Order of the Second Senate of 14 October 2004
– 2 BvR 1481/04 –

HEADNOTES:

1. The principle that the judge is bound by statute and law (Article 20.3 of the Basic Law (Grundgesetz – GG)) includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights (ECHR) as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.

2. In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights.

Order of the Second Senate of 14 October 2004
– 2 BvR 1481/04 –

in the proceedings on the constitutional complaint of the Turkish citizen G.,
…

against the order of the Naumburg Higher Regional Court
a) (Oberlandesgericht) of 30 June 2004 – 14 WF 64/04 –,
b) the order of the Naumburg Higher Regional Court of 30 March 2004 – 14 WF 64/04 –
and the complainant's application for a temporary injunction

…

RULING:

The order of the Naumburg Higher Regional Court of 30 June 2004 – 14 WF 64/04 – violates the complainant's fundamental right under Article 6 of the Basic Law (Grundgesetz) in conjunction with the principle of the rule of law and is reversed.

The matter is referred back for a new decision to another civil senate of the Naumburg Higher Regional Court.

Apart from this, the constitutional complaint is rejected as unfounded.

This also disposes of the application for a temporary injunction.

The Land (state) Saxony-Anhalt is ordered to reimburse two-thirds of the complainant's necessary expenses.

GROUNDS:

A.

1

In his constitutional complaint, the complainant challenges inter alia what he regards as the unsatisfactory enforcement of the judgment of the European Court of Human Rights (ECHR) of 26 February 2004 pronounced in his case and the disregard of international law by the Naumburg Higher Regional Court.

I.

2

1. a) The complainant is the father of the child Christofer, who was born illegitimate on 25 August 1999. The mother of the child, who at first did not name the complainant to the authorities as the father of the child, gave the boy up for adoption one day after his birth and first declared her prior consent to the adoption by the foster parents in a notarial deed of 1 November 1999; she repeated her consent on 24 September 2002. The boy has been living with the foster parents since 29 August 1999.

3

The complainant learned in October 1999 of the child's birth and release for adoption; his contact with the mother of the child had broken off in July 1999. Thereupon he began himself to attempt to adopt his son; this encountered difficulties at first, since his paternity was not recognised. Finally, his paternity was established by a judgment of the Wittenberg Local Court (*Amtsgericht*) of 20 June 2000.

4

b) In an order of 9 March 2001, the Wittenberg Local Court transferred the sole parental custody of Christofer to the complainant in accordance with his application. Before this, there had been a total of four meetings between the child and the complainant by way of access. Upon the appeal of the foster parents and the Wittenberg Youth Welfare Office (*Jugendamt*), which was appointed official guardian after the birth, the Local Court's custody decision was reversed by order of 20 June 2001 of the Naumburg Higher Regional Court, and the complainant's application for transfer of custody was dismissed on the merits. At the same time, the Higher Regional Court, of its own motion, excluded rights of access between the complainant and the boy until 30 June 2002 on the grounds of the best interest of the child.

5

c) The Third Chamber of the First Senate of the Federal Constitutional Court, by an order not stating grounds of 31 July 2001 – 1 BvR 1174/01 – refused to admit for decision the complainant's constitutional complaint against the order of the Higher Regional Court.

6

2. a) The complainant had in the meantime commenced new proceedings at the Local Court for the transfer of the rights of custody and access. On seven separate dates he attempted to have contact with Christofer. He submits that these attempts were unsuccessful because the foster parents were not prepared to cooperate or were not present. Two dates for hearings before the Local Court scheduled for February and July 2003 were cancelled. Thereupon, on 22 July 2003, the Local Court appointed a children's guardian in both the custody and access proceedings.

7

By an order of 30 September 2003, the Naumburg Higher Regional Court dismissed the complainant's application for a temporary injunction to make arrangements for access on the grounds that in the opinion of the court there was continuing tension between the parties and that the legal situation was not clear.

8

b) On 19 January 2001, the application of the foster parents for the adoption of Christofer was received by the Wittenberg Local Court. The Wittenberg Youth Welfare Office as the official guardian of the boy had already given its prior consent to the adoption. After the complainant refused prior consent to Christofer's adoption, the Local Court, by an order of 28 December 2001, gave prior consent to the adoption in substitution for the complainant's absent consent. On 30 October 2002, the Guardianship Court at the Dessau Regional Court (*Landgericht*) dismissed the complainant's application for the adoption proceedings to be suspended until the final decision in the custody and access proceedings. Upon the appeal of the complainant, the Naumburg Higher Regional Court, by an order of 24 July 2003, reversed the decision of the Regional Court. Although the Higher Regional Court refused to suspend the adoption proceedings until the decision in the proceedings before the European Court of Human Rights (on this, see under 3 below), in its decision it pointed out that the competent domestic courts were obliged to take a judgment of the European Court of Human Rights into account if applicable. Instead, the Higher Regional Court suspended the appeal proceedings in the adoption proceedings until the final and non-appealable decision of the new custody proceedings, which were now pending at the Higher Regional Court.

9

3. a) In September 2001, the complainant filed an individual application under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) at the European Court of Human Rights. He challenged in particular a violation of Article 8 of the Convention, which protects the right to respect for private and family life. He submitted that carrying out a forced adoption in disregard of the rights of the natural father was a flagrant violation of human dignity and the fundamental right to respect for family life. He stated that he had the right to bring up his son himself.

10

In a judgment of 26 February 2004, a chamber of the Third Section of the ECHR declared unanimously that the decision on custody and the exclusion of the right of access violated Article 8 of the Convention. On the basis of Article 41 of the Convention, the ECHR awarded the complainant EUR 15,000.00 in damages and EUR 1,500.00 to reimburse costs and expenses (see ECHR, No. 74969/01, Judgment of 26 February 2004 – Görgülü).

11

aa) With regard to the right of custody, the ECHR first referred to its case-law, under which in cases where family bonds to a child are shown to exist, the state must act in such a way that these bonds could develop further. According to the ECHR, this gives rise to the duty under Article 8 of the Convention to endeavour to reunite a natural parent with his or her child (ECHR, loc. cit., no. 45, with further references). In consideration of the fact that the complainant is Christofer's natural father and undisputedly willing and able to take care of him, the Higher Regional Court did not examine all possible ways of solving the problem (ECHR, loc. cit., no. 46).

12

bb) With regard to the right of access, the ECHR came to the conclusion that the grounds on which the Naumburg Higher Regional Court based its decision to exclude the complainant's access to his child for the period of one year were not sufficient to justify such a serious encroachment upon the complainant's family life. It held that notwithstanding the margin of discretion of the domestic authorities, the encroachment was therefore disproportionate with regard to the lawfully pursued goals (ECHR, loc. cit., no. 50). In the present legal matter, it stated, it must be made possible for the complainant at least to have access to his child (ECHR, loc. cit., no. 64).

13

4. a) Thereupon, in the parallel proceedings on custody, the Wittenberg Local Court transferred sole parental custody to the complainant by an order of 19 March 2004 in accordance with his application. In addition, the Local Court, of its own motion by an order of the same date and with reference to this custody decision, issued a temporary injunction on the access rights of the complainant to his son. He was given the right, from April 3 2004, to have access to his son for two hours every Saturday, until there was a final and non-appealable decision in the custody proceedings.

14

b) The official guardian and the children's guardian appealed against the decision of the Local Court on access rights. The Naumburg Higher Regional Court first, by order of 30 March 2004, suspended the execution of the temporary injunction, and by a further order of 30 June 2004 cancelled the temporary injunction.

15

It held that arrangements for access could be made only on application. Since this integral requirement had not been satisfied, the order of the Local Court, issued without an

application, lacked a basis under procedural law. This applied all the more in view of the fact that the complainant's urgent application had been dismissed as early as in September 2003 and that the reasons for dismissal that were decisive at that time in principle continued in existence unchanged. Granting the right of access of the court's own motion was generally excluded and could have been ordered at most for the welfare of the child, but not in the interest of the child's father, which alone was affected here. The boy was fully integrated in the foster family and was clearly happy there.

16

The order of the Local Court on access, which was admissibly challenged, also proved to be unjustified on the merits, for there was no need to make arrangements, after the proceedings had been continuing for approximately one and three-quarter years, for an urgent measure that had not been applied for, even taking into account the decision of the ECHR that had been made in the meantime.

17

Nor could the issuing of a temporary injunction be justified by the decision of the ECHR. It was true that the decision showed that the exclusion of access ordered in June 2001 had violated the rights of the complainant and father of the child under Article 8 of the Convention and that – under no. 64 of the judgment – the Federal Republic of Germany, by reason of its duty under Article 46 of the Convention, was obliged to grant the complainant at least the right of access. But the judgment bound only the Federal Republic of Germany as a subject of public international law, but not its bodies, authorities and the bodies responsible for the administration of justice, which are independent under Article 97.1 of the Basic Law. The effect of the judgment, therefore, subject to a change of domestic law, is limited as a matter of law and as a matter of fact to establishing the sanctioning of what in the opinion of the ECHR was a past violation of law. The judgment of the ECHR remained a judgment that at all events for the domestic courts was not binding, without any influence on the finality and non-appealability of the decision appealed against. Where a decision of the ECHR established that a sovereign German act was contrary to the Convention, neither the European Convention on Human Rights nor the Basic Law created an obligation to accord to that decision the power to reverse finality and non-appealability.

18

As a result of the status of the European Convention on Human Rights as ordinary statutory law below the level of the constitution, the ECHR was not functionally a higher-ranking court in relation to the courts of the States parties. For this reason, neither in interpreting the European Convention on Human Rights nor in interpreting national fundamental rights could domestic courts be bound by the decisions of the ECHR.

19

Furthermore, as a result of the passage of time, both the relevant factual position and the substantive and procedural legal position had since changed with lasting effect. If only for this reason, there could be no binding of any nature to the decision of the ECHR, which did not deal with purely procedural questions of temporary protection of the law.

II.

20

In his constitutional complaint, the complainant challenges a violation of his fundamental rights under Article 1, Article 3 and Article 6 of the Basic Law, and of the right to fair trial. At the same time he applies for a temporary injunction on access to his son to be issued.

21

To the extent that the complainant relies on a violation of Article 6 of the Convention (a fair trial), he also considers that there has been a violation of public international law. He submits that he is injured as the child's natural father by the challenged order of the Higher Regional Court of 30 June 2004, because the court, on the basis of an error of law, proceeds on the assumption that the decision of the ECHR relates only to the past. In this, the Higher Regional Court fails to appreciate that the ECHR in its decision unequivocally calls for access in the future. He states that a decision of the ECHR binds the Higher Regional Court for the future too; otherwise the ECHR would not have repeatedly pointed out that the future conduct of the German authorities and courts dealing with the case in future has to orient itself to the ECHR's interpretation of the law.

22

In addition, he submits, the arguments of the Higher Regional Court are based on an error of law, for example because Article 97.1 of the Basic Law, which is cited, is not relevant to the present case. It is not a question of the independence of the court, but of a specific binding effect of the decision of the ECHR. The ECHR specifically decided that the father of the child should be granted access immediately, in order that the family bonds could be strengthened. The interpretation of law of the Higher Regional Court, he states, is in violation of public international law.

III.

23

The Federal Ministry of Justice, the State Chancellery of the *Land* of Lower Saxony and the Ministry of Justice of the *Land* of Saxony-Anhalt, and also the Youth Welfare Office, the children's guardian and the foster parents submitted opinions in the proceedings.

B.

24

The constitutional complaint is inadmissible to the extent that the complainant challenges the order of the Higher Regional Court of 30 March 2004. The time limit in § 93.1 sentence 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*), which provides that the constitutional complaint must be filed and grounds be given within one month after the service or informal notification of the decision, was not complied with.

25

It is true that an order suspending the enforcement of a temporary injunction is an interim decision, which in general cannot be separately challenged by a constitutional complaint (see *Entscheidungen des Bundesverfassungsgerichts* (Decisions of the Federal Constitutional

Court – BVerfGE) 58, 1 (23) with further references). However, in cases in which there is an urgent interest warranting protection, there may be a direct decision on the constitutionality of an interim decision, instead of a decision being made later together with the review of the final decision. In assessing whether the requirements for an exception to the rule are present, particular account should be taken as to whether the interim decision creates a long-term legal disadvantage for the person affected, and this disadvantage could no longer or not completely be removed (see BVerfGE 1, 322 (324-325; 58, 1 (23)).

26

In its order of 30 March 2004, the Naumburg Higher Regional Court suspended the enforcement of the temporary injunction of the Local Court under §§ 621.g, 620.e, 621.1 nos. 1 and 2 of the Code of Civil Procedure (*Zivilprozessordnung – ZPO*) in conjunction with § 1684.4 sentences 1 and 2 of the Civil Code (*Bürgerliches Gesetzbuch – BGB*). The result of the decision was that the complainant was unable to have the access to his son that the Local Court had granted him. In this respect, the decision entailed a legal disadvantage for the complainant. For this reason, he should have challenged the order of 30 March 2004 separately by a constitutional complaint. The constitutional complaint received by telefax at the Federal Constitutional Court on 20 July 2004 did not comply with the time limit laid down in § 93.1 sentence 1 of the Federal Constitutional Court Act for such a challenge.

27

To the extent that the constitutional complaint challenges the order of 30 June 2004, the procedural requirements for the admissibility are satisfied.

C.

28

The constitutional complaint is well-founded. In its order of 30 June 2004, the Higher Regional Court violated Article 6 of the Basic Law in conjunction with the principle of the rule of law.

29

The authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the ECHR in making their decisions (I.). The challenged decision of the Higher Regional Court does not do justice to this obligation, since the court does not pay sufficient attention to the judgment of the ECHR of 26 February 2004 in the case of the complainant (II.).

I.

30

In the German legal system, the European Convention on Human Rights has the status of a federal statute, and it must be taken into account in the interpretation of domestic law, including fundamental rights and constitutional guarantees (1.). The binding effect of a decision of the ECHR extends to all state bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create

a situation that complies with the Convention (2.). The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law (3.). A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law (4.).

31

1. a) The European Convention on Human Rights and its protocols are agreements under public international law. The Convention leaves it to the States parties to decide in what way they comply with their duty to observe the provisions of the Convention (ECHR, Judgment of 6 February 1976, Series A20, no. 50 – Swedish Engine Drivers Union; ECHR, Judgment of 21 February 1986, Series A98, no. 84 – James and Others; see Geiger, *Grundgesetz und Völkerrecht*, 3rd ed. 2002, 405; Ehlers, in: idem (ed.), *Europäische Grundrechte und Grundfreiheiten*, 2003, § 2 marginal nos. 2-3). The federal legislature consented to the above treaty in each case by a formal statute under Article 59.2 of the Basic Law (Act on the Convention for the Protection of Human Rights and Fundamental Freedoms, *Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten* of 7 August 1952, Federal Law Gazette (*Bundesgesetzblatt – BGBl*) II, p. 685; by the proclamation of 15 December 1953, Federal Law Gazette 1954 II p. 14, the Convention entered into force for the Federal Republic of Germany on 3 September 1953; there was a new proclamation of the Convention as amended by the 11th protocol in Federal Law Gazette 2002 II p. 1054). In doing this, the federal legislature transformed the Convention into German law and made an order on the application of the law to this effect. Within the German legal system, the European Convention on Human Rights and its protocols, to the extent that they have come into force for the Federal Republic of Germany, have the status of a federal statute (see BVerfGE 74, 358 (370); 82, 106 (120)).

32

This classification means that German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government. But the guarantees of the European Convention on Human Rights and its protocols, by reason of this status in the hierarchy of norms, are not a direct constitutional standard of review in the German legal system (see Article 93.1 no. 4.a of the Basic Law, § 90.1 of the Federal Constitutional Court Act). A complainant can therefore not directly challenge the violation of a human right contained in the European Convention on Human Rights by a constitutional complaint before the Federal Constitutional Court (see BVerfGE 74, 102 (128) with further references; Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 1 March 2004 – 2 BvR 1570/03 –, *Europäische Grundrechte-Zeitschrift – EuGRZ* 2004, p. 317 (318)). However, the guarantees of the Convention influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law - and this the Convention itself does not desire (see Article 53 of the Convention; see BVerfGE 74, 358 (370); 83, 119 (128); Order of the Third Chamber of

the Second Senate of the Federal Constitutional Court of 20 December 2000 – 2 BvR 591/00 –, *Neue Juristische Wochenschrift – NJW* 2001, pp. 2245 ff.).

33

b) This constitutional significance of an agreement under international law, aiming at the regional protection of human rights, is the expression of the Basic Law's openness towards international law (*Völkerrechtsfreundlichkeit*); the Basic Law encourages both the exercise of state sovereignty through the law of international agreements and international cooperation, and the incorporation of the general rules of public international law, and therefore is, if possible, to be interpreted in such a way that no conflict arises with duties of the Federal Republic of Germany under public international law. The Basic Law has laid down in its programme that German public authority is committed to international cooperation (Article 24 of the Basic Law) and to European integration (Article 23 of the Basic Law). The Basic Law has granted the general rules of public international law priority over ordinary statute law (Article 25 sentence 2 of the Basic Law) and has integrated the law of international agreements, by Article 59.2 of the Basic Law, into the system of the separation of powers. In addition, it has opened the possibility of joining systems of mutual collective security (Article 24.2 of the Basic Law), created the duty to ensure the peaceful settlement of international disputes by way of arbitration (Article 24.3 of the Basic Law) and declared that the disturbance of the peace, and in particular preparing a war of aggression, is unconstitutional (Article 26 of the Basic Law). In this complex of norms, the German constitution, as is also shown by its preamble, aims to incorporate the Federal Republic of Germany into the community of states as a peaceful member having equal rights in a system of public international law serving peace (see also BVerfGE 63, 343 (370)).

34

However, the Basic Law did not take the greatest possible steps in opening itself to international-law connections. On the domestic level, the law of international agreements is not to be treated directly as applicable law, that is, without an Act subject to the consent of the German parliament under Article 59.2 of the Basic Law, and – like customary international law (see Article 25 of the Basic Law) – not endowed with the status of constitutional law. The Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the viewpoint of domestic law only by domestic law itself; this is shown by the existence and the wording of Article 25 and Article 59.2 of the Basic Law. The commitment to international law takes effect only within the democratic and constitutional system of the Basic Law.

35

The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted.

36

The Basic Law is intended to achieve comprehensive commitment to international law, cross-border cooperation and political integration in a gradually developing international community of democratic states under the rule of law. However, it does not seek a submission to non-German acts of sovereignty that is removed from every constitutional limit and control. Even the far-reaching supranational integration of Europe, which accepts the order to apply a norm, when this order originates from Community law and has direct domestic effect, is subject to a reservation of sovereignty, albeit one that is greatly reduced (see Article 23.1 of the Basic Law). The law of international agreements applies on the domestic level only when it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law.

37

c) On this basis, the legal effect of the decisions of an international court that was brought into existence under an international agreement is determined according to the content of the incorporated international agreement and the relevant provisions of the Basic Law as to its applicability. If the Convention law of the European Convention on Human Rights, and with it the federal legislature on the basis of Article 59.2 of the Basic Law, has provided that the legal decisions are directly applicable, then they have this effect below the level of constitutional law. Under domestic law, it is first the duty of the competent nonconstitutional courts to establish this legal effect.

38

2. a) The decisions of the ECHR have particular importance for Convention law as the law of international agreements, because they reflect the current state of development of the Convention and its protocols. Convention law itself accords varying legal effects to the ECHR's decisions on the merits. Under Article 42 and Article 44 of the Convention, the judgments of the ECHR become final and thus formally non-appealable. In Article 46 of the Convention, the States parties have agreed that in all legal matters to which they are party they will abide by the final judgment of the ECHR. It follows from this provision that the judgments of the ECHR are binding on the parties to the proceedings and thus have limited substantive res judicata (see H.-J. Cremer, in: Grote/Marauhn (eds.), *Konkordanzkommentar*, 2004, *Entscheidung und Entscheidungswirkung*, marginal nos. 56–57 with further references).

39

The substantive res judicata in individual application proceedings under Article 34 of the Convention is restricted by the personal, material and temporal limits of the matter in dispute (see Order of the Second Senate of the Federal Constitutional Court (preliminary examination committee) of 11 October 1985 – 2 BvR 336/85 – Pakelli, *Europäische Grundrechte-Zeitschrift* 1985, p. 654 (656); see also E. Klein, *Binding effect of ECHR judgments*, *Festschrift für Ryssdal*, 2000, p. 705 (pp. 706 ff.)). The decisions of the ECHR in proceedings against other States parties merely give the states that are not involved an occasion to examine their domestic legal systems and, if it appears that an amendment may be necessary, to orient themselves to the relevant case-law of the ECHR (see Ress, *Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane*, *Europäische Grundrechte-Zeitschrift* 1996, p. 350). In this respect, Convention law has no provision comparable to § 31.1 of the Federal Constitutional Court Act, under which all the federal and *Land* constitutional bodies and all courts and authorities are bound by the decisions of the Federal Constitutional Court. Article 46.1 of the Convention provides only that the State party

involved is bound by the final judgment with regard to a specific matter in dispute (res judicata).

40

b) In the question of fact, the ECHR pronounces a declaratory judgment; the decision establishes that the State party in question – with regard to the specific matter in dispute – complied with the Convention or acted in contradiction to it; however, there is no judgment of cassation that would directly quash the challenged measure of the State party (see Ehlers, loc. cit., § 2 marginal no. 52; Polakiewicz, *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte*, 1993, pp. 217 ff.; Steinberger, *Human Rights Law Journal* 1985, p. 402 (407)).

41

If it is declared that there has been a violation of the Convention, the first consequence is that the State party may no longer hold the view that its acts were in compliance with the Convention (see Frowein, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. VII, 1992, § 180 marginal no. 14). In principle, the decision also obliges the State party affected with regard to the matter in dispute to restore, if possible, the state of affairs without the declared violation of the Convention (see Polakiewicz, loc. cit, pp. 97 ff.; on the possibility of attaining the goal of restitutio in integrum, see the Recommendation of the Committee of Ministers of the Council of Europe No. R (2000) 2 of 19 January 2000). If the violation that has been found is still continuing, for example in the case of continued arrest in violation of Article 5 of the Convention or an encroachment upon private and family life in violation of Article 8 of the Convention, the State party is under an obligation to end this state (see most recently ECHR, No. 71503/01, Judgment of 8 April 2004, no. 198 – Assanidze, *Europäische Grundrechte-Zeitschrift* 2004, p. 268 (275); see also Breuer, *Europäische Grundrechte-Zeitschrift* 2004, p. 257 (259); Grabenwarter, *European Convention on Human Rights*, 2003, § 16 marginal no. 3; Polakiewicz, loc. cit., pp. 63 ff.; Villiger, *Handbuch der Europäischen Menschenrechtskonvention*, 1999, § 13 marginal no. 233). The State party would therefore commit a new violation of the European Convention on Human Rights if it failed to terminate or repeated its conduct that has been established to be contrary to the Convention (see E. Klein, *Binding effect of ECHR judgments*, *Festschrift für Ryssdal*, 2000, p. 705 (708)). However, it should be taken into account that the effect of the decision relates only to the res judicata and that the factual and legal position may change before new domestic proceedings to which the complainant is a party.

42

c) The fact that the ECHR may award the complainant a "just compensation" in the form of money if the domestic law of the State party involved permits only inadequate compensation (see Article 41 of the Convention) shows that the Convention allows the State party involved some latitude with regard to the correction of decisions that have already been made and that are non-appealable.

43

However, in its more recent case-law relating to Article 41 of the Convention, the ECHR points out that the States parties, in ratifying the Convention, agreed to ensure that their domestic legal systems are in accordance with the Convention (Article 1 of the Convention).

It is therefore, according to the ECHR, for the defendant state to remove every obstacle in domestic law that prevents a redress of the complainant's situation (see ECHR, loc. cit., *Europäische Grundrechte-Zeitschrift* 2004, p. 268 (275) with reference to ECHR, No. 39748/98, Judgment of 17 February 2004, no. 47 – Maestri).

44

If the State party affected is ordered to pay compensation to the successful complainant under Article 41 of the Convention, this judgment of the ECHR creates an obligation to perform (see Stöcker, *Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte in der Bundesrepublik*, *Neue Juristische Wochenschrift* 1982, p. 1905 (1908)). The granting of compensation is not necessarily part of the decision in the principal proceedings, but may be made at a later date, in order to give the parties the opportunity to reach an amicable agreement. In this way, Convention law recognises that in general only the State party affected can assess what legal possibilities of action exist in the national legal system for the enforcement of the decision.

45

d) The legal effect of a decision of the ECHR, under the principles of public international law, is directed in the first instance to the State party as such. In principle, the Convention takes a neutral attitude towards the domestic legal system, and, unlike the law of a supranational organisation, it is not intended to intervene directly in the domestic legal system. On the domestic level, appropriate Convention provisions in conjunction with the consent Act and constitutional requirements (Article 20.3, Article 59.2 of the Basic Law in conjunction with Article 19.4 of the Basic Law) bind all organisations responsible for German public authority in principle to the decisions of the ECHR.

46

This legal position corresponds to the conception of the European Convention on Human Rights as an instrument for protection and for the enforcement of particular human rights. The obligation of the States parties, integrated into federal law by the consent Act, to create a domestic instance at which the person affected can have an "effective remedy" against particular conduct by the state (Article 13 of the Convention) already extends into the domestic structure of the state system and is not restricted to the executive branch, which is competent to act externally. In addition, the States parties must guarantee the "effective implementation of any of the provisions" of the European Convention on Human Rights in their domestic law (see Article 52 of the Convention), which is possible in a state under the rule of law governed by the principle of the separation of powers only if all the organisations responsible for sovereign power are bound by the guarantees of the Convention (on this, see Order of the Second Senate of the Federal Constitutional Court (preliminary examination committee) of 11 October 1985 – 2 BvR 336/85 – Pakelli, *Europäische Grundrechte-Zeitschrift* 1985, p. 654 (656)). In this view, the German courts too are under a duty to take the decisions of the ECHR into account.

47

3. The binding effect of decisions of the ECHR depends on the area of competence of the state bodies and the relevant law. Administrative bodies and courts may not free themselves from the constitutional system of competencies and the binding effect of statute and law

(Article 20.3 of the Basic Law) by relying on a decision of the ECHR. But the binding effect of statute and law also includes a duty to take into account the guarantees of the Convention and the decisions of the ECHR as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law.

48

a) The obligation created by the consent Act to take into account the guarantees of the European Convention on Human Rights and the decisions of the ECHR at least demands that notice is taken of the relevant texts and case-law and that they are part of the process of developing an informed opinion of the court appointed to make a decision, of the competent authority or of the legislature. Domestic law must if possible be interpreted in harmony with public international law, regardless of the date when it comes into force (see BVerfGE 74, 358 (370)).

49

If there are decisions of the ECHR that are relevant to the assessment of a set of facts, then in principle the aspects taken into account by the ECHR when it considered the case must also be taken into account when the matter is considered from the point of view of constitutional law, in particular when proportionality is examined, and there must be a consideration of the findings made by the ECHR after weighing the rights of the parties (see Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 1 March 2004 – 2 BvR 1570/03 –, *Europäische Grundrechte-Zeitschrift* 2004 p. 317 (319)).

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If, in concrete application proceedings in which the Federal Republic of Germany in involved, the ECHR establishes that there has been a violation of the Convention, and if this is a continuing violation, the decision of the ECHR must be taken into account in the domestic sphere, that is, the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international-law interpretation of the law. Precisely in cases in which national courts, as in private law, have to structure multipolar fundamental rights situations, it is always important that various subjective legal positions are sensitively weighed against each other, and if there is a change in the persons involved in the dispute or a change in the actual or legal circumstances, this weighing up may lead to a different result. There may therefore be constitutional problems if one of the subjects of fundamental rights in conflict with another obtains an ECHR judgment in his or her favour against the Federal Republic of Germany and German courts schematically apply this decision to the private-law relationship, with the result that the holder of fundamental rights who has "lost" in this case and was possibly not involved in the proceedings at the ECHR would no longer be able to take an effective part in the proceedings as a party.

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b) aa) If the ECHR has declared a domestic provision to be contrary to the Convention, either this provision may be interpreted in conformity with public international law when applied in practice, or the legislature has the possibility of altering this domestic provision that is

incompatible with the Convention. If the violation of the Convention consists in effecting a specific administrative act, the authority responsible has the possibility of cancelling this act under the provisions of the law of administrative procedure (§ 48 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*)). Administrative practice that is in violation of the Convention can be amended, and courts may establish the duty to do this.

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bb) If judicial decisions violate the Convention, neither the European Convention on Human Rights nor the Basic Law imposes an obligation to accord to a judgment of the ECHR that establishes that a decision of a German court was made in violation of the European Convention on Human Rights the effect of removing the non-appealability of this decision (see Federal Constitutional Court, *Europäische Grundrechte-Zeitschrift* 1985, p. 654). Admittedly, it cannot be concluded from this that decisions of the ECHR need not be taken into account by German courts.

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Under Article 20.3 of the Basic Law, judicial decisions are bound by statute and law. The constitutionally guaranteed independence of the judge, who is subject to the law, is not affected by this commitment, which is derived from the principle of the rule of law (Article 97.1 of the Basic Law; see BVerfGE 18, 52 (59); 19, 17 (31–32)). Both the commitment to law and the commitment to statute put into concrete terms the judicial power that is entrusted to the judges (Article 92 of the Basic Law). Since the European Convention on Human Rights – as interpreted by the ECHR – has the status of a formal federal statute, it shares the primacy of statute law and must therefore be complied with by the judiciary.

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With regard to the principle of legal certainty, it must be noted that the federal legislature in the year 1998, in § 359 no. 6 of the Code of Criminal Procedure (*Strafprozessordnung – StPO*), introduced into the law of criminal procedure a new ground for reopening criminal proceedings (Act on the Reform of the Reopening of Proceedings under Criminal Law; *Gesetz zur Reform des strafrechtlichen Wiederaufnahmerechts* of 9 July 1998, Federal Law Gazette I p. 1802). This provides that it is admissible to reopen proceedings that ended in a non-appealable judgment if the ECHR has established that there was a violation of the European Convention on Human Rights or its protocols and the German judgment is based on this violation. This amendment of the law is based on the idea that a violation of the Convention whose effect continues in a specific individual case should be terminated, at all events in the area of criminal law, which is a particularly sensitive one for human rights, even if it is already non-appealable (see § 79.1 of the Federal Constitutional Court Act), if the judgment of the ECHR is relevant to the national proceedings. In this way, the competent court is given the opportunity to deal again, on application, with the case which has actually been closed, and to include the new legal facts in its development of an informed opinion. In this connection, the statute expresses the fundamental expectation that the court will change its original decision – which was contrary to the Convention – to the extent that this is based on the violation.

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In other rules of procedure, there is no conclusive answer to the question as to how the Federal Republic of Germany, if the ECHR rules against it, is to react, if national court proceedings have been completed and are non-appealable. There may be facts and circumstances in which German courts may make a new decision, not about the res judicata, but about the matter on which the ECHR has established that there has been a violation of the Convention on the part of the Federal Republic of Germany. This may be the case, for example, when the court is intended to consider the matter again on the basis of a new application or changed circumstances, or the court in another constellation is still dealing with the matter. In the last instance, it is decisive whether a court, within the scope of the applicable law of procedure, has the possibility of making a new decision in which it can take account of the relevant decision of the ECHR.

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In such case constellations, it would not be acceptable merely to refer the complainant to money damages, although restoration would fail neither for factual nor for legal reasons.

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c) In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular with regard to a partial system of domestic law whose legal consequences are balanced and that is intended to achieve an equilibrium between differing fundamental rights.

58

Individual application proceedings under Article 34 of the Convention before the ECHR are intended to decide specific individual cases in the two-party relationship between the complainant and the State party, by the measure of the European Convention on Human Rights and its protocols. The decisions of the ECHR may encounter national partial systems of law shaped by a complex system of case-law. In the German legal system, this may happen in particular in family law and the law concerning aliens, and also in the law on the protection of personality (on this, see, recently, ECHR, No. 59320/00, Judgment of 24 June 2004 – von Hannover v. Germany, *Europäische Grundrechte-Zeitschrift* 2004, pp. 404 ff.), in which conflicting fundamental rights are balanced by the creation of groups of cases and graduated legal consequences. It is the task of the domestic courts to integrate a decision of the ECHR into the relevant partial legal area of the national legal system, because it cannot be the desired result of the international-law basis nor express the will of the ECHR for the ECHR through its decisions itself to undertake directly any necessary adjustments within a domestic partial legal system

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In this respect, it is necessary for the national courts to evaluate the decision when taking it into account; in this process, account may also be taken of the fact that the individual application proceedings before the ECHR, in particular where the original proceedings were in civil law, possibly does not give a complete picture of the legal positions and interests involved. The only party to the proceedings before the ECHR apart from the complainant is the State party affected; the possibility for third parties to take part in the application proceedings (see Article 36.2 of the European Convention on Human Rights) is not an

institutional equivalent to the rights and duties as a party to proceedings or another person involved in the original national proceedings.

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4. The constitutional review of the interpretation and application of agreements under international law that have been given by statute the power of domestic German law is governed by the same principles that elsewhere too define the authority of the Federal Constitutional Court to review judicial decisions. The interpretation and application of agreements under international law by the ordinary courts can in principle be examined only to assess whether they are arbitrary or are based on a fundamentally incorrect view of the significance of a fundamental right or are incompatible with other constitutional provisions (see BVerfGE 18, 441 (450); 94, 315 (328)).

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Admittedly, as part of its competence the Federal Constitutional Court is also competent to prevent and remove, if possible, violations of public international law that consist in the incorrect application or non-observance by German courts of international-law obligations and may given rise to an international-law responsibility on the part of Germany (see BVerfGE 58, 1 (34); 59, 63 (89); 109, 13 (23)). In this, the Federal Constitutional Court is indirectly in the service of enforcing international law and in this way reduces the risk of failing to comply with international law. For this reason it may be necessary, deviating from the customary standard, to review the application and interpretation of international-law treaties by the ordinary courts.

62

This applies in a particularly high degree to the duties under public international law arising from the Convention, which contributes to promoting a joint European development of fundamental rights (*gemeineuropäische Grundrechtsentwicklung*). In Article 1.2 of the Basic Law, the Basic Law accords particular protection to the central stock of international human rights. This protection, in conjunction with Article 59.2 of the Basic Law, is the basis for the constitutional duty to use the European Convention on Human Rights in its specific manifestation when applying German fundamental rights too (see BVerfGE 74, 358 (370)). As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECHR, for example because the facts on which it is based have changed, clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. “Take into account” means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. In any event, the Convention provision as interpreted by the ECHR must be taken into account in making a decision; the court must at least duly consider it. Where the facts have changed in the meantime or in the case of a different fact situation, the courts will need to determine what, in the view of the ECHR, constituted the specific violation of the Convention and why a changed fact situation does not permit it to be applied to the case. Here, it will always be important how taking account of the decision takes in the system of the field of law in question. On the level of federal law too, the Convention does not automatically have priority over other federal law, in particular if in this connection it has not already been the object of a decision of the ECHR.

63

Against this background, it must at all events be possible, on the basis of the relevant fundamental right, to raise the objection in proceedings before the Federal Constitutional Court that state bodies disregarded or failed to take into account a decision of the ECHR. In this process, the fundamental right is closely connected to the priority of statute embodied in the principle of the rule of law, under which all state bodies are bound by statute and law within their competence (see BVerfGE 6, 32 (41)).

II.

64

The challenged decision of the Naumburg Higher Regional Court of 30 June 2004 violates Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court did not take sufficient account of the judgment of the ECHR of 26 February 2004 when making its decision, although it was under an obligation to do so.

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1. The challenged decision does not reveal whether and to what extent the Higher Regional Court considered the fact that the right of access asserted by the complainant is in principle protected by Article 6 of the Basic Law. This constitutional protection is to be seen against the background of the court's remarks on the complementary guarantee in Article 8 of the Convention. The Higher Regional Court should have considered in an understandable way how Article 6 of the Basic Law could have been interpreted in a manner that complied with the obligations under international law of the Federal Republic of Germany.

66

Here it is of central importance that the Federal Republic of Germany's violation of Article 8 of the Convention established by the ECHR is a continuing violation from the perspective of Convention law, for the complainant still has no access to his son. In its judgment, the ECHR held that the Federal Republic of Germany, in the choice of the means with which the judgment has to be enforced on the domestic level, is free, insofar as these means are compatible with the conclusions from the judgment. In the view of the ECHR, this means that it must at least be possible for the complainant to have access to his child (ECHR, Judgment of 26 February 2004, no. 64). This opinion of the ECHR should have caused the Higher Regional Court to consider the question as to whether and how far personal access of the complainant to his child might precisely be in the best interest of the child and what obstacles that could be documented – if necessary by way of a new expert witness's report – are presented by the consideration of the best interest of the child to the access which the ECHR regards as appropriate and which are protected by Article 6.2 of the Basic Law.

67

2. The Higher Regional Court in particular assumes in a manner that is not acceptable under constitutional law that a judgment of the European Court of Human Rights binds only the Federal Republic of Germany as a subject of public international law, but does not bind German courts. All the state bodies of the Federal Republic of Germany are – to the extent set out here under C. I. above – bound by operation of law within their jurisdiction by the

Convention and the protocols that have entered into force in Germany. They must take into account the guarantees of the Convention and the case-law of the ECHR when interpreting fundamental rights and constitutional guarantees.

68

In the present case, the Higher Regional Court, by reason of the judgment of the ECHR of 26 February 2004, had particular cause to consider the grounds of that judgment, because the judgment, which established a violation of the Convention by the Federal Republic of Germany, dealt with the matter with which the Higher Regional Court was again concerned. The duty to take the decision into account neither adversely affects the Higher Regional Court's constitutionally guaranteed independence, nor does it force the court to enforce the ECHR decision without reflection. However, the Higher Regional Court is bound by statute and law, which includes not only civil law and the relevant procedural law, but also the European Convention on Human Rights, which has the status of an ordinary federal statute.

69

In the legal analysis in particular of new facts, in weighing conflicting fundamental rights such as those of the foster family and in integrating the individual case in the overall context of family-law cases relating to the right of access, the Higher Regional Court is not bound in its particular conclusion. The order challenged, however, lacks a discussion of the connections set out above.

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3. It is not necessary to decide whether the Higher Regional Court, in a way that is constitutionally unacceptable, proceeded on the assumption that a temporary injunction can be issued only on application and not – as in the present case – also of the court's own motion, and thus that the complaint was admissible (see for example Saarbrücken Higher Regional Court, *OLG-Report* 2001, p. 269 on the one hand, Brandenburg Higher Regional Court, *OLG-Rechtsprechung Neue Länder – OLG-NL* 1994, 159 and Naumburg Higher Regional Court, OLG Naumburg, *Justiz-Ministerialblatt für Sachsen-Anhalt* 2003, p. 346 on the other hand). At all events, the Higher Regional Court made its procedural remarks too without taking correct account of the judgment of the ECHR of 26 February 2004. However, this was of importance for the question as to whether the Local Court was obliged or entitled of its own motion to examine the granting of a right of access and if the factual requirements were satisfied – as was the case – to make contact by access possible by way of a temporary injunction.

D.

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With the decision on the constitutional complaint in the principal proceedings, the application for a temporary injunction is also disposed of.

E.

72

The decision on the reimbursement of expenses is based on § 34.a.2 of the Federal Constitutional Court Act.

Judges: Hassemer, Jentsch, Broß, Osterloh, Di Fabio, Mellinghoff, Lübbe-Wolff, Gerhardt