12 December 2008, before the expert had submitted her expert opinion, the Family Court decided to suspend the applicant's contact until 31 December 2011. It considered that because of the massive and continuing conflict between the parents, the child would experience a serious conflict of loyalty if contact was enforced. This would seriously jeopardise his welfare. The court further considered that Ms K., because of her own stress disorder, which had been established by medical certificates, was not able to prepare the child for contact meetings with the applicant properly. As had already been pointed out by the court-appointed expert in 2002 (see paragraph 9 above), contact without a minimum of cooperation between the parents would put serious strain on the child. This should be avoided considering his ongoing therapeutic treatment. In view of the lack of co-operation from Ms K., it had to be expected that forced contact would again traumatise the child. Consequently the child's well-being required the suspension of the applicant's contact rights for three years in order to allow the child to undergo trauma therapy (*Traumatherapie*).

31. On 5 January 2009 the applicant appealed against the Family Court's suspension of contact. He complained, *inter alia*, that the Family Court had relied on an outdated expert report, failed to explore the child's true wishes and assumed a traumatisation of the child which had never been confirmed by an independent expert.

32. On 30 January 2009 the expert submitted a preliminary expert opinion in the custody proceedings, stating, *inter alia*, that contact with the applicant would not jeopardise the child's welfare.

33. On 12 May 2009 the Family Court rejected the applicant's application for custody while having regard to the fact that neither the appointed guardian *ad litem* nor the expert had been able to examine Ms K. and the child owing to Ms K.'s refusal. It relied on the expert's preliminary report according to which a transfer of custody was not in the child's best interest, although there was no indication that contact with the applicant would jeopardise the child's welfare. On the other hand there were indications that Ms K.'s obstructive attitude towards contact between the applicant and the child would do so. On 30 June 2009 the Cologne Court of Appeal dismissed a related appeal by the applicant.

34. On 30 June 2009, the Cologne Court of Appeal rendered its decision on the basis of the case-file and confirmed the Family Court's decision to suspend contact (see paragraph 30 above), even though this decision meant that Ms K., who – for whatever reason – had wanted to prevent contact with the applicant, had managed to attain her aim. It observed that the child, when heard by the Family Court on 8 January 2008 during the custody proceedings, had clearly stated that he currently did not wish to see his father. By a letter to the guardian *ad litem* dating from 2008, the child had stated that he did not wish to discuss this issue further, having already expressed his opinion five times. The Youth Office had confirmed on 22 June 2007 that D. wanted to be left in peace and that he had not wanted to see his father, as the latter always "obliged him to go to the Youth Office". This was in line with D.'s statement to his paediatrician in 2007. These statements demonstrated that D. had established an association between his father and the court hearings, which he disliked. Only a period of respite could give D. the feeling that he could decide on his own whether he wished to see his father. Furthermore, this period of time would also allow Ms K. to reflect on her behaviour. She should be aware of the fact that D., when reaching adolescence, would be in urgent need of his father as a counterbalancing authority figure. The applicant's own submissions did not lead to different conclusions. The conflict of loyalty to which D. was exposed was certainly not exclusively imputable to Ms K. Furthermore, it would undoubtedly not be compatible with the child's welfare to separate him from both parents and to place him in a boarding school, as had been suggested by the applicant. Referring to its decision on custody rights given on that same day, the Court of Appeal lastly observed that D. was developing in a positive way.

35. On 10 August 2009 the Federal Constitutional Court declined to consider the applicant's constitutional complaint regarding both contact and custody, without giving reasons (no. 1 BvR 1831/09).

II. RELEVANT DOMESTIC LAW

36. With regard to the relevant provisions of the domestic law the Court refers to its judgment in the case of *Kuppinger v. Germany* (no. 62198/11, §§ 81-86, 15 January 2015).

THE LAW

I. JOINDER OF THE APPLICATIONS

37. Given their similar factual and legal background, the Court decides that the two applications shall be joined by virtue of Rule 42 § 1 of the Rules of Court.

II. SCOPE OF THE APPLICATIONS

38. Having regard to the proceedings before the domestic courts, the Court considers it necessary to clarify at the outset that the scope of the present case is delimited by the complaints raised in the applicant's original applications to the Court. In this regard, the Court notes that in his applications and submissions the applicant made factual statements not only with regard to the contact proceedings, but also with regard to the custody proceedings. Furthermore, he made factual statements regarding decisions taken by the family courts before 2005, but did not include any complaints related to the transfer of custody on his application forms. Neither did he include in these forms any complaints related to decisions taken before 2005. The Court concludes therefore that the applicant, represented by a lawyer, cannot be considered as having validly raised complaints about the domestic courts' refusal to grant custody and the court proceedings predating 2005.

III. THE APPLICANT'S CAPACITY TO ACT ON BEHALF OF HIS SON

39. The Government challenged the applicant's capacity to act on behalf of his son, D., in the proceedings before the Court.

40. The applicant contested that view. Even though the child's mother had sole custody, there was a danger that some of the child's interests might never be brought to the Court's attention if he were not allowed to represent the child in a case of conflict with his mother. The applicant referred to *Petersen v. Germany* ((dec.), no. 31178/96, 6 December 2001) and *Iosub Caras v. Romania* (no. 7198/04, 27 July 2006).

41. The Court reiterates that in cases arising out of disputes between parents, it is the parent entitled to custody who is entrusted with safeguarding the child's interests. In these situations, the position as natural parent cannot be regarded as a sufficient basis to bring an application on behalf of a child (see *Sahin v. Germany* (dec.), no. 30943/96, 10 December 2000, and *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, § 88, 1 December 2009; and *Z. v. Slovenia*, no. 43155/05, § 115, 30 November 2010).

42. The Court observes that the instant case concerns a dispute about contact rights between the applicant and the child's mother, the latter having full custody of the child. Consequently, the applicant does not have standing to act on his child's behalf in the present proceedings. The Court will therefore limit its examination of the case to the part that concerns the applicant (compare *Eberhard and M.*, cited above, § 90).

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. In his first application lodged on 30 April 2008 (no. 23280/08), the applicant complained about the decision by the Cologne Court of Appeal of 8 February 2008 to quash the imposition of a coercive fine, and about the family courts' failure to enable him to have contact to his son. He further complained that the excessive length of the contact proceedings had given Ms K. the opportunity to destroy his relationship with his son. In his second application lodged on 24 December 2009 (no. 2334/10), the applicant complained about the Cologne Family Court's decision of 12 December 2008 to suspend his contact and about the respective appeal decision given by the Cologne Court of Appeal on 30 June 2009. He further complained about the family courts' failure to appoint in due time a guardian *ad litem* in order to safeguard the child's interests, and to obtain an expert opinion. The applicant relied on Article 8 of the Convention, which, in so far as relevant, provides:

> "1. Everyone has the right to respect for his ... family life ...
>
> 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."

A. Admissibility

44. The Government argued that the applicant had, from a solely formal point of view, exhausted domestic remedies in respect of the decisions taken by the family courts in 2008 and 2009. However, in order to be granted contact, the applicant had - since 1 January 2012 - had the opportunity to

start new contact proceedings with the Family Court, as the suspension of access had run out on 31 December 2011. Thus, from a practical point of view, he had at his disposal an effective remedy.

45. As regards the length of the proceedings, the Government pointed out that the applicant had failed to lodge a compensation claim according to the Remedy Act (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*) and that this complaint had to be declared inadmissible for non-exhaustion of domestic remedies.

46. They further submitted that the applicant had failed to lodge a complaint about the alleged failure to appoint a guardian *ad litem* before the domestic courts.

47. The applicant submitted in reply that he had lodged two applications to be granted contact, which were ultimately to no avail. He considered that he could not reasonably be expected to continue court proceedings on contact rights until D. reached his majority.

48. As regards the first observation of the Government, the Court finds that a suspension of contact for three years cannot be redressed by a right to start new contact proceedings afterwards. Accordingly, this objection by the Government must be rejected.

49. As regards the Government's further submission that the applicant failed to lodge a compensation claim under the Remedy Act, the Court refers to its judgment in the case of *Kuppinger* (cited above, §§ 139-141), where the provisions of the Remedy Act were found to be ineffective in proceedings in which their length had had a clear impact on the applicant's family life. Thus, the applicant has exhausted domestic remedies in this respect.

50. The Court further observes that the applicant has not established that he had availed himself of domestic remedies with respect to the Family Courts' alleged failure to appoint a guardian *ad litem* at an earlier stage of the proceedings. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

51. The Court notes that the remaining complaints under Article 8 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

52. The Court notes that the issues of the present case relate firstly to the implementation of the contact order of 24 April 2007 (see paragraphs 55-63 below), secondly to the suspension of contact rights (see paragraphs 64-83 below) and lastly to the conduct of the proceedings (see paragraphs 84-91

below). It is the Court's task to examine whether there has been a failure to respect the applicant's family life with regard to these three issues.

53. The Court notes that where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be maintained. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, among other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005, and *K. and T. v. Finland*, no. 25702/94, § 151, 27 April 2000).

54. Moreover, even though the primary object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life, even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps (see, with further references, *Nazarenko v. Russia*, no. 39438/13, § 61, ECHR 2015 (extracts)).

1. Decision of the Cologne Court of Appeal of 8 February 2008 revoking the imposition of an administrative fine on the child's mother

55. The Court must examine first whether the Cologne Court of Appeal's decision of 8 February 2008 revoking the imposition of an administrative fine on the child's mother constituted a failure to respect the applicant's family life as enshrined in Article 8 of the Convention.

(a) The parties' submissions

56. The applicant complained that the decision taken by the Cologne Court of Appeal on 8 February 2008 not to impose an administrative fine on Ms K. resulted in a *de facto* ending of contact rights. He further submitted that Ms K.'s alleged stress disorder had never been established by an independent medical expert. He contested that Ms K. had ever suffered traumata which could have led to post-traumatic stress disorder.

57. The Government held that the Court of Appeal's decision of 8 February 2008 had been necessary for the protection of Ms K.'s health. A medical certificate of 7 January 2008 had established that Ms K. had been suffering from post-traumatic stress disorder and that she had therefore been unable to prepare D. for contact meetings with the applicant. Furthermore, D. had repeatedly and vehemently refused contact with his father. It was to be expected that forced contact would only intensify the child's rejection.

(b) The Court's assessment

58. With regard to the Cologne Court of Appeal's decision revoking the imposition of an administrative fine on the child's mother, the Court has to determine whether the domestic authorities took all necessary steps as could reasonably be demanded in the special circumstances of this case to facilitate the execution of the contact order of 24 April 2007.

59. It reiterates that in relation to the State's obligation to implement positive measures, Article 8 includes a parental right to have steps taken to reunite them with their children and an obligation on the national authorities to facilitate such a reunion (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I). In cases concerning the enforcement of decisions in the sphere of family law, the Court has repeatedly found that what was decisive was whether the national authorities had taken all necessary steps that could reasonably be demanded in the special circumstances of each case to facilitate the execution (see, *mutatis mutandis*, *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A; and *Nuutinen v. Finland*, no. 32842/96, § 128, ECHR 2000-VIII;).

60. Turning to the circumstances of the present case, the Court notes that the Cologne Family Court, by an interim decision of 24 April 2007, granted the applicant contact on a monthly basis and ordered Ms K. to prepare the child accordingly. On 9 July 2007 the Family Court imposed a coercive fine on Ms K. for having failed to comply with this decision. Upon Ms K.'s appeal, the Cologne Court of Appeal quashed this decision on the grounds that there were serious doubts about whether Ms K. was able to cooperate. The Court of Appeal considered that, according to a private medical certificate prepared by a psychologist, Ms K. suffered from post-traumatic stress disorder. The Court of Appeal further emphasised that Ms K.'s psychological problems had to be clarified and that the ordering of an expert opinion in the parallel proceedings on custody rights was indispensable.

61. The Court observes in this context that the decision to quash the imposition of the administrative fine was primarily based on the assumption that such a fine could have negative effects on Ms K. and consequently on the child. It was thus based on considerations relating to the child's welfare. Given the potential risks to his welfare, the Court accepts that the Cologne Court of Appeal, at that stage of the proceedings and in view of the fact that it was not the final decision on contact rights, stayed within its margin of appreciation when considering that the evidential basis was sufficient for temporarily suspending enforcement of the contact order in order to avert potential risks to the child's welfare.

62. With regard to the swiftness of the enforcement proceedings, the Court observes that the District Court ordered the coercive fine on 9 July 2007, that is to say approximately one month after the first scheduled contact had failed on 2 June 2007. On 8 February 2008 the Court of Appeal

gave its decision on Ms K.'s appeal. The enforcement proceedings thus lasted a total of seven months at two instances. Based on all the material in its possession, the Court cannot find any lack of special diligence in the processing of the enforcement proceedings.

63. There has accordingly been no violation of Article 8 of the Convention in respect of the non-enforcement of the contact order of 24 April 2007.

2. Suspension of contact rights

64. The Court must examine next whether the suspension of the applicant's contact with his son respected his right to respect of his family life as enshrined in Article 8 of the Convention.

(a) The parties' submissions

65. The applicant alleged that the family courts had breached his right to respect for his family life by preventing him from having contact with his son although his ability and willingness to care for him had never been in dispute. They had failed to order an independent expert opinion on the child's best interests and the question of whether the refusal to see his father had been genuine. Referring to his complaints with regard to the decision of the Court of Appeal (see paragraph 56 above), the applicant further stressed that the family courts had neither called into question the private medical certificates submitted by Ms K., even though there were sufficient reasons for doing so, nor had they heard evidence in person from the psychologist treating Ms K.

66. The Government acknowledged that the impugned decisions had interfered with the applicant's right to respect for his family life. They were, however, justified under paragraph two of Article 8 as being necessary in a democratic society. They considered that the suspension of contact rights had been justified by the particular circumstances of the instant case, in order to allow the child to recover and to dissociate his image of the applicant from the constant judicial proceedings. It had been acceptable that the Court of Appeal had not heard evidence from D. in person before deciding on the suspension of contact, as there had been no indication that D. had changed his attitude since his statements before the Family Court in January 2008. Furthermore, forced contact would have entailed the unacceptable risk of again traumatising both mother and child.

(b) The Court's assessment

67. The Court notes at the outset that it was common ground between the parties that the impugned decisions constituted an interference with the applicant's right to family life. The Court sees no reason to depart from this conclusion.

68. The interference mentioned in the preceding paragraph constitutes a violation of Article 8 unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society".

(i) "In accordance with the law"

69. It was undisputed before the Court that the relevant decisions had a basis in national law, namely, Article 1684 § 2 of the Civil Code as in force at the relevant time (see paragraph 36 above).

(ii) Legitimate aim

70. In the Court's view the court decisions of which the applicant complained were aimed at protecting the "health or morals" and the "rights and freedoms" of the child. Accordingly, they pursued legitimate aims within the meaning of paragraph 2 of Article 8.

(iii) "Necessary in a democratic society"

71. It now needs to be ascertained whether, in the light of the relevant principles of the Court's case-law as, *inter alia*, laid down in the case of *Elsholz v. Germany* ([GC] no. 25735/94, §§ 48-50, ECHR 2000-VIII) the suspension of the applicant's contact with his son was "necessary in a democratic society".

72. In determining this issue the Court will consider whether in the present case the domestic courts, in the light of the case as a whole and in the exercise of their margin of appreciation, based their decisions to suspend the applicant's contact for a period of three years on relevant and sufficient grounds (see, with further references, *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII (extracts)).

73. The Court observes that the Family Court, in its decision given on 12 December 2008 (see paragraph 30 above), considered that forced contact would seriously jeopardise the child's welfare, taking into account the parents' lack of cooperation with each other and the fact that Ms K., because of her stress disorder, was not able to prepare the child for contact meetings. In the light of this, the Family Court considered it necessary to suspend contact for three years in order to allow the child to undergo trauma therapy. The Court of Appeal emphasised that D. had clearly and insistently expressed his wish not to see his father.

74. In these circumstances, the Court finds that the national courts' decisions to suspend the applicant's contact with his child can be taken to have been made in the child's best interest, which, because of the serious nature of that interest, must override the applicant's interests. Consequently, the Court is satisfied that the German courts adduced relevant reasons to justify their decision.

75. In assessing whether those reasons were also sufficient for the purpose of Article 8 § 2, the Court will determine whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests (see, *inter alia*, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V (extracts); and *Süß v. Germany*, no. 40324/98, § 89, 10 November 2005). This depends on the particular circumstances of the case. The applicant must notably have been placed in a position enabling him to put forward all arguments in favour of obtaining contact to his child (see *Sommerfeld*, cited above, §§ 68-69).

76. In this respect, the Court observes that in the proceedings before the Family Court, the applicant was given ample opportunity to make statements orally in the court, both in person and through his counsel. He was able to argue his case at the hearing on 25 November 2008 (see paragraph 29 above), at which he was present, and also had access to all relevant information which was relied on by the courts (see *Sommerfeld*, cited above, § 69).

77. The Court further reiterates that, for the reasons adduced by the domestic courts to be sufficient to deny a right of contact, it is also necessary that the national courts' procedural approach be considered reasonable and that it provided sufficient material to reach a reasoned decision on the question of contact in the particular case (see, among others, *Süß*, cited above, § 94). It observes that in the present case the applicant notably objected to the courts' assessment of his child's best interests and to the lack of an evidential basis for this assessment, in particular an expert report (see paragraph 65 above).

78. In this connection, the Court notes that the Family Court had ordered an expert opinion in the custody proceedings and suspended the contact proceedings on 20 March 2008 to await the said opinion (see paragraph 28 above). However, it did not await the completion of the said opinion and instead moved to a decision on 12 December 2008 and relied on the expert opinion obtained in 2002. As the Court has held in the case of *Sommerfeld* (cited above, § 71) it would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of contact to a parent not having custody, but this issue depends on the specific circumstances of each case. In the present case, having regard to the age of the expert opinion on which the Family Court relied – some seven years –, the submissions of the director of the kindergarten, according to which further contact with the applicant would have been beneficial to the child (see paragraph 20 above), and the fact that already in 2007 the Youth Office had recommended to obtain an expert opinion because of the contradictory accounts regarding the child's situation (see paragraph 24 above), the Court is not convinced that there was a sufficient evidential basis to assess whether the suspension of contact had been in the child's best interest without obtaining such an expert opinion.

79. Furthermore, as far as the Family Court relied on private medical certificates provided by Ms K. herself to establish that she was not capable of preparing the child for contact, the Court notes that at the hearing of 25 November 2008 Ms K. had not been present. Taking into account Ms K.'s overall conduct in the proceedings and having regard to the importance of the subject matter, the Family Court should not have been satisfied, in the circumstances, with relying on that private medical attestation without having at its disposal an expert opinion or, at least, without having had the benefit of direct contact with Ms K., when finding that it was the fact that Ms K. suffered from post-traumatic stress disorder which prevented her from preparing the child for contact with the applicant. In this regard the Court notes that the Court of Appeal in its decision of 8 February 2008 found that it was indispensable to obtain expert opinion with regard to Ms K.'s psychological situation (see paragraph 27 above).

80. With regard to the Family Court's reference to the ongoing child's therapeutic treatment and its assessment that the child needed time to respite and to undergo trauma therapy to motivate its decision to suspend contact, the Court notes that these findings do not seem to be based on any evidence. The child's statement in the hearing on 8 January 2008 (see paragraph 26 above), that he only saw his paediatrician on rare occasions, cannot confirm an ongoing treatment in December 2008. The child's paediatrician's statement of 11 March 2006, according to which the child was in need of a psychotherapy but too young for it (see paragraph 16 above), did not mention a trauma therapy at all. Much more, it dated back two years and nine months at the time of the decision.

81. As regards the appeal proceedings, the Court notes that the applicant, in his appeal, challenged the Family Court's decision, *inter alia*, with regard to the evidential basis on which it had based its decision (see paragraph 31 above) and that the Court of Appeal rendered its decision on the basis of the Family Court's case-file (see paragraph 34 above). It relied, in particular, on a letter by the child to his guardian *ad litem* dating from 2008, the Youth Office's statement of 22 June 2007 and the child's paediatrician's statement of 2007 and thus relied on statements which dated between eighteen and twenty-four months back at the time of the Court of Appeal's decision. It further relied on the child's statement in its hearing before the Family Court in January 2008. As regards the issue of hearing the child in court, the Court observes that as a general rule it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33; and *Sahin v. Germany* [GC], no. 30943/96, § 73, ECHR 2003-VIII). In this connection, the child had last been heard sixteen months earlier by the Family Court with regard to the question of custody. In the meantime, on 30 January 2009 the expert had stated that contact with the applicant would not jeopardise the child's welfare. The Court, taking into

account the child's declaration 16 months earlier that it did not want to go to court anymore (compare paragraph 26 above), is not convinced that hearing testimony of the child or obtaining new statements by the guardian *ad litem*, the Youth Office or the child's paediatrician would not have produced relevant information of the child's present attitude. It is thus of the opinion that the Court of Appeal overstepped its margin of appreciation when reaching its decision without obtaining fresh statements by the parties involved.

82. Having regard to the above considerations, and bearing in mind the strict scrutiny required in cases concerning restrictions of contact and the narrow margin of appreciation accorded to the domestic courts in matters concerning a parent's contact rights with a child who has not reached his or her majority (see, among other authorities, *Sommerfeld*, cited above, § 63), the Court considers that the domestic courts have not established that the suspension of the applicant's contact for a period of three years was justified under paragraph 2 of Article 8 of the Convention.

83. There has accordingly been a violation of Article 8 of the Convention in respect of the decision to suspend the applicant's contact rights for a period of three years.

3. The conduct of the contact proceedings

84. The Court will finally proceed to determine whether the conduct of the contact proceedings respected the applicant's right to respect of his family life.

(a) The parties' submissions

85. The applicant submitted that since 1999 he had been unable to have contact with his son due to the ineffectiveness of the domestic proceedings. He was of the opinion that the domestic courts had failed their duty to exercise exceptional diligence in the contact proceedings which had caused irremediable harm to his family life, as he had not been able to build up a stable relationship with his son.

86. The Government was of the opinion that the proceedings had been conducted diligently.

(b) The Court's assessment

87. In relation to the State's positive obligations under Article 8 of the Convention (see paragraph 59 above) the Court has previously considered that ineffective, and in particular delayed, conduct of custody proceedings may give rise to a breach of Article 8 of the Convention (see *Z. v. Slovenia*, no. 43155/05, § 142, 30 November 2010; and *V.A.M. v. Serbia*, no. 39177/05, § 146, 13 March 2007).

88. Turning to the case at hand the Court, at the outset, takes note of the applicant's opinion that the contact proceedings started in 1999 (see paragraph 85 above). However, the Court cannot subscribe to this view. Even though the first set of contact proceedings had been instigated in 1999 (see paragraph 7 above), they were terminated on 22 October 2002, when the Cologne Family Court issued a decision concerning contact (see paragraphs 9 and 10 above). The proceedings at issue were started with the child's mother's request to suspend the applicant's contact rights dated 20 June 2005 (see paragraph 12 above). Within the limits of these proceedings, on 18 January 2006 the applicant applied for a new contact regulation. As the contact proceedings were terminated on 10 August 2009, when the Federal Constitutional Court rejected the applicant's constitutional complaint (see paragraph 35 above), they therefore lasted an average of four years and two months at three levels of jurisdiction. During this time, the Family Court issued two interim decisions granting the applicant contact, which however did not take place subsequently.

89. Furthermore, having regard to the fact that the application of the child's mother aimed at suspending the applicant's contact with his son, the Court considers that the proceedings at issue had a considerable impact on the applicant's family life. Thus, the domestic authorities were under a positive obligation to exercise exceptional diligence in the conduct of the proceedings (compare *Prodělalová v. the Czech Republic*, no. 40094/08, § 62, 20 December 2011).

90. In this regard, the Court observes that the Family Court was responsible for considerable delays in the proceedings, notably the five months period after the new proceedings were instigated until it held a hearing (see paragraphs 12 and 13 above), the three months' period between being informed in September 2006 that contact could not be established and the decision to obtain a further witness statement (see paragraphs 18 and 19 above), and a delay of eight months when the Family Court suspended the contact proceedings in March 2008 (see paragraph 28 above). The Court is of the opinion that the lengthy suspension of the proceedings in order to obtain an expert opinion could only have been justified if the Family Court had awaited this opinion and taken account of its content when assessing the relevant facts in order to reach its decision.

91. The Court also notes that throughout the proceedings the applicant had no contact with his son, despite the two interim orders issued by the Family Court.

92. In the light of the foregoing, and having regard to the considerable impact on the applicant's family life, the Court concludes that the German authorities failed to meet their positive obligations arising from Article 8 of the Convention, as a result of which the applicant's contact with his son was curtailed for the duration of more than four years.

93. There has, accordingly, been a violation of Article 8 of the Convention in the contact proceedings.

V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Complaint about lack of fairness of the proceedings before the family courts

94. The applicant further complained that the proceedings before the family courts had been unfair. He complained, in particular, that the Court of Appeal did not personally hear testimony from the child. He relied on Article 6 of the Convention, providing:

> "In the determination of his civil rights ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

95. The Court notes that this complaint is linked to the one examined above and therefore must likewise be declared admissible.

96. Having regard to the finding relating to the procedural aspect of Article 8, the Court considers that the instant complaint does not raise a separate issue under Article 6 in respect of the fairness of the proceedings before the family courts.

B. Length complaint

97. The applicant also complained that the length of the court proceedings had exceeded a reasonable time, in breach of Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by a ... tribunal ..."

98. The Government submitted that the applicant had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention, as he had not lodged a compensation claim under the Remedy Act.

99. The applicant submitted in reply that a compensation claim would have lacked any prospect of success, bearing in mind that even the Government contested that the length of the proceedings had been excessive.

100. The Court observes, at the outset, that is has examined the conduct of the contact proceedings, its effect on the outcome of these proceedings and the impact on the applicant's family life, within the framework of Article 8 of the Convention. With regard to the length complaint under Article 6 of the Convention, the Court notes that the applicant had access to the claim for just satisfaction, which became available to him under the transitory provision of the Remedy Act upon its entry into force on

3 December 2011. The Court has previously found that the Remedy Act was in principle capable of providing adequate redress for the violation of the right to a trial within a reasonable time and that an applicant could be expected to make use of this remedy, even though it became available to him only after he had lodged his complaint with the Court (see *Taron v. Germany* (dec.), 53126/07, §§ 40-43, 19 May 2012). The Court considers that the applicant has not submitted any reason which would allow the conclusion that the just satisfaction claim in respect of the alleged unreasonable length of the court proceedings would not have had a reasonable prospect of success if pursued by the applicant (see *Kuppinger*, cited above, § 126). The mere fact that the Government contested that the length of proceedings had been excessive is not sufficient to call into question the effectiveness of that legal remedy.

101. This part of the application must thus be rejected for non-exhaustion of domestic remedies in accordance with Article 35 §§ 1 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

103. The applicant claimed an overall sum of EUR 156,314.08 in respect of pecuniary damage. He submitted that the court's failure to implement his contact rights had caused him to suffer severe symptoms of stress and depression, finally forcing him to give up a promising professional career by terminating his employment in March 2002. The sum claimed represented lost income for the years 2003 to 2005 including interest and loss of company pension claims.

104. The Government contested that there had been a causal connection between the applicant's termination of his employment in 2002 and the decisions complained of in the instant proceedings.

105. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

106. The applicant further claimed non-pecuniary damage caused by the loss of contact with his son, the assessment of which he left to the Court's discretion.

107. The Government leaves the assessment of any award for non-pecuniary damage to the Court's discretion.

108. The Court, ruling on an equitable basis, awards the applicant EUR 10,000 in respect of non-pecuniary damage for the violation of his rights under Article 8 of the Convention.

B. Costs and expenses

109. The applicant also claimed EUR 18,934.65 plus interest amounting to EUR 3,709.04 for the costs and expenses incurred before the domestic courts and EUR 2,748.42 for those incurred before the Court.

110. The Government submitted that the sum claimed for the proceedings before the domestic courts was to a large extent made up of amounts that were incurred a long time before the court orders which formed the subject matter of the instant proceedings. The Government further submitted that the applicant had failed to state plausibly which costs he had actually incurred, and to show that he had paid the costs claimed.

111. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred in an attempt to redress the violation of the Convention rights and are reasonable as to quantum. The Court observes that it has found a violation of Article 8 of the Convention with regard to the suspension of contact rights and the conduct of the proceedings. In the light of this, the Court considers it reasonable to award the sum of EUR 4,000 for costs and expenses in the domestic proceedings and the sum of EUR 2,748.42 for the proceedings before the Court.

C. Default interest

112. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications,

2. *Decides* that the applicant has no standing to act on behalf of D.;

3. *Declares* the applicant's complaints under Articles 6 (as regards the alleged unfairness of the proceedings before the family courts) and 8 of the Convention admissible and the complaints under Article 6 of the

Convention about the excessive length of the proceedings and the complaint about the failure to appoint a guardian *ad litem* inadmissible;

4. *Holds* that there has been no violation of Article 8 of the Convention in respect of the non-enforcement of the contact order of 24 April 2007;

5. *Holds* that there has been a violation of Article 8 of the Convention in respect of the decision to suspend the applicant's contact for a period of three years and in respect of the conduct of the contact proceedings;

6. *Holds* that there is no need to examine the complaint concerning the alleged unfairness of the proceedings before the family courts under Article 6 § 1 of the Convention;

7. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 6,748.42 (six thousand seven hundred and forty-eight euros and forty-two cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Ganna Yudkiska
President