Pressemitteilung: Autor - Herr Deepak Rajani
CASE OF SPORER v. AUSTRIA (Application no. 35637/03)

Deepak Rajani
Netzwerk Parentalis
http://www.elterlicheSorge.de
http://www.Gleichstellungsmodell.de
Mobil: 0176 – 68 64 78 74

PRESSEMITTEILUNG vom 03.02.11

Menschenrechtsgerichtshof zeigt der Diskriminierung nichtehelicher Väter erneut die Rote Karte!

Am 3. Februar 2011 hat der Europäische Gerichtshof für Menschenrechte eine weitere historische Entscheidung, CASE OF SPORER v. AUSTRIA (Application no. 35637/03), in Hinblick auf das gemeinsame Sorgerecht für nicht verheiratete Väter getroffen und Österreich verurteilt.

Die Besonderheit des Urteils liegt vielmehr darin, dass der Gerichtshof drei grundsätzliche Orientierungen für die Überprüfung in sorgerechtsrelevanten Verfahren zu Grunde gelegt hat, die wichtige Hinweise und Folgerungen für die nationale Gesetzgebung auch in der Bundesrepublik Deutschland haben wird. Die Kernpunkte sind die Folgenden:

i) Familiengemeinschaft: Eine Familiengemeinschaft entsteht mit der Geburt des Kindes. Nur die Entstehung der Familiengemeinschaft ermöglicht ein Familienleben des Kindes mit seinen Elternteilen.
ii) Lebensform: Die praktizierte Lebensform der Eltern, nämlich gemeinsames Leben in einem Haushalt gegenüber dem Leben in getrennten Haushalten darf zu keiner Benachteiligung des Kindes führen.
iii) Gleichstellung: Der Gesetzgeber ist verpflichtet, die Gleichstellung von nicht ehelichen Vätern im Hinblick auf den Kindeswohlmaßstab sowohl für den Zugang als auch für die Aufhebung von Elternrechten gleichermaßen zu gewährleisten.

Das Urteil geht über das Zaunegger-Urteil hinaus, weil der Gerichtshof hier konkret eine Überprüfung in Hinblick auf die praktizierte Lebensform der Eltern vorgenommen hat und die Diskriminierung wegen der Lebensform von gemeinsamem Leben und getrenntem Leben zurückgewiesen hat.

Ebenfalls fortgeführt wird die Rechtsprechung des EGMR dahin gehend, dass der Gerichtshof hat auch eine Überprüfung hinsichtlich des Kindeswohl-maßstabes vorgenommen hat und dazu auffordert, dass die nationale Gesetzgebung eine Gleichstellung in jedem Gerichtsverfahren bezüglich des anzuwendenden Kindeswohlmaßstabes gewährleisten muss.

Folgerungen für die Familienpolitik

Am 28. Januar 2011 wurde im Deutschen Bundestag über den Antrag der GRÜNEN debattiert. Nach deren vorgeschlagener Antragslösung werden die nicht

ehelichen Väter eine zusätzliche Diskriminierung in Hinblick auf die originäre Zuordnung des Sorgerechts - ohne sachlichen Grund - erleben müssen.

Ende Dezember 2010 hatte die Bundesjustizministerin Frau Leutheusser-Schnarrenberger eine Fristenlösung, den so genannten Stufenplan, vorgeschlagen. Nach dem heutige Urteil und der klaren Aussagen im Urteil des Europäisches Gerichtshofs für Menschenrechte läge in dieser Lösung auch eine klare Diskriminierung zwischen den nicht ehelichen und ehelichen Vätern im Hinblick auf die originäre Zuordnung des Sorgerechts vor.

Die Freie Demokraten (FDP) haben eine sog. Widerspruchslösung vorgeschlagen. Nach dieser Widerspruchslösung bleiben die Elternrechte eines nicht ehelichen Vaters weiter zur freien Disposition der Mutter des Kindes. Viele nicht eheliche Mütter des Kindes, die mit dem Vater Zusammenleben oder nicht, haben den Zugang zu Elternrechten des nicht ehelichen Vaters wegen „nicht im Kindeswohl liegenden Gründen" verweigert. Weil die ehelichen Väter in der Ausübung von Elternrechten nicht abhängig von die Mutter des Kindes sind im Gegensatz zu den nicht ehelichen Vätern, liegt hier eine Diskriminierung dieser Gruppe vor.

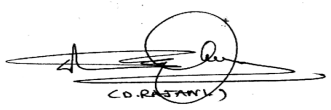
Grundsätzlich hat der Gerichtshof eine „Rote Karte" an die Regierungen in Europa in Hinblick auf die Diskriminierung von nicht ehelichen Vätern in alle Bereichen gezeigt. Unterschiedliche Lebensformen und sich wandelnde Familienstrukturen machen es der Politik schwer eine allgemeine Lösung zu finden, welche die Eltern gleichstellt und deren Elternrechte gleichermaßen für das „Kindeswohl fördernd„ gestaltet.

Aus diesen Gründen hat der Unterzeichner einen Vorschlag zur Elternrechtsreform vorbereitet und an das Bundesjustizministerium eingereicht. Im Dezember 2010 hat der Unterzeichner zusammen mit die Gleichstellungsbeauftragten der Stadt Goslar einen Appell veröffentlicht. An diesem Appell haben sich 16 prominente Fachleute und Vereine beteiligt. Dieser Appell wurde am 10. Dezember 2010 allen Bundestagsabgeordneten zugestellt.

Der Unterzeichner hat der Bundesregierung eine besondere Konstruktion zur Gestaltung der Elternrechte empfohlen, welche „die Familiengemeinschaften nach dem Gleichstellungsmodell" als einen Rechtsanspruch des Kindes vorsehen. Nach dieser Konstruktion hat jedes Kind ab der Geburt einen Rechtsanspruch auf die Familiengemeinschaften mit seinen beiden Elternteilen.

In diesem Vorschlag zur Elternrechtsreform werden die Elternteile - unabhängig von dem Lebensform der Eltern - im vollem Umfang gegenüber dem Kind gleich gestellt. Alle Kinder sind danach ebenso gleichgestellt in ihrem Anspruch auf Elternverantwortung. Für eine evtl. Überprüfung hat der Unterzeichner daraus folgerichtig die Einführung des Kindeswohlmaßstabes „das Kindeswohl fördernd" vorgeschlagen.

Wir hoffen, dass die Regierung diesen Vorschlag zu einer Elternrechtsreform ernst nimmt und die Grundprinzipien auch tatsächlich in der Gesetzgebung umgesetzt.



(Deepak RAJANI)

Auswertung des Urteils

Erster Grundsatz: Familiengemeinschaft

Im Verfahren Zaunegger gegen Deutschland hat der Gerichtshof den Begriff „Familiengemeinschaft" bereits schon definiert. Im heutigen Urteil, Ziffer 69 hat der Gerichtshof diesen Grundsatz zusätzlich wie folgt begründet:

> *Ziff. 69*
> *A child born out of such a relationship is ipso jure part of that "family" unit from the moment and by the very fact of his birth. Thus there exists between the child and its parents a bond amounting to family life.*

Damit hat der Gerichtshof die Entstehung von Familiengemeinschaften des Kindes als einen Rechtsanspruch aus der Menschenrechtskonvention angesehen und die Entstehung des Familienlebens heran geleitet. Die logische Konsequenz ist, dass ein nicht ehelicher Vater sein Familienleben mit dem Kind nicht mehr Gründen kann, wenn die Familiengemeinschaft des Kindes als ein Rechtsverhältnis mit ihm – grundsätzlich - nicht definiert ist.

Zweiter Grundsatz: Lebensform

In diesen Verfahren hat der Beschwerdeführer ein gemeinsamen Haushalt und ein gemeinsames Familienleben mit dem Kind gehabt. In diesen Zeitraum wurde das gemeinsame Sorgerecht nicht begründet. Damit unterlagen diese Lebensformen der Eltern aus dem „gemeinsamen Haushalt" und der Überprüfung nach der Menschenrechtskonvention.

> *Ziff. 78*
> *Until 1 July 2001 such a request for joint custody could only be made by parents living in the same household. Following the entry into force of the Law Amending Child Custody Law, it can be made by parents of a child born out of wedlock irrespective of whether or not they are living together. The court will approve the agreement on joint custody if it serves the child's interests.*
>
> *However, in the absence of the mother's agreement, Austrian law does not provide for a judicial examination as to whether the attribution of joint custody would serve the child's best interests.*
>
> *Thus, a father's only possibility to obtain custody of the child, in such circumstances, would be a request for sole custody, but custody will only be awarded to him if the mother endangers the child's well-being.*

Nach der nationalen Gesetzgebung in Österreich hat ein Vater die Möglichkeit das gemeinsame Sorgerecht zu erlangen, wenn die Eltern gemeinsam gelebt hätten. Der Gerichtshof hat nach dem gemeinsamen Leben der Eltern und die Verhinderung dieser Lebensform der Eltern zu Grunde gelegt und festgestellt, ob der nicht eheliche Vater die Möglichkeit hätte, Zugang zu seinen Elternrechten zu erlangen.

Der Gerichtshof stellte fest, dass dieses nicht der Fall war, wenn die Mutter, den Zugang zu seinem Elternrecht widersprach. Nach dem Widerspruch der Mutter und das entstandene Familienleben des Kindes mit dem Vater, haben alle Gerichte keine Möglichkeit den Zugang zu den Elternrechten zu gewähren. Die Gerichte hätte nur die Möglichkeit nach dem Maßstab „Kindeswohlgefährdung" das alleinige Sorgerecht des nicht ehelichen Vater zu gewähren.

(i) Initial attribution of custody of a child born out of wedlock to its mother

In diesem Fall überprüfte das Gericht die originäre Zuordnung des alleinigen Sorgerechts an die Mutter und die Gelegenheit auf Zugang zu den Elternrechten des nicht ehelichen Vater.

> *Ziff. 82*
> *In reply to the applicant's arguments that the applicable provisions discriminated against the father of a child born out of wedlock, the domestic courts found in essence that the relevant provisions were based on the consideration that in the majority of cases of children born out of wedlock it was actually the mother who took care of the child.*

Die Regierung argumentierte, dass die originäre Zuordnung des alleinigen Sorgerechts an die Mutter sei gerechtfertigt. Grundsätzlich sind es Mütter, die die Kinder erziehen und somit bildet dieser Tatsachenbestand einer sachlichen Begründung zur Diskriminierung.

> *Ziff. 83*
> *It follows from the above-mentioned court decisions and the underlying legislation that there has been a difference in treatment as regards the attribution of custody to the applicant in his capacity as the father of a child born out of wedlock in comparison with the mother and in comparison with married fathers.*

Daraufhin hat der Gerichtshof festgestellt, dass die Ungleichbehandlung in Hinblick auf die originäre Zuweisung des Sorgerechts eines nicht ehelichen Vaters gegenüber ehelichen Vätern vorliegt.

(ii) Possibilities of attributing joint or sole custody to the father of a child born out of wedlock

Der Gerichtshof hat weiterhin überprüft, ob der nicht eheliche Vater die Gelegenheit gehabt hat, alleiniges oder gemeinsames Sorgerecht gegen den Willen der Mutter zu erlangen.

> *Ziff. 88*
> *In the present case, Austrian law did not allow for a judicial review of whether joint custody would be in the interests of the child, nor did it allow for an examination, in the event that joint custody was against the child's interests, of whether the child's interests were better served by awarding sole custody to the mother or to the father. The only issue the domestic courts could examine, pursuant to Article 176 of the Civil Code, was whether the child's well-being was endangered if the mother continued to exercise sole custody.*

Der Gerichtshof stellte fest, dass die nationale Gesetzgebung in Österreich die Übertragung vom alleinigen oder dem gemeinsamen Sorgerecht auf den nicht ehelichen Vater nicht zulässt, wenn die Mutter des Kindes widersprach.

Ziff. 88
In contrast, Austrian law provides for a full judicial review of the attribution of parental authority and resolution of conflicts between separated parents in cases in which the father once held parental authority, either because the parents were married or, if they were unmarried, had concluded an agreement to exercise joint custody. In such cases the parents retain joint custody unless the court, upon request, awards sole custody to one parent in accordance with the child's best interests pursuant to Article 177a of the Civil Code.

Gleichzeitig stellte der Gerichtshof fest, dass die nationalen Gerichte ein vollständiges gerichtliches Überprüfungsverfahren vornehmen würde wenn der Vater einmal Sorgerecht ausgeübt hat. Dieses war insbesondere der Fall wenn der Vater gemeinsames Sorgerecht ausübt, und zwar unabhängig von seiner Rechtsstellung als ehelicher oder nicht ehelicher Vater.

Wenn der Vater ein gemeinsames Sorgerecht gehabt hat, dann die vorgenommene Überprüfung vor dem Gericht bildet eine Diskriminierung gegenüber den nicht ehelichen Vätern die kein Sorgerecht gehabt hätten. Damit hat der Gerichtshof eine Gleichstellung von sowohl nicht ehelichen und ehelichen Vätern als auch die gemeinsamen sorgeberechtigten Vätern gegenüber den nicht gemeinsam sorgeberechtigten Vätern zu Grunde gelegt.

Daraus folgt, dass die nicht ehelichen Väter, die kein Sorgerecht besitzen dürfen weiterhin gegenüber den gemeinsam sorgeberechtigten Vätern nicht mehr diskriminiert werden dürfen.

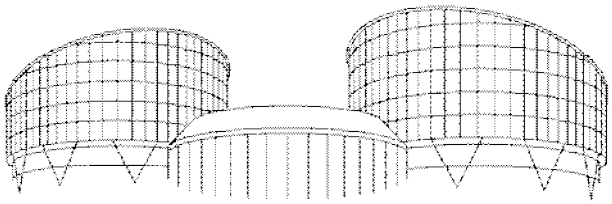
Dritte Grundsatz: Gleichstellung

Der Gerichtshof hat einen dritten Grundsatz im familiengerichtlichen Überprüfungsverfahren nach dem Gleichheitssatz in Hinblick auf das Kindeswohl zu Grunde gelegt.

Ziff. 89
The Court considers that the Government have not submitted sufficient reasons to justify why the situation of the applicant, who had assumed his role as K.'s father from the very beginning, should allow for less judicial scrutiny than these cases and why the applicant should in this respect be treated differently from a father who had originally held parental authority and later separated from the mother or divorced.

Der Gerichtshof hat in dem vorliegenden Überprüfungsverfahren festgestellt, dass es keine Gründe gibt, warum ein nicht ehelicher Vater in Hinblick auf Gleichbehandlung für die originäre Zuordnung des originären Sorgerechts eines ehelichen Vater weniger Möglichkeiten haben soll.

Daraus folgt, dass die Regierungen in allen europäischen Länder verpflichtet sind die nicht ehelichen Väter mit den ehelichen Vätern in Hinblick auf die originäre Zuordnung des Sorgerechts und der Kindeswohl Überprüfung im Familiengerichtsverfahren im vollen Umfang gleichzustellen sind.



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

FIRST SECTION

CASE OF SPORER v. AUSTRIA

(Application no. 35637/03)

JUDGMENT

STRASBOURG

3 February 2011

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

In the case of Sporer v. Austria,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 13 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 35637/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Gerald Sporer ("the applicant"), on 12 November 2003.

2. The applicant was represented by Mrs M. Speer, a lawyer practising in Mattighofen. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that the relevant provisions of the Civil Code relating to custody and their application by the courts had discriminated against him as the father of a child born out of wedlock. Furthermore, he alleged that the District Court had failed to hold a hearing to discuss the decisive expert opinion and, more generally, that it had failed to hear him in person.

4. By a decision of 25 September 2008 the Court declared the application admissible.

5. Neither party filed further observations on the merits of the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1976 and lives in Schalchen.

7. The applicant's son K. was born out of wedlock on 26 May 2000. The child was given the applicant's family name by decision of the Braunau District Administrative Authority of 29 June 2000.

8. At that time K.'s mother was living as a tenant in the applicant's house, in a separate apartment. The applicant was sharing an apartment with his long-term partner, U., who later became his wife, and their son D. aged six at that time. During K.'s first year the applicant took parental leave and took care of him together with U. Subsequently, K.'s mother took parental leave.

9. In early January 2002 K.'s mother moved out of the applicant's house.

10. On 28 January 2002 the applicant asked the Mattighofen District Court (*Bezirksgericht*) to transfer sole custody of K. to him under Article 176 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). He submitted in particular that he and U. had mainly taken care of K. and that the child's mother was not capable of doing so. The latter opposed the transfer of custody. At that stage and at all subsequent stages of the proceedings the applicant was assisted by counsel.

11. By letter of 12 February 2002 the Youth Office (*Jugendamt*), which had been following the case since summer 2001, expressed the view that both parents were capable of exercising custody.

12. On 12 March 2002 the applicant and K.'s mother appeared before the District Court and were heard by the judge.

13. According to the minutes, the applicant requested that the opinion of an expert in child psychology be taken. K.'s mother agreed to that request. The court appointed Dr J.-W., an expert in child psychology, and ordered him to submit an opinion on whether the interests of the child were better served by leaving sole custody with the mother or by awarding it to the applicant. The judge then proceeded to discuss the factual and legal issues with the parties. The parties then concluded an agreement to the effect that, pending a decision on custody, K. would spend three days with his mother and three days with the applicant.

14. The expert, Dr J.-W., submitted his opinion to the Court on 17 April 2002. The opinion was based on interviews which the expert had conducted with K.'s mother and the applicant and his partner. He had also paid a visit to the applicant's home during which he had observed how the applicant and the other members of his family interacted with K. The expert opinion was served on the applicant.

15. On 8 July 2002 the District Court held a hearing in the presence of the applicant, his counsel, K.'s mother, Dr J.-W. and a representative of the Youth Office.

16. According to the minutes, the contents of the file were read out. Subsequently, Dr J.-W.'s opinion was discussed. In the course of the hearing Dr J.-W. supplemented his opinion. He expressed the view that K.'s mother was very immature and not yet capable of taking care of him and recommended the transfer of sole custody to the applicant. The representative of the Youth Office opposed the view that K.'s mother was not capable of raising the child. None of the parties made further submissions.

17. On the following day, that is, on 9 July 2002, the District Court ordered a second expert in child psychology, Dr R., to submit an opinion on whether or not K.'s mother was capable of taking care of him. In her opinion of 15 July 2002, Dr R. came to the conclusion that K.'s mother was sufficiently mature, did not show any emotional instability and was capable of taking care of him. A copy of this expert opinion was served on the applicant.

18. In addition the District Court requested the Youth Office to prepare a report. A representative of the Youth Office visited K. and his mother at their home and as a result of that visit concluded that she was able to exercise custody.

19. On 29 July and 13 August 2002 the applicant requested that a decisive expert opinion (*Obergutachten*) be commissioned. The motion contained comprehensive submissions on K.'s mother's alleged incapacity to raise him.

20. The District Court ordered a third expert, Dr B., to submit a decisive expert opinion on the question whether K.'s mother was capable of exercising custody.

21. Both the applicant and K.'s mother made further written submissions. Each of them forwarded detailed arguments as to why the other parent was not an appropriate person to take care of K.

22. On 14 October 2002 Dr B. submitted his expert opinion. Having interviewed the applicant and K.'s mother, he found that both parents were in principle capable of taking care of K. The mother had some issues as regards her own personality development and a somewhat limited capacity to cope with everyday life. The applicant had a tendency to dominate and had given reason to fear that, if custody was awarded to him, he would try to curtail the mother's access rights. The applicant could provide a more stable environment and a more coherent style of upbringing. However, K.'s best interests would not be manifestly endangered if custody remained with his mother. It was recommended that the applicant be given extensive access rights, in that K. should stay with him from Friday to Sunday every

second weekend, spend two weeks with him in summer and one week during the Christmas period.

23. A copy of Dr B.'s expert opinion was served on the applicant, and he was given 14 days to submit comments. Within that time-limit, the applicant requested that the expert opinion be discussed at a hearing. He did not make any comments in writing.

24. Without holding a further hearing, the District Court dismissed the applicant's request for sole custody of K. to be transferred to him by decision of 4 December 2002.

25. The District Court noted that under Article 166 of the Civil Code the mother of a child born out of wedlock had sole custody. A transfer of custody was only to be ordered if the child's best interests were at risk. In the present case the applicant would have had to prove that K.'s mother was unable to take care of him. While the first expert, Mr J.-W., had come to the conclusion that this was the case, the second expert, Ms R., had reached the opposite conclusion. Finally, the decisive expert opinion by Mr B. had found it established that K.'s mother was capable of taking care of him. Having regard to the second and third expert opinions and to the view expressed by the Youth Office, it had been established that K.'s mother was able to exercise custody and the applicant had failed to adduce proof to the contrary.

26. Furthermore, the District Court noted that it had not considered it necessary to hold a hearing to discuss the decisive expert opinion, since it found that opinion coherent and convincing. The factual and legal issues of the case had therefore been sufficiently clarified and a hearing would only have delayed the proceedings. It followed that the applicant's further requests for the taking of evidence had to be dismissed.

27. Finally, the court ruled that its decision was immediately enforceable with the consequence that the agreement of 12 March 2002 was no longer effective.

28. The applicant appealed. He complained about a number of procedural shortcomings. He alleged, *inter alia*, that the District Court had failed to hold a hearing for the purpose of discussing Dr B.'s expert opinion, and that it had not heard him in person.

29. In addition, the applicant contended that the relevant provisions of the Civil Code, namely, Articles 166 and 176, were discriminatory and suggested that the appellate court request the Constitutional Court to rule on their constitutionality. Since K. had been born out of wedlock, his mother had sole custody of him and he, as the child's father, could only be awarded custody if the mother put the child's well-being at risk. In the case of a child born in wedlock the parents had joint custody and retained it upon divorce or separation unless the child's best interests required that sole custody be awarded to one of them. The application of different criteria when the

parents of a child born out of wedlock separated lacked reasonable justification.

30. On 24 February 2003 the Ried Regional Court dismissed the applicant's appeal.

31. The Regional Court found that the proceedings before the District Court had not suffered from any procedural defects. In non-contentious proceedings it was not always required to question the parties at a hearing. A hearing had been held on 8 July 2002 in the presence of the applicant. Furthermore, the applicant had had the opportunity to file written submissions, of which he had made ample use. He had also been interviewed by the experts. A further hearing for the purpose of discussing the decisive expert opinion of Dr B. would only have been required had there been substantial doubts as to its correctness.

32. Moreover, the Regional Court did not see any reason to request the Constitutional Court to rule on the constitutionality of the relevant provisions of the Civil Code. It noted that Article 167 of the Civil Code allowed life-companions to request joint custody. The applicant had not claimed to have cohabited with K.'s mother. On the contrary he had co-habited with another woman, U., who had meanwhile become his wife.

33. A distinction between children born in wedlock and children born out of wedlock was not discriminatory as long as it was objectively justified. The rule contained in Article 176 of the Civil Code that in the case of a child born out of wedlock (unless the parents had requested joint custody under Article 167) custody was only to be transferred if the mother put the child's well-being at risk, was based on the consideration that in the majority of cases of children born out of wedlock it was actually the mother who took care of the child.

34. The applicant filed an extraordinary appeal on points of law. He repeated his complaints about the alleged procedural shortcomings. In particular, he submitted that the court had neither held a hearing to discuss the decisive expert opinion of Dr B. nor given him an opportunity to comment in writing. The applicant also reiterated his request for the case to be submitted to the Constitutional Court.

35. On 26 June 2003 the Supreme Court (*Oberster Gerichtshof*) dismissed the applicant's extraordinary appeal on points of law. It noted that the courts were not obliged to hold hearings in custody proceedings. The applicant had been given the opportunity to comment on the expert opinion at issue. Moreover, the courts had correctly applied Article 176 of the Civil Code. It had not been shown that the mother put K.'s well-being at risk.

36. To date, K.'s mother continues to have sole custody of him while the applicant has a right of access under the terms recommended by the courts in the custody proceedings.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW

A. Relevant domestic law

37. The relevant provisions of the Civil Code in the version in force at the material time read as follows:

Article 144

"The parents shall care for and raise the minor child, manage its assets and represent it in these, as well as in all other matters; care, upbringing and asset management also include representing the child in these matters before the law [in court]. The parents shall proceed on a consensual basis when complying with these obligations and exercising these rights."

Article 166

"The mother shall have sole custody of an illegitimate child. Moreover, unless the present provisions stipulate otherwise, the provisions on legitimate children regarding maintenance and custody shall also apply to illegitimate children."

Article 167

"(1) Whenever the parents of a child live in a common household, they may agree that both parents will have custody in the future. The court shall uphold the agreement if it serves the interests of the child. If one parent leaves the common household, other than on a temporary basis, § 177 and § 177a shall be applied accordingly.

(2) Whenever the parents do not live in a common household, they can agree that the father shall also have full custodial powers or regarding specific matters in the future, if they present such an agreement to the court indicating the parent with which the child is to stay primarily. If the child stays primarily in the household of the father, the latter must also be assigned full custody. The court shall uphold the agreement if it serves the interests of the child."

38. This version of Article 167 of the Civil Code was introduced by the 2001 Law Amending Child Custody Law, which entered into force on 1 July 2001. Before that date parents of an illegitimate child could only agree on exercising custody jointly if they were living in a common household.

Article 176

"(1) Whenever the parents put the well-being of a minor child at risk, on account of their conduct, the court will take the steps necessary to secure the interests of the child, irrespective of which party has applied to the court. In particular, the court may withdraw all or part of the custodial rights in respect of the child, ..."

Article 177

"(1) If the marriage of the parents of a minor legitimate child is dissolved or annulled, the custodial rights of both parents remain intact. However, they may present an agreement to the court – even modifying an existing agreement – regarding custodial responsibility. In this connection it may be agreed that one parent alone or both parents shall have custody. Where both parents have custodial powers, those of one parent may be limited to specific matters.

(2) Where both parents have custody, they must submit an agreement to the court regarding the parent with whom the child is to stay primarily. This parent must always be put in charge of all custodial matters.

(3) The court must approve the agreement of the parents, if it serves the interests of the child."

Article 177a

"(1) If an agreement in accordance with Article 177 on the main domicile of the child or on custodial powers is not reached within a reasonable period after a marriage is dissolved or annulled, or if it is incompatible with the interests of the child, the court must decide which parent shall henceforth have sole custody, if all attempts to reach an amicable solution fail.

(2) If both parents have custody under Article 177 after their marriage has been dissolved or annulled, and if one parent applies for the withdrawal of that custody, the court must decide which parent shall have sole custody, if all attempts to reach an amicable solution fail."

Article 177b

"The above provisions shall also be applied if the parents of a minor legitimate child live apart, other than on a temporary basis. However, in such a case the court shall decide on custody only upon application by a parent."

B. Relevant comparative law

39. A recent case concerning similar complaints (*Zaunegger v. Germany*, no. 22028/04, §§ 22-27, 3 December 2009) contains the following summary of comparative law:

"22. A survey on comparative law taking into account the national laws of a selection of Member States of the Council of Europe shows that basically all Member States included in the survey provide for joint parental authority by unmarried parents over their children born out of wedlock. The main elements referred to as a basis for allowing joint parental authority for unmarried parents are the establishment of paternity and the parents' agreement to exercise joint authority.

23. However, the solutions in the Member States vary as regards the attribution of joint parental authority for children born out of wedlock in the event no agreement between the parents can be reached in this respect.

24. In only a limited number of countries do the statutory regulations explicitly address this issue. In a few countries, such as Austria, Norway and Serbia, the national law stipulates that the exercise of joint parental authority of unmarried parents requires the consent of both parents and thus implies that the non-consenting parent has a right of veto. By contrast, the laws in Hungary, Ireland and Monaco appear to provide for a joint exercise of parental authority even without the parents' consent.

25. In some Member States such as the Czech Republic and Luxembourg, while the law itself is not clear on the subject, the domestic courts have interpreted the applicable provisions so as to allow joint parental authority only with the consent of the parents, whereas for example the Dutch Supreme Court has held that the national law has to be interpreted so as to enable the father of a child born out of wedlock to request joint parental authority with the mother even though the latter disagrees. A similar approach seems to be followed in Spain.

26. With the exception of the few countries where a right of veto of one parent is explicitly stipulated in national law, the most common solution put forward by national legislations is that a court decides on the outcome of a corresponding dispute between the parents at the request of one of the parents bearing in mind the best interests of the child. All Member States emphasise the importance of the child's best interest in decisions regarding the attribution of custody. In determining the child's best interest in this connection domestic courts commonly take into consideration the positions of the parents and the child and the particular circumstances of the case, as regards, *inter alia,* the demonstrable interest in and commitment to the child by the respective parent.

27. In summary, ... , the survey confirms that while different approaches exist in the Member States, the majority provide for paternal participation in custody if the parents were not married to each other, either irrespective of the mother's will or at least by court order following an evaluation of the child's interests."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

40. The applicant complained about the lack of a proper hearing before the District Court. Furthermore he alleges that the District Court failed to duly hear him in person. He relied on Article 6 of the Convention which, in so far as material, reads as follows.

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

A. The parties' submissions

41. The applicant maintained that the Mattighofen District Court had failed to hold a proper hearing in his case. In his view that court should have held a hearing once it had obtained the expert opinion of Dr. B. He emphasised that in custody proceedings the parents of the child must be heard in person and asserted that he had not been given a proper opportunity to make oral submissions.

42. The Government submitted that the applicant's allegation that the courts had failed to hold a proper hearing and to hear him in person was unsupported by the facts of the case. The District Court had held two hearings, namely, on 12 March and 8 July 2002, in which the factual and legal issues of the case were discussed. These hearings gave the applicant an opportunity to make submissions and allowed the court to obtain a personal impression of both parties. Moreover, the applicant made repeated use of the opportunity to file written submissions. Finally, he was given a time-limit to comment on the decisive expert opinion of Dr B. However, he did not make use of this opportunity but limited his submissions to an application for a further hearing. In sum, the proceedings complied with the requirements of Article 6 § 1.

B. The Court's assessment

1. General principles

43. According to the Court's case-law, the right to a public hearing under Article 6 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, *Stallinger and Kuso v. Austria*, 23 April 1997, § 51, *Reports of Judgments and Decisions* 1997-II, and *Allan Jacobsson v. Sweden (no. 2)*, 19 February 1998, § 46, *Reports* 1998-I).

44. Furthermore, the right to appear in person in a civil case is not, as such guaranteed by the Convention but may, in particular circumstances, be implied in the right to a fair hearing, in particular where the court needs to gain a personal impression of the parties (see, *mutatis mutandis*, *Helmers v. Sweden*, 29 October 1991, § 38, Series A no. 212-A).

2. Application to the present case

45. The Court has to examine whether the applicant was entitled to a hearing and, if so, whether a hearing complying with the requirements of Article 6 § 1 of the Convention was held. In addition it has to examine whether the applicant had a right to appear in person and, if so, whether this

right was respected. The Court considers that the two questions are closely linked to each other and will therefore examine them together.

46. Regarding the right to a hearing, the Court considers that in the present case, there were no exceptional circumstances which would justify dispensing with a hearing. Nor did the proceedings concern highly technical issues or purely legal questions (see, regarding these criteria, *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263, and *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002). The applicant was therefore entitled to a hearing.

47. Moreover, the Court considers that in custody proceedings the personal impression of the parents is an important element and that the applicant was therefore entitled to appear before the court and to be heard in person.

48. The Government argued that the Mattighofen District Court held two hearings namely on 12 March and 8 July 2002. The Court observes that the first one, on 12 March 2002, was apparently held on the initiative of the parties, namely the applicant and K.'s mother and was of a preparatory nature. According to the minutes, the court granted the applicant's request to hear an expert in child psychology and then proceeded to a discussion of the factual and legal issues of the case with the parties. At the close of this discussion the parties concluded an agreement to take care of K. alternately, pending the decision on custody.

49. A second hearing was held on 8 July 2002 in the presence of the parties, the applicant's counsel, the expert J.-W. and a representative of the Youth Office. According to the minutes, the expert opinion was discussed and the expert commented on and supplemented his opinion. None of the parties made further submissions.

50. Following the hearing of 8 July 2002 and as the expert J.-W. had come to the conclusion that K.'s mother was not able to exercise custody while the representative of the Youth Office had opposed that position, the District Court ordered a further expert, Dr. R., to submit an opinion. The latter came to the conclusion that K.'s mother was capable of exercising custody. At the applicant's request, the District Court ordered a third expert, Dr. B. to submit a decisive opinion.

51. Subsequently, the applicant requested that Dr. B.'s expert opinion be discussed at a hearing. The District Court refused that request. It found that the opinion was conclusive, that the factual and legal issues of the case had been sufficiently clarified and that a further hearing risked delaying the proceedings.

52. The Court finds that the reasons given by the District Court are convincing, given that it had already held two hearings, one of a preparatory nature and one on the merits of case before it. These hearings had allowed the District Court to gain a personal impression of both parties and had served to discuss various aspects of the case. Insofar as the applicant

asserted that he had not been given a proper opportunity to make oral submissions, the Court notes, firstly, that the applicant has not substantiated this complaint. It notes, secondly, that the applicant was present at the hearing of 8 July 2002 and was assisted by counsel. There is no indication that following the discussion of the expert opinion of Dr. J.-W. he would not have been able to make further submissions had he wished to do so.

53. Moreover, the Court is satisfied that the applicant had the benefit of adversarial proceedings which provided him with an opportunity to put forward all his arguments. In particular, the Court notes that Dr. B.'s decisive expert opinion was prepared and examined in an adversarial manner: both parties had made comprehensive written submissions on the other parent's alleged incapacity to exercise custody. In addition Dr. B. had interviewed both the applicant and K.'s mother when preparing his opinion and, finally, that opinion was served on the applicant and he was given an opportunity to comment on it. In these circumstances the District Court could fairly and reasonably decide on the case without holding a further hearing after having obtained Dr. B.'s expert opinion.

54. Consequently, there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

55. The applicant complained under Article 8, taken alone and in conjunction with Article 14, that the relevant provisions of the Civil Code and their application by the courts had discriminated against him as the father of a child born out of wedlock.

Article 8, in so far as relevant, provides:

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

Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The parties' submissions

1. The applicant

56. Under Article 14 taken in conjunction with Article 8, the applicant maintained that the relevant provisions of the Civil Code discriminated against him as the father of a child born out of wedlock.

57. Whereas, in the case of a child born in wedlock the parents had joint custody, sole custody of a child born out of wedlock was awarded to the mother. The father could only obtain joint custody with the agreement of the mother. Moreover, when a married couple separated or divorced, they retained joint custody, while sole custody could be awarded to one of the parents if the child's well-being so required. When the parents of a child born out of wedlock, whose mother had sole custody, separated, sole custody could only be transferred to the father if the mother put the child's well-being at risk.

58. The applicant asserted with regard to Article 8 alone that the child's well-being would have been served better by granting sole custody to him. However, under Austrian law as it stood, the courts were only entitled to withdraw sole custody from K.'s mother if the latter put the child's well-being at risk.

2. The Government

59. As to Article 14 taken in conjunction with Article 8, the Government asserted that Austrian law on custody did not draw a fundamental distinction between fathers of children born in wedlock and fathers of children born out of wedlock. In so far as differences existed, they were based on factual differences in given situations and served the interests of the child.

60. First of all, the father of a child born out of wedlock was not excluded from exercising custody. Even before the amendment of Article 167 of the Civil Code in 2001 parents of a child born out of wedlock could conclude an agreement to exercise joint custody, provided they were living together in a common household. If they separated later, the same rules applied as for the divorce or permanent separation of parents of a child born in wedlock.

61. For parents not living in a common household, whether divorced parents of a child born in wedlock or parents of a child born out of wedlock not living together, it had not been possible to exercise joint custody until 1 July 2001, when the 2001 Law Amending Child Custody entered into force. Since then, such parents could also conclude an agreement to exercise joint custody pursuant to Article 167 of the Civil Code in its amended version.

62. The one difference that still existed, namely, that the parents of a child born in wedlock automatically had joint custody while in the case of a child born out of wedlock the mother of the child had sole custody unless the parents concluded an agreement on joint custody, was justified in order to protect the interests of the child.

63. Given that the father of a child born out of wedlock was not always known or, if known, was not always willing to acknowledge paternity, vesting sole custody in the mother served to enable her to defend the child's rights in paternity and maintenance proceedings. The difference in the legal situation stemmed from a difference in fact and was, therefore, not discriminatory in the sense of lacking objective and reasonable justification.

64. Where the father of a child born out of wedlock wished to assume parental responsibility, the award of joint custody depended on the mother's agreement. The law was based on the assumption that awarding joint custody against the will of the mother would not serve the child's interests. Parents who could not reach an agreement on custody were very likely to disagree on fundamental questions concerning the child's up-bringing and education. Making the exercise of joint custody dependent on the mother's agreement therefore also served the child's best interests.

65. The Government, with a view to Article 8 alone, asserted that the refusal to transfer sole custody of K. to the applicant served a legitimate aim, namely, the protection of the child's interests, and did not interfere in a disproportionate manner with the applicant's right to respect for his family life.

B. The Court's assessment

66. In view of the alleged discrimination against the applicant in his capacity as the father of a child born out of wedlock, the Court considers it appropriate to examine the case first under Article 14 taken in conjunction with Article 8 of the Convention (see *Zaunegger,* cited above, § 34).

1. Applicability

67. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see, as a recent authority, *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, ECHR 2008-...).

68. The Court must therefore determine whether the facts of the case fall within the ambit of Article 8 of the Convention.

69. In this context the Court reiterates that the notion of family under this provision is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit from the moment and by the very fact of his birth. Thus there exists between the child and its parents a bond amounting to family life (see *Elsholz*, cited above § 43, and *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290).

70. In the instant case the applicant and the mother of his son, K., did not live together. At the time of K.'s birth they lived in separate apartments in the same house, and the applicant was co-habiting with another woman and their son. However, the Court reiterates that the existence or non-existence of "family life" within the meaning of Article 8 is also a question of fact depending upon the real existence in practice of close personal ties, in particular the demonstrable interest and commitment by the father to the child both before and after birth (see among other authorities, *Lebbink v. the Netherlands*, no. 45582/99, § 36, ECHR 2004-IV).

71. The Court notes that the applicant assumed his role as K's father from the beginning. K. was given the applicant's family name. During K.'s first year the applicant took parental leave to take care of his son. While the custody proceedings were pending the applicant and K.'s mother concluded an agreement according to which the applicant regularly took care of K. three days a week. Thereafter he continued to have extended access rights.

72. The Court considers that in such circumstances the applicant's relationship with his son constituted "family life", a fact which is furthermore not in dispute between the parties. The Court therefore finds that the facts of the instant case fall within the ambit of Article 8 of the Convention and that accordingly, Article 14 is applicable.

2. Compliance

(a) General principles

73. It is the Court's established case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Burden*, cited above, § 60).

74. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common

ground between the laws of the Contracting States (*Petrovic v. Austria*, 27 March 1998, § 38, *Reports* 1998-II, and *Zaunegger*, cited above, § 50).

75. However, very weighty reasons need to be put forward before a difference in treatment on the ground of sex or birth out of or within wedlock can be regarded as compatible with the Convention. The same is true for a difference in treatment of the father of a child born out of wedlock as compared with the father of a child born of a marriage-based relationship (*Zaunegger*, cited above, § 51, with further references).

(b) Application to the present case

76. The applicant, as the father of a child born out of wedlock, complained firstly of different treatment in comparison with the mother in that he had no opportunity to obtain joint custody without the latter's consent. Secondly, he complained of different treatment in comparison with married or divorced fathers, who are able to retain joint custody following divorce or separation from the mother.

77. The Court observes that the applicable provisions of Austrian law do indeed contain different standards in respect of the above categories of parents. Parents of a child born in wedlock have a legal right to joint custody from the beginning. In principle they retain joint custody even following divorce or separation, unless the exercise of joint custody is not in the child's interests. In that case, sole custody has to be awarded to one parent, be it the mother or the father, in accordance with the child's interests.

78. In contrast, parental authority over a child born out of wedlock is attributed to the mother, unless both parents consent to make a request for joint custody. Until 1 July 2001 such a request for joint custody could only be made by parents living in the same household. Following the entry into force of the Law Amending Child Custody Law, it can be made by parents of a child born out of wedlock irrespective of whether or not they are living together. The court will approve the agreement on joint custody if it serves the child's interests. However, in the absence of the mother's agreement, Austrian law does not provide for a judicial examination as to whether the attribution of joint custody would serve the child's best interests. Thus, a father's only possibility to obtain custody of the child, in such circumstances, would be a request for sole custody, but custody will only be awarded to him if the mother endangers the child's well-being.

79. The Court reiterates that in cases arising from individual applications it is not its task to examine the domestic legislation in the abstract, but it must examine the manner in which that legislation was applied to the applicant in the particular circumstances and whether its application in the present case led to an unjustified difference in treatment of the applicant (see, for instance, *Sahin v. Germany* [GC], no. 30943/96, § 87,

ECHR 2003-VIII, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 86, ECHR 2003-VIII).

(i) Initial attribution of custody of a child born out of wedlock to its mother

80. In the present case sole custody of K. was obtained by the mother pursuant to Article 166 of the Civil Code, as he was born out of wedlock. Until 1 July 2001, when the Law Amending Child Custody Law entered into force, the applicant and K.'s mother did not have the possibility to request joint custody under Article 167 of the Civil Code as they were not living in a common household (see paragraph 38 above). The Court observes that the relationship between the applicant and K.'s mother had not yet ended when the above-mentioned law entered into force. However, they did not make use of the possibility to conclude an agreement to exercise joint custody.

81. The relationship came to an end in January 2002. Subsequently, the applicant applied for sole custody of K. On the basis of the legislation described above, the courts could not examine in these proceedings whether joint custody would be in the child's interests as the agreement of K.'s mother was absent, nor were they called on to examine whether one of the parents was better suited to exercise custody than the other. The only question before them was, pursuant to Article 176 of the Civil Code, whether K.'s mother endangered his well-being. After two conflicting expert opinions had been taken, the District Court ordered a third expert in child psychology to submit a decisive expert opinion. The latter came to the conclusion that K.'s best interests would not be manifestly endangered if custody remained with his mother. Consequently, the courts dismissed the applicant's request for transfer of sole custody.

82. In reply to the applicant's arguments that the applicable provisions discriminated against the father of a child born out of wedlock, the domestic courts found in essence that the relevant provisions were based on the consideration that in the majority of cases of children born out of wedlock it was actually the mother who took care of the child.

83. It follows from the above-mentioned court decisions and the underlying legislation that there has been a difference in treatment as regards the attribution of custody to the applicant in his capacity as the father of a child born out of wedlock in comparison with the mother and in comparison with married fathers. In the *Zaunegger* case (cited above, § 48) the Court did not explicitly examine whether or not the father of a child born out of wedlock was in an analogous situation to the mother on the one hand or to a married father on the other hand, but considered that the arguments made in that respect were of relevance when determining whether the difference in treatment was justified. The Court will follow the same approach in the present case.

84. The Government argued that the difference in treatment was justified. They asserted, firstly, that attributing sole custody to the mother of a child born out of wedlock was justified, as the father was not always known and willing to acknowledge paternity. Given the difference in the factual situation in comparison with a child born in wedlock vesting sole custody in the mother of a child born out of wedlock was justified to enable her to defend the child's interests in paternity and maintenance proceedings. Secondly, the Government asserted that a father of a child born out of wedlock who wished to assert parental responsibility could do so with the mother's consent. The relevant provisions were based on the assumption that awarding joint custody against the will of the mother would not serve the child's interests.

85. In the case of *Zaunegger*, the Court found that in view of the different life situations into which children whose parents are not married are born and in the absence of an agreement on joint custody, it was justified to attribute parental authority over the child initially to the mother in order to ensure that there was a person at birth who would act for the child in a legally binding way (cited above, §§ 54-55). The Court sees no reason to come to a different conclusion in the present case.

(ii) Possibilities of attributing joint or sole custody to the father of a child born out of wedlock

86. While the above considerations provide justification for the difference in treatment between the father of a child born out of wedlock and its mother in respect of the initial attribution of custody, it remains to be examined whether the second difference complained of by the applicant was justified, namely that as a father of a child born out of wedlock he could not obtain joint custody without the consent of K's mother's and that the courts could only withdraw sole custody from her if she put the child's well-being at risk.

87. In the case of *Zaunegger*, the Court did not share the assumption that joint custody against the will of the mother is *prima facie* against the child's interests (*Zaunegger*, cited above, §§56-59). In reaching that conclusion the Court had regard on the one hand to the wide margin of appreciation of the authorities when deciding on custody-related matters and on the other hand to the evolving European context in this sphere and the growing number of unmarried parents. The Court observed that although there existed no European consensus as to whether fathers of children born out of wedlock had a right to request joint custody even without the consent of the mother, the common point of departure in the majority of Member States appeared to be that decisions regarding the attribution of custody are to be based on the child's best interests and that in the event of a conflict between the parents such attribution should be subject to scrutiny by the national courts (ibid., § 60).

88. In the present case, Austrian law did not allow for a judicial review of whether joint custody would be in the interests of the child, nor did it allow for an examination, in the event that joint custody was against the child's interests, of whether the child's interests were better served by awarding sole custody to the mother or to the father. The only issue the domestic courts could examine, pursuant to Article 176 of the Civil Code, was whether the child's well-being was endangered if the mother continued to exercise sole custody. In contrast, Austrian law provides for a full judicial review of the attribution of parental authority and resolution of conflicts between separated parents in cases in which the father once held parental authority, either because the parents were married or, if they were unmarried, had concluded an agreement to exercise joint custody. In such cases the parents retain joint custody unless the court, upon request, awards sole custody to one parent in accordance with the child's best interests pursuant to Article 177a of the Civil Code.

89. The Court considers that the Government have not submitted sufficient reasons to justify why the situation of the applicant, who had assumed his role as K.'s father from the very beginning, should allow for less judicial scrutiny than these cases and why the applicant should in this respect be treated differently from a father who had originally held parental authority and later separated from the mother or divorced.

90. In the case of *Zaunegger* (cited above, § 63), the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 in a comparable situation. The Court sees no reasons to reach a different conclusion in the present case. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 8.

91. Having regard to this conclusion, the Court does not consider it necessary to determine whether there has also been a breach of Article 8 of the Convention taken alone.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The applicant claimed compensation for pecuniary damage, namely, reimbursement of child support payments of 198 euros (EUR) per months since June 2003. He argued that, had he been awarded sole custody, K.

would be living with him and he would not have been obliged to pay child support. Furthermore, the applicant claimed EUR 30,000 in compensation for non-pecuniary damage. He asserted in particular that being deprived of his custody rights and only having access rights instead of sharing everyday life with his son had caused him suffering.

94. The Government commented that there was no causal link between the violation alleged and the pecuniary damage claimed by the applicant. In any case, even if the applicant had obtained sole custody of K. and the latter lived with him, he would be obliged to provide maintenance. In respect of non-pecuniary damage the Government commented that the Court had so far only awarded compensation for non-pecuniary damage in cases in which there had been no contact between parent and child during the proceedings at issue (see, for instance, *Sahin*, cited above, § 100). In the present case the applicant had always had extensive and regular contact with his son.

95. The Court agrees with the Government that there is no causal link between the violation of the Convention and the pecuniary damage claimed by the applicant. Consequently, it makes no award under this head.

96. In respect of non-pecuniary damage, the Court notes that the applicant was discriminated against as a father of a child born out of wedlock. However, having regard to the fact that the applicant had enjoyed regular contact with his son throughout the proceedings and thereafter, the Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage suffered (see *Zaunegger*, cited above, § 69).

B. Costs and expenses

97. The applicant claimed EUR 3,258.28 in respect of costs and expenses incurred in the domestic proceedings and EUR 3,500 in respect of costs and expenses incurred in the Convention proceedings. Both amounts include value-added tax (VAT).

98. The Government disputed that the costs had been incurred to prevent or redress the alleged violation of the Convention. In any case, they argued that the costs were not "necessarily incurred", as there was no obligation to be represented by counsel at first instance. From 20 August 2002 onwards the applicant was represented by legal-aid counsel and was therefore not entitled to claim costs for his legal representation after that date. Finally, the Government argued that the costs claimed for the Convention proceedings were excessive.

99. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only insofar as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its

possession and the above criteria, the Court considers that no award is to be made in respect of the domestic proceedings.

100. In contrast the Court awards the sum claimed for the Convention proceedings in full, namely, EUR 3,500.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 of the Convention;

2. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 8 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 3 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President