CONSEIL DE L'EUROPE

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

FORMER FOURTH SECTION

**CASE OF KUTZNER v. GERMANY**

*(Application no. 46544/99)*

JUDGMENT

STRASBOURG

26 February 2002

**FINAL**

*10/07/2002*

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

**In the case of Kutzner v. Germany,**

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

Mr A. PASTOR RIDRUEJO, *President*,
Mr G. RESS,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mr I. CABRAL BARRETO,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 10 July 2001 and 30 January 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in an application (no. 46544/99) against the Federal Republic of Germany lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two German nationals, Mr Ingo Kutzner and Mrs Annette Kutzner ("the applicants"), on 5 July 1998.

2. The applicants, who had been granted legal aid, were represented by Mr H. Brückner, a lawyer practising in Osnabrück, and the Association for the Protection of the Rights of the Child (*Aktion Rechte für Kinder e.V.*), represented by Mr V. Laubert. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, Federal Ministry of Justice.

3. The applicants alleged that the withdrawal of their parental responsibility for their two daughters had infringed their right to respect for their family life, as guaranteed by Article 8 of the Convention. They also complained that they had not had a fair trial within the meaning of Article 6 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 10 July 2001 the Court declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

8. In a letter of 13 July 2001 the Court invited the parties to supply additional information (Rule 59 § 1). The applicants filed their observations on 31 August and 4 September 2001 and the Government filed theirs on 5 September 2001.

9. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Fourth Section.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

10. The applicants are German nationals who were born in 1966 and 1968 respectively and live at Badbergen (Germany). They are married and have two daughters: Corinna, who was born on 11 September 1991, and Nicola, who was born on 27 February 1993.

### A. Background to the case

11. The applicants and their two daughters had lived since the girls' birth with Mr Kutzner's parents and his unmarried brother on an old farm. Mr Kutzner works on a poultry farm. Mrs Kutzner used to work in a factory, but since losing her job has stayed at home to look after the children and do the housework.

The applicants had attended a special school for people with learning difficulties (*Sonderschule fûr Lernbehinderte*).

12. Owing to their late physical and, above all, mental development, the girls underwent a series of medical examinations. On the advice of one of the doctors and at the applicants' request, they received educational assistance and support from a very early age. Thus, from 1994 Corinna, the elder daughter, received educational assistance (*Frühförderung*), while from 1995 and 1996 respectively, both girls attended a day-nursery school for children with special needs (*Heilpädagogischer Kindergarten*).

13. Between October 1995 and May 1996, Ms Klose, a social worker (*sozialpädagogische Familienhilfe*) visited the applicants' family at home, officially for ten hours a week. The applicants say that she actually spent

only three hours there, as the time she spent travelling had to be taken into account. Relations between her and the applicants rapidly deteriorated, which the applicants say resulted in her preparing a very negative report on them.

14. Ms Klose's report to the Osnabrück District Youth Office (*Kreisjugendamt*) did indeed emphasise negative points: the applicants' intellectual shortcomings, conflictual relations between the family members and the contempt that, initially at least, she had been shown by the family.

15. Following that report the District Youth Office made an application on 13 September 1996 to the Bersenbrück Guardianship Court (*Vormundschaftsgericht*) for an order withdrawing the applicants' parental responsibility for their two children.

## B. The proceedings withdrawing the applicants' parental responsibility

### *1. Proceedings in the Bersenbrück Guardianship Court*

16. On 18 September 1996 the Bersenbrück Guardianship Court appointed Mr Waschke-Peter, a psychologist, to give expert evidence. He delivered his report on 20 November 1996.

17. On 12 February 1997, after hearing evidence from the applicants and the grandparents, the Guardianship Court made an interlocutory order (*einstweilige Anordnung*) withdrawing the applicants' rights to decide where their children should live (*Aufenthaltsbestimmungsrecht*) or to take decisions regarding the children's health (*Recht zur Bestimmung über ärztliche Maßnahmen*), notably on the ground that "[the applicants did] not have the intellectual capacity required to bring up their children properly" ("*die Kindeseltern sind intellektuell nicht in der Lage, ihre Kinder ordnungsgemäss zu erziehen*").

18. From February to July 1997 the girls were placed in the care of the assessment team (*Clearingstelle*) of a private association at Meppen (*Verein für familienorientierte Sozialpädagogik*), which was part of the Society for Family Education (*Gesellschaft für familienorientierte Sozialpädagogik*).

19. In a report dated 18 and 24 April 1997, the chairwoman of the executive board of the society, Ms Backhaus, also requested that the applicants' parental responsibility be withdrawn on the ground that, while the children's IQ was expected to decrease, a new home would afford them a chance to enjoy a relationship that would stimulate the development of their social skills and intelligence (*eine Verflachung des IQ's ist vorprogrammiert, eine Chance haben die Kinder durch eine neue Beelterung, in der über die Beziehung neue Impulse für die Sozial- und Intelligenzentwicklung gesetzt werden*).

20. On 27 May 1997, after hearing further evidence from the applicants and the grandparents, the Guardianship Court withdrew the applicants' parental rights (*Sorgerecht*) over their two children. It relied notably on the finding in the psychologist's report that the applicants were not fit to bring up their children, not through any fault of their own (*unverschuldet erziehungsunfähig*), but because they did not possess the requisite intellectual capacity.

The Guardianship Court found that the applicants lacked the necessary awareness to answer their children's needs. Moreover, they were opposed to receiving any support from social services and, far from being genuine, the consent they had now given to the measures that had been taken was merely a reaction to the pressure they had felt as a result of the proceedings.

The Guardianship Court added that the children's development was so retarded that it could not be corrected by the grandparents or support from social services. Only a foster home – and in Corinna's case this would have to be a professional foster home (*professionelle Pflegefamilie*) – could help the two children, as any less radical measures would be inadequate.

21. On 15 July 1997 the two girls were placed with separate, unidentified (*IncognitoPflege*) foster parents (*Pflegefamilien*) on the register held by the Society for Family Education, which had produced a report on 18 and 24 April 1997 requesting that the applicants' parental responsibility for their children be withdrawn.

22. In letters of 24 January, 23 June and 2 July 1997 the applicants' family doctors said that they considered that the children should be returned to the applicants' care.

*2. Proceedings in the Osnabrück Regional Court*

23. In June 1997 the applicants appealed to the Osnabrück Regional Court (*Landgericht*) against the Guardianship Court's decision of 27 May 1997.

24. From 2 September to 25 November 1997 Mrs Kutzner attended a course to qualify as a childminder (*Qualifizierungskurs für Tagesmütter*); she completed the course and received a certificate.

25. On 29 August 1997 an expert in psychology from the German Association for the Protection of Children (*Deutscher Kinderschutzbund*), a private organisation from which the applicants had sought help, also expressed the view that the children should be returned to their family and receive extra educational support from social services.

26. After these views had been expressed, the Regional Court appointed Mr Trennheuser as a second expert witness in psychology on 9 October 1997. He delivered his report on 18 December 1997. The Regional Court also heard evidence from the applicants, the grandparents, the relevant authority and the expert witness.

27. By a decision of 29 January 1998 the Regional Court dismissed the applicants' appeal on the ground that the relevant provisions of the Civil Code (Articles 1666 and 1666a – see "Relevant domestic law" below) governing the protection of children's interests were satisfied.

The Regional Court referred to the two reports by the experts in psychology.

According to the first report, which had been lodged with the Bersenbrück Guardianship Court on 20 November 1996, the applicants were incapable of bringing up their children because of their own deficiencies and because they felt out of their depth. Bringing in persons from outside the family circle to assist would merely exacerbate existing tensions between the parents and their daughters and the applicants' sense of insecurity. The family was dominated by the grandparents and the applicants were unable to project an image of authority for their children. Moreover, the grandparents, who were incapable of offering support to their own children (the applicants), were no more capable of remedying the intellectual deficiencies presented by their grandchildren.

According to the second expert report – the one delivered on 18 December 1997 – the girls were approximately one year behind in their general development, a factor that was discernible in particular from their speech, which consisted of stammering. Had they not benefited from years of support from the educational and social services, they would probably have ended up in a special school for the mentally disabled and would have been unable to develop normally or lead a normal adult life. The applicants were incapable of helping their daughters to develop their personalities, as they were ill-equipped to understand them or to treat them in an appropriate manner. Scientific studies had shown that parents with deficiencies of that type prevented the development of emotional ties between them and their children. In particular, the knowledge and skills acquired at school were in danger of being stifled in the family environment. The applicants had done no more than to tend to the children's basic needs. There was a risk that in the future the parents would become increasingly aggressive towards their children. Regard being had to all those considerations, separating the children from the family was the only way of eliminating all danger to the children's welfare (*Gefährdung des Kindeswohls*).

The Regional Court noted that the expert witnesses had reached the same conclusion following a thorough analysis. The second expert witness had had due regard to the fact that the applicants had contacted the German Association for the Protection of Children and that Mrs Kutzner had attended a childminding course. However, those factors were not sufficient to enable the Regional Court to rule out all risk of the children's development being harmed.

*3. Proceedings in the Oldenburg Court of Appeal*

28. On 20 March 1998 the Oldenburg Court of Appeal (*Oberlandesgericht*) dismissed the applicants' appeal, holding that there had been no breach of the law. The courts concerned had heard representations from the parties, relied on reports by two expert witnesses and had taken into account the educational assistance measures that had already been implemented, the expert psychological report lodged by the German Association for the Protection of Children on behalf of the applicants and the opinion of the family doctors.

*4. Proceedings in the Federal Constitutional Court*

29. On 26 May 1998 a three-member committee of the Federal Constitutional Court (*Bundesverfassungsgericht*) dismissed an appeal by the applicants.

*5. Expert evidence furnished on behalf of the applicants at the request of the Association for the Protection of the Rights of the Child*

30. On 29 May 1998 Mr Riedl, a professor of educational sciences and Director of the Educational Sciences Institute at the University of Schwäbisch-Gmünd, lodged a report as an expert witness appointed on behalf of the applicants in which he concluded that the children's welfare was not in danger and that the applicants were entirely fit to bring up their children, both emotionally and intellectually. He said in particular that the family provided a successful example of cohabitation between three generations that was desired, planned and well-organised in satisfactory material conditions and in circumstances that permitted both individual and social fulfilment ("*die Familie Kutzner bietet somit ein geglücktes Beispiel für das gewollte, geplante und wohlorganisierte Zusammenleben dreier Generationen in geordneten wirtschaftlichen Verhältnissen und unter positiven individuellen Bedingungen*"). He added that additional measures of educational support could largely compensate for the ground the children would have to make up at school.

31. On 17 November 1999, also at the request of that association, Mr Giese, a professor of law at the Tübingen Institute for the Assessment of Physical and Mental Damage (*Institut für Medizinschaden*), produced a further expert report on behalf of the applicants, in which he concluded that the procedure followed by the German courts in the instant case had contravened Articles 6 and 8 of the Convention.

### C. Restrictions on the applicants' visiting rights

32. As the children had been placed in unidentified foster homes, the applicants were unable to see them for the first six months.

33. They then made an application to the Osnabrück Regional Court, which on 4 December 1997 granted them visiting rights of one hour a month despite opposition from the Youth Office.

34. Contrary to what had been ordered by the Guardianship Court, visits were conducted in the presence of eight representatives from various social services departments and associations. Subsequently, their number decreased, but the Youth Office insisted on visits being accompanied (*begleitetes Besuchsrecht*).

35. Between July and November 1999 the applicants made various attempts to obtain permission to see their children at Christmas or at the start of their eldest daughter's school year, but the Youth Office refused. The applicants applied to the Bersenbrück Guardianship Court and were granted permission to see their eldest daughter at the beginning of the school year.

36. On 8 December 1999 the applicants made a fresh application to the Guardianship Court seeking the right to visit their children for two hours at Christmas.

37. On 21 December 1999 the Guardianship Court dismissed their application. It sought a further report from another psychologist, Ms Sperschneider, in order to establish to what extent and to whom further visiting rights should be granted.

38. Additional information supplied by the parties after the Court had delivered its admissibility decision (see paragraph 8 above) indicates that in her report of 12 May 2000 Ms Sperschneider recommended that the applicants' visiting rights should be increased to two hours a month and that the grandparents should also be permitted to take part in visits once every two months.

39. By an order of 9 October 2000 the Guardianship Court requested the parties to indicate whether they accepted the psychologist's proposal.

40. In a letter of 2 November 2000 the Youth Office said that the applicants would be granted visiting rights in accordance with the arrangements proposed by the psychologist.

41. In a letter of 14 March 2001 the applicants asked the Guardianship Court to issue a decision on the merits.

42. In a decision of 16 March 2001 the Guardianship Court took formal note that an agreement had been reached between the parties concerning the applicants' rights to visit their children and held that it was unnecessary to determine the merits of the case.

### D. The applicants' request for the appointment of a new guardian

43. In a letter of 29 January 2001 the applicants asked Mr Seifert, who as the Osnabrück Youth Office representative acted as the children's guardian, to meet them in order to discuss various issues such as the children's physical and psychological development, arrangements for visiting rights, and a christening ceremony that had been arranged in their home village.

44. Mr Seifert declined such a meeting in a letter of 22 February 2001, saying that the applicants could observe their children's progress for themselves during visits.

45. On 4 March 2001 the applicants wrote to the Bersenbrück Guardianship Court requesting it to terminate the Osnabrück Youth Office's appointment as guardian and to name an independent expert in its place.

46. In a letter of 26 April 2001 Mr Seifert rejected the criticism directed at him by the applicants.

47. In a reply of 17 May 2001 the applicants said that the Youth Office had systematically sought to separate them from their children for good, whereas the opinion of the majority of the experts had been that separation could only be temporary and that the children needed their family of origin. They added that if the experts considered that contact of one or two hours a month under strict supervision was sufficient, then the expert evidence was of little value. Lastly, Ms Sperschneider had spent in all only two hours with the applicants and had shown no interest in what they really thought.

48. In a letter of 12 July 2001 a court clerk (*Rechtspfleger*) replied to the applicants, informing them that the Guardianship Court had rejected their application.

## II. RELEVANT DOMESTIC LAW

49. Article 1666 of the Civil Code (*Bürgerliches Gesetzbuch*) lays down that the guardianship courts are under an obligation to order necessary measures if a child's welfare is jeopardised (*Gefährdung des Kindeswohls*).

50. The first sub-paragraph of Article 1666a provides that measures intended to separate a child from its family are permissible only if it is not possible for the authorities to take any other measure to avoid jeopardising the child's welfare.

51. The second sub-paragraph of Article 1666a provides:

> "Full [parental] responsibility may only be withdrawn if other measures have proved ineffective or have to be regarded as insufficient to remove the danger."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicants alleged that the withdrawal of their parental responsibility for their two daughters had infringed their right to respect for their family life, as guaranteed by Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

53. The Government asserted that the interference in issue was based on Articles 1666 and 1666a of the Civil Code and was necessary for the children's physical and psychological welfare. They said that, after hearing representations from the parties and seeking the opinion of two experts in psychology, the domestic courts had concluded that the applicants' interest in maintaining family life had to yield to the interest of ensuring the children's welfare, as the children's development had been found to have become so retarded that, partly as a result of a lack of cooperation between the applicants and the social services, less radical educational assistance measures had proved insufficient in the past. Indeed, the experts had reached identical conclusions, but had simply stressed different aspects of the problem, something that was not uncommon in such cases and was also explained by the fact that their reports had been prepared at different stages of the proceedings. Furthermore, it had not been possible to take Mr Riedl's report on behalf of the applicants into account, as it had not been lodged until 28 May 1998, that is to say two days after the Federal Constitutional Court had delivered its decision. In any event, that report had been prepared privately and could not be used to challenge the conclusions of the first two experts. Lastly, the Government stressed that there had not been a total severance of contact between the applicants and their children and that there was also contact between the girls' respective foster parents. In conclusion, the dispute concerning the applicants' visiting rights was now settled, as the applicants had accepted Ms Sperschneider's proposals on that subject and were in fact visiting their children in accordance with the suggested arrangements.

54. The applicants questioned the need for the interference and criticised certain aspects of the expert reports commissioned by the domestic courts. In their submission, those reports were neither reliable nor credible, as they proffered entirely different reasons as proof that the children's welfare was in jeopardy. In the first report, the expert had referred to emotional deficiencies in the relationship between the applicants and their daughters, whereas the second expert had laid the emphasis on the parents' intellectual shortcomings. They found it intolerable to be criticised for their low intellectual level, as, if such criteria were to be applied, approximately 30% of parents in Germany would have their parental responsibility for their children withdrawn. The applicants also complained that the experts had failed to examine in detail, as they were required to do by the relevant provisions of civil law, whether alternative measures could be taken, such as appointing another social worker to assist the family, that would obviate the need for parental responsibility to be withdrawn altogether. They stressed that the effects of being separated from their parents had been dramatic for the children and that the children were suffering from "parental alienation" syndrome, a condition recognised by the international scientific community. Lastly, they expressed their disapproval of the decision of the Osnabrück Youth Office to place the children in separate unidentified homes and of its insistence on doing everything possible to keep contact between them and their children to a strict minimum, without seeking to offer support to the family of origin, despite the obligation imposed on them to do so by the Law governing support for children and adolescents (*Kinder- und Jugendhilfegesetz*). They submitted that the unsatisfactory restrictions on their visiting rights were causing the children to become increasingly alienated (*Entfremdung*) from their family of origin and risked causing irreparable damage to the parent-child relationship.

55. The applicants also complained that they been denied a fair trial, as the domestic courts had relied exclusively on the findings of the District Youth Office, the Society for Family Education and the official expert witnesses, without having regard to the reports of the experts called on behalf of the applicants, Mr Riedl and Mr Giese. They relied on Article 6 § 1 of the Convention, the relevant part of which provides:

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

56. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 223, § 44), and that it has previously held that whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8 (see, among other authorities,

*McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 55, § 87, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 99, ECHR 2000-I).

57. In the instant case the Court considers that the complaint raised by the applicants under Article 6 is closely linked to their complaint under Article 8 and may accordingly be examined as part of the latter complaint.

### A. Whether there has been an interference

58. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life (see, among other authorities, *W.*, *B.* and *R. v. the United Kingdom*, judgments of 8 July 1987, Series A no. 121, respectively, p. 27, § 59, pp. 71-72, § 60, and p. 117, § 64; *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no. 130, p. 29, § 59; *Eriksson v. Sweden*, judgment of 22 June 1989, Series A no. 156, p. 24, § 58; *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A no. 226-A, p. 25, § 72; *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 50; *McMichael*, cited above, p. 55, § 86; *Johansen v. Norway*, judgment of 7 August 1996, *Reports* 1996-III, p. 1001-02, § 52; *Bronda v. Italy*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1489, § 51; *Buscemi v. Italy*, no. 29569/95, § 53, ECHR 1999-VI; *Gnahoré v. France*, no. 40031/98, § 50, ECHR 2000-IX; and *K. and T. v. Finland* [GC], no. 25702/94, § 151, ECHR 2001-VII).

59. There is therefore no doubt – and the Government do not contest – that the measures concerned in the present case (the children's continued placement in foster homes and the restrictions imposed on contact between the applicants and their children) amounts to an "interference" with the applicants' rights to respect for their family life.

### B. Whether the interference is justified

60. An interference with the right to respect for family life entails a violation of Article 8 unless it is "in accordance with the law", has an aim or aims that is or are legitimate under Article 8 § 2 and is "necessary in a democratic society" for the aforesaid aim or aims. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see, among other authorities, *Gnahoré*, cited above, § 50 *in fine*).

61. Although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. Thus, 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 developed and take measures that will enable parent and child to be reunited (see, among

other authorities: *Eriksson*, cited above, pp. 26-27, § 71; *Margareta and Roger Andersson*, cited above, p. 30, § 91; *Olsson v. Sweden (no. 2)*, judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90; *Ignaccolo-Zenide*, cited above, § 94; and *Gnahoré*, cited above, § 51).

62. The boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *W., B.* and *R. v. the United Kingdom*, cited above, respectively, p. 27, § 60, p. 72, § 61, and p. 117, § 65; and *Gnahoré*, cited above, § 52).

*1. "In accordance with the law"*

63. The interference in issue was indisputably based on Articles 1666 and 1666a of the Civil Code.

*2. Legitimate aims*

64. The Court considers that there is no doubt that the measures in issue were intended to protect "health or morals" and the "rights and freedoms" of the children.

*3. "Necessary in a democratic society"*

65. The Court reiterates that in order to determine whether the impugned measures were "necessary in a democratic society", it has to consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, among other authorities, *Olsson (no. 1)*, cited above, p. 32, § 68; *Johansen*, cited above, pp. 1003-04, § 64; *Olsson (no. 2)*, cited above, p. 34, § 87; *Bronda*, cited above, p. 1491, § 59; *Gnahoré*, cited above, § 54; and *K and T. v. Finland*, cited above, § 154). It will also have regard to the obligation which the State has in principle to enable the ties between parents and their children to be preserved.

66. In so doing, the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area. However, consideration of what is in the best interest of the child is in any event of crucial importance. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned (*Olsson (no. 2)*, cited above, pp. 35-36, § 90), often at the very stage when care measures are being

envisaged or immediately after their implementation. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, among other authorities, *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55; *Johansen*, cited above, pp. 1003-04, § 64; *K. and T. v. Finland*, cited above, § 154).

67. The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as the importance of protecting the child in a situation in which its health or development may be seriously at risk and the objective of reuniting the family as soon as circumstances permit. When a considerable period of time has passed since the child was first placed in care, the child's interest in not undergoing further *de facto* changes to its family situation may prevail over the parents' interest in seeing the family reunited. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that family relations between the parents and a young child are effectively curtailed (see *Johansen*, cited above, pp. 1003-04, § 64).

68. The Court notes that in the instant case, by a judgment of 27 May 1997, the Bersenbrück Guardianship Court withdrew the applicants' parental responsibility for their two daughters, Corinna and Nicola, who were born in 1991 and 1993 respectively, and ordered their placement with foster parents, notably on the ground that the applicants did not have the requisite intellectual capacity to bring up their children. The Guardianship Court also noted that the children were considerably behind in their emotional and physical development and that the applicants had failed to cooperate with social services.

In a judgment of 29 January 1998 the Osnabrück Regional Court, relying on two reports by expert witnesses, the first of whom stressed the applicants' intellectual deficiencies and the second their lack of emotional support, upheld the Guardianship Court's order placing the children with foster parents.

69. The Court begins by noting that the fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the

"necessity" for such an interference with the parents' right under Article 8 of the Convention to enjoy a family life with their child (*K. and T. v. Finland*, cited above, § 173).

70. The Court recognises that in the instant case the authorities may have had legitimate concerns about the late development of the children noted by the various social services departments and psychologists. However, it considers that both the care order itself and, above all, the manner in which it was implemented were unsatisfactory.

71. It appears that the children benefited from an early age and, indeed, at the applicants' request, from educational support and that the situation became acrimonious as a result notably of a conflict between the applicants and a social worker, Ms Klose, who submitted a very negative report to the Osnabrück Youth Office.

72. Moreover, the opinions of the psychologists, from whom expert evidence was taken at various stages of the proceedings by the domestic courts, were contradictory, if not in their conclusions then at least as regards the reasons relied on (one psychologist referred to the parents' lack of intellectual capacity while the other referred to emotional underdevelopment that made them incapable of contributing to the development of the children's personalities).

73. Moreover, both of the other psychologists, who had been retained as expert witnesses by the German Association for the Protection of Children and the Association for the Protection of the Rights of the Child, and the family doctors urged that the children be returned to their family of origin. They emphasised in particular that the children's welfare was not in jeopardy and that the applicants were entirely fit to bring up their children, both emotionally and intellectually. They said that the children should be given additional educational support. Those conclusions could not be disregarded simply because they emanated from people who were acting on behalf of one of the parties to the proceedings (see paragraph 53 above).

74. Lastly, unlike the position in other cases of the same type that have come before the Court, there have been no allegations that the children have been neglected or ill-treated by the applicants.

75. Accordingly, although the educational-support measures taken initially subsequently proved to be inadequate, it is questionable whether the domestic administrative and judicial authorities have given sufficient consideration to additional measures of support as an alternative to what is by far the most extreme measure, namely separating the children from their parents.

76. The Court further reiterates that a care order should in principle be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child (*Olsson (no. 1)*, cited above, pp. 36-37, § 81). The positive

duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the responsible authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child (*K. and T. v. Finland*, cited above, § 178).

77. However, in the instant case, not only have the children been separated from their family of origin, they have also been placed in separate, unidentified, foster homes and all contact with their parents was severed for the first six months. In addition, the children themselves have at no stage been heard by the judges.

78. Furthermore, the evidence in the case file shows that the applicants were only granted visiting rights after making an application to the court, and visits were in practice systematically obstructed by the Bersenbrück Youth Office, initially being restricted to one hour a month in the presence of eight people who were not members of the family before being increased to two hours a month (with the grandparents being authorised to visit once every two months) by a decision of the Osnabrück Guardianship Court on 9 October 2000.

79. Having regard to the fact that the children were very young, severing contact in that way and imposing such restrictions on visiting rights could, in the Court's opinion, only lead to the children's increased "alienation" (*Entfremdung)* from their parents and from each other.

80. Nor can the issue be regarded as having been resolved, as the applicants have consistently contested not only their children's placement with the foster parents, but also the restrictions imposed on their visiting rights and in practice it would be unfair to criticise them for making use of the arrangements proposed by the domestic courts to at least gain an opportunity to see their children.

81. Having regard to all these considerations, the Court finds that although the reasons relied on by the domestic authorities and courts were relevant, they were insufficient to justify such a serious interference in the applicant's family life. Notwithstanding the domestic authorities' margin of appreciation, the interference was therefore not proportionate to the legitimate aims pursued.

82. Consequently, there has been a violation of Article 8 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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

84. The applicants maintained that the withdrawal of their parental responsibility for their two daughters had caused them pecuniary damage, which they calculated as follows:

(i) 25,700 marks (DEM) in family benefit which they no longer received owing to the fact that the children had been placed in foster homes;

(ii) DEM 1,488, being the sums which the Youth Office had allegedly seized on their account as a financial contribution towards the children's needs in their new homes (however, proceedings were still pending as the applicants had contested the attachment order);

(iii) DEM 18,000 for delays in the building of their house;

(iv) DEM 110,448 for loss of earnings by Mr Kutzner, who had been unable to carry on working owing to the dramatic psychological and physical effects of being separated from her children;

(v) DEM 35,895 for loss of earnings by Mrs Kutzner's mother, who had likewise been prevented from working as a result of the effects of the family situation on her health.

85. The applicants also alleged that they had sustained substantial non-pecuniary damage, their physical and psychological health having suffered as a result of their separation from their children, their children's separation from each other and the restrictions on their visiting rights. They left the issue of quantum to the Court's discretion.

86. The Government expressed no view on the matter.

87. The Court considered that the alleged pecuniary damage was either unsupported by evidence or had not been caused by the violation that had been found. However, it found that the applicants had undeniably sustained non-pecuniary damage as a result of being separated from their two daughters and the restrictions on their visiting rights. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41, it awards them compensation of 15,000 euros (EUR) jointly.

### B. Costs and expenses

88. The applicants' claim for costs and expenses was broken down as follows:

(i) DEM 8,392 for lawyers' fees before the domestic courts;

(ii) DEM 9,602.20 for expert witnesses' fees;

(iii) DEM 7,674.60 for the fees of the Association for the Protection of the Rights of the Child, which had also represented the applicants before the domestic courts and the Court;

(iv) DEM 1,220 for the expenses incurred by the Association for the Protection of the Rights of the Child.

89. The Government did not raise any objections to the claims.

90. According to its settled case-law, the Court will award costs and expenses only in so far as these relate to the violation found and to the extent to which they have been actually and necessarily incurred and are reasonable as to quantum (see, among many other authorities, *Pammel v. Germany*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1114, § 82). With regard to lawyers' fees, the Court reiterates that it does not consider itself bound by domestic scales and practices, although it may derive some assistance from them.

Ruling on an equitable basis, the Court decides to award the applicants jointly the sum of EUR 8,000, from which EUR 350.63 which they have already received in legal aid must be deducted.

### C. Default interest

91. According to the information available to the Court, the statutory rate of interest applicable in Germany at the date of adoption of the present judgment is 7.57% per annum.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds*

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

(i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;

(ii) EUR 8,000 (eight thousand euros), less EUR 350.63 (three hundred and fifty euros sixty-three cents), in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest at an annual rate of 7.57% shall be payable on those amounts;

3. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 February 2002.

Vincent BERGER
Registrar

Antonio PASTOR RIDRUEJO
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Pellonpää is annexed to this judgment.

A.P.R.
V.B.

# CONCURRING OPINION OF JUDGE PELLONPÄÄ

*(Translation)*

I voted in favour of finding a violation of Article 8 in this case. However, I have to disagree with the reasons that led the Court to find a violation. The Chamber "considers that ... the care order in itself and, above all, its implementation were unsatisfactory" (see paragraph 70 of the judgment). While the criticism of the implementation of that measure appears to me to be justified, I disagree with the conclusion that the care order was not in itself satisfactory for the purposes of Article 8.

Although it is true that the procedure that led to the applicants' parental responsibility being withdrawn began with the "very negative" report of Ms Klose (see paragraph 71 of judgment), the fact remains that the concerns expressed by that social worker were to a large extent confirmed in the ensuing proceedings. Thus, two psychologists from whom expert evidence was sought by the domestic courts reached the same conclusion regarding the parents' inability to bring up their children and the need, in the children's interest, to separate them from their parents and subsequently to keep them separated. Contrary to what is suggested in paragraph 72 of the judgment, I do not find any contradictions between the two opinions such as would undermine their credibility.

In view of the national authorities' "wide margin of appreciation in assessing the necessity of taking a child into care" (see paragraph 67 of the judgment) and the procedure that was followed in that connection, which to my mind cannot be criticised, I fail to see how the authorities can be said not to "have given sufficient consideration to additional measures of support as an alternative to what is by far the most extreme measure, namely separating the children from their parents" (see paragraph 75 of the judgment).

In my opinion, what may on the other hand amount to a violation of Article 8 is the manner in which the separation was effected. The two children were placed in different foster homes, all contact with the parents was severed for the first six months and the applicants' right to see their children was severely curtailed even after that period had expired. While I can accept that the reasons given for ordering these measures were also relevant, I am not persuaded that it was necessary to act in such a heavy-handed manner.

In the light of the foregoing, I conclude that the manner in which the applicants' parental responsibility was withdrawn amounted to a violation of Article 8.