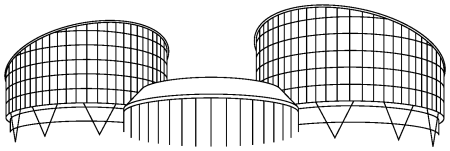

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF I.S. v. GERMANY

(Application no. 31021/08)

JUDGMENT

STRASBOURG

5 June 2014

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 I.S. v. Germany,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 6 May 2014,

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

PROCEDURE

1. The case originated in an application (no. 31021/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Ms I.S. ("the applicant"), on 19 June 2008. The President of the Section acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr G. Rixe, a lawyer practising in Bielefeld. The German Government ("the Government") were represented by their Agent, Ms K. Behr, *Regierungsdirektorin*, of the Federal Ministry of Justice.

3. The applicant alleged that the decisions of the German courts violated her rights to respect for her family life and private life under Article 8 of the Convention. Although she had placed her newborn twin children for adoption she was promised a "half-open" adoption with contact with and information about the children. This had not been respected by the German courts.

4. On 9 January 2012 the application was communicated to the Government. On 20 June 2012 the applicant informed the Court that she did not wish further to pursue her complaint under Article 6 of the Convention.

THE FACTS

5. The applicant, Ms I. S., was born in 1962 and lives in Bielefeld.

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

6. The applicant married in 1986 and had two children. In 1991 and 1992 she suffered miscarriages and a stillbirth, which caused her a long lasting psychological trauma.

7. In summer 1999 she became pregnant with twins after an extramarital affair. The natural father insisted on an abortion, as did the husband of the applicant. Both men threatened to leave her.

8. In November 1999 the husband of the applicant moved out and threatened to stop paying maintenance for his two sons and to the applicant. He put further pressure on her by threatening to break off all contact with his sons if she sued for maintenance. Instead, he offered to move back in with the applicant if she gave away the "illegitimate" children. The applicant's sister and her mother refused to support her. The applicant felt extremely guilty for having destroyed the family situation for her two sons, yet she was determined not to have an abortion.

9. On 19 April 2000 the twin sisters, S. and M., were born prematurely. The applicant and the newborn children had to remain in hospital, where until 7 May 2000 the applicant cared for the children.

The applicant did not specify the identity of the natural father of the twins.

B. The adoption proceedings

10. The applicant made initial contact with the Bielefeld Youth Office during her pregnancy. She allegedly initially thought about having the twins placed in foster care, due to her difficult family and financial situation. The Bielefeld Youth Office – according to the applicant – instead suggested adoption as the applicant herself or her husband would have to pay for the foster care.

11. From January until October 2000 the applicant received psychological treatment on the advice of her gynaecologist. According to her psychoanalyst the applicant was depressed, had suicidal tendencies, and suffered from anxiety, panic attacks and extreme feelings of guilt as well as a sleeping disorder. The applicant felt overwhelmed by the situation and the decisions to be taken. The potential adoption was a topic of discussion during the treatment.

12. As the applicant could not take the newborn children home she consented to having them placed in provisional care with a view to later adoption. In this way she hoped to avoid too many changes of the children's primary carers. She was allegedly told that if placed in foster care the newborns would first be given to an emergency foster family for six months before being handed over to a long-term foster family.

13. From 8 May 2000 onwards a staff member from the Bielefeld Youth Office advised the applicant to stop visiting the children if she really intended to give them up for adoption.

14. On 19 May 2000 the children were handed over to the couple who later became their adoptive parents.

15. In summer 2000 the applicant personally met the future adoptive parents of the twin sisters. The applicant was allegedly so upset that she burst into tears and had to cut the visit short.

16. On 1 September 2000 it was legally acknowledged that the husband of the applicant was not the father of the twin sisters by judgment of the Bielefeld District Court (no. 34 F 1306/00). The applicant began to work full time in order to support herself and her two sons.

17. On 9 November 2000 the applicant formally consented to the adoption of the children in a deed before the civil law notary, D.R., in Bielefeld. The declaration reads as follows:

> "I hereby give consent for my children, S. and M., born 19.04.2000 in Bielefeld, to be adopted by the married couple identified under no. [...] on the list of the Bielefeld City Youth Office.
>
> I declare this for the use of the competent family court. I am aware that this declaration cannot be revoked.
>
> I have been instructed by the civil law notary as to the legal consequences of the adoption, in particular the fact that all kinship of the children and their children to me and my relatives will cease as will all duties and rights that follow from kinship.
>
> Although I do not know the names of the future parents of my children I trust that the Bielefeld City Youth Office has made a proper choice regarding the parents and respected the interests of the children.
>
> In case the family court wishes to inform me about the beginning or the end of care, the beginning or the end of guardianship regarding my children or about the granting of adoption, I hereby empower the Bielefeld City Youth Office to receive that information for me."

18. As the identity of the natural father of the children remained unknown, he could not consent to or object to the adoption.

19. After the declaration of consent had been made, the applicant, the prospective adoptive parents and the twin infants met again in person. On 25 November 2000 an oral agreement was reached between the prospective adoptive parents and the applicant at a meeting at Stormarn District Social Services in the presence of a staff member. It was considered that the adoptive parents would send a short report together with photographs of the

children to the applicant once a year through the Bielefeld Youth Office. Whether this agreement laid down any rules regarding regular meetings between the children and the applicant is disputed. A personal meeting in summer 2001 was considered, but did not take place.

20. On 1 February 2001 the future adoptive parents declared in a deed before a civil law notary that they wished to adopt the twin sisters S. and M.

21. In March 2001 the District Administrator (*Landrat*) of Stormarn District, Department of Social Services and Adoption gave an expert opinion on the development of the children in the care of the prospective adoptive parents.

22. On 21 June 2001 the guardianship division of the Reinbek District Court (proceedings no. 2 XVI 1/01) held a hearing with the prospective adoptive parents in the presence of the twins. The record of the hearing reads:

> "It was debated how the children have been getting on in the family. Particular attention was paid to addressing anxieties resulting from the fact that the natural mother is obviously having enormous difficulties coping on a psychological level with the fact that she has given away her children. There are signs, given that a half-open adoption was agreed on, which lead to the conclusion that the mother seeks contact with the twins. However, the arrangement involving the staff of the Youth Office and the natural mother remains valid, namely, that photographs of the children are to be sent annually to the natural mother. The children will also be told early on that they were adopted."

23. On the same day the Reinbek District Court concluded the adoption of S. and M. and declared them the legitimate children of the adoptive parents. The family and the given names of the children were changed accordingly.

C. Proceedings to declare the applicant's consent to adoption void

24. On 11 April 2002 the applicant commenced proceedings before the Bielefeld District Court in order to declare her consent to the adoption void. The court transferred the case to the competent Reinbek District Court (no. 2 XVI 6/02). The applicant argued that the adoption was void because the father of the child had not consented to the adoption. She further argued that at the time of giving her consent she had been either in a temporary or in a pathological state of mental disturbance, which had prevented the free exercise of her will. She had not been aware of what she had been doing. She argued – referring to medical evidence – that she had been suffering from an "aggravated reactive form of depression with acute risk of suicide" since 1992, when she had been traumatised by the stillbirth.

25. The *guardian ad litem* of the children argued that a revocation of the adoption would be against the best interests of the children, as since their

birth they had been almost continuously in the care of the adoptive parents who had established a very good parental relationship with them.

26. In reaction to the arguments of the *guardian ad litem* the applicant partly withdrew her application with regard to custody rights and made clear that her aim was no longer to integrate the children into her own family. She acknowledged that the children were well cared for and fully settled in the adoptive family. She underlined that her aim was to regain kinship in order to have a right to contact with the children. In her view her vulnerable situation at the time of the birth had been exploited by the Bielefeld Youth Office; she now felt that she had been unduly influenced to put the children up for adoption.

27. The Reinbek District Court procured a psychiatric opinion on whether the applicant had been temporarily legally incapable of acting at the time of consenting to the adoption. The expert contacted the applicant, her psychoanalyst at the time and her long-term gynaecologist. According to the psychiatric expert the applicant had been in a situation of extreme conflict from the time she had become aware of her pregnancy. This had aggravated the depression she was already suffering from due to the accidental stillbirth in 1992. He put the applicant's decision to put the twin sisters up for adoption down to her desire to "get her husband back". He diagnosed a certain weakness in the applicant's personality and a dependency on male authority. However, he could not diagnose any past or present psychotic illnesses and therefore concluded that although she had been suffering from a deep inner conflict at the time of consenting to the adoption, the applicant had been legally capable of making a decision on her own.

28. On 4 June 2003 the court heard the applicant, who explained how, in her view, the Bielefeld Youth Office had unduly used her wish to see her children in the summer of 2000 in order to pressurise her into signing the adoption declaration.

29. In a decision of 10 June 2003 the Reinbek District Court dismissed the applicant's claim. It acknowledged the situation of extreme conflict the applicant had been in at the time of consenting to the adoption and the psychological implications of that. It stated that solutions other than putting the children up for adoption might have been available to resolve the applicant's personal crisis. In line with the expert opinion, however, the court held that the applicant had still been capable of making decisions. Furthermore, the court stated that the applicant had no legal standing to rely on the lack of consent of the children's father to the adoption.

30. Since the applicant did not appeal against the decision, it became final.

D. The proceedings concerning contact and/or information rights of the applicant

1. Proceedings before Reinbek District Court

31. On 14 November 2002 the applicant filed proceedings (no. 1 F 32/02) for contact with the children and the right to receive information about them at the Reinbek District Court. She argued that she had been promised meetings with the children every six months and letters and photos of them. A meeting with the children in June 2001 had been scheduled according to the agreement, but did not take place because the responsible member of Bielefeld Youth Office was on extended leave. No other member of the Youth Office had replaced the absent staff member. In September 2001 the applicant received photos of the children. When she mentioned that she was thinking about revoking her consent to the adoption, staff of the Bielefeld Youth Office threatened to stop her contact with the children. A letter that the applicant wrote to the adoptive parents and handed over to the Bielefeld Youth Office was returned with the remark that the applicant should seek psychological treatment. The applicant based her claim for contact on Article 1666 and additionally on Article 1685 § 2 of the Civil Code (see "Relevant domestic law" below). Her claim for the right to receive information about the children was based on Article 1686 of the Civil Code.

32. On 2 July 2003 the adoptive parents were heard. They opposed the claim of the applicant and asked for it to be dismissed. They referred to the legal basis of adoption under the Civil Code, which only provided for anonymous adoption. According to the hearing record the adoptive parents declared that they still intended to inform the children about the adoption before they started primary school. They had planned to see the mother of the children together with the children in spring 2001. This meeting had been set up for the sole benefit of the applicant, as the children would not have benefited from it. They had had the intention of sending letters to the applicant with information about the children. Now, in view of the court proceedings, they felt insecure and preferred to wait for the court decisions.

33. In a decision of 21 July 2003 the Reinbek District Court dismissed the applicant's request for contact with the children. According to the court Article 1684 of the Civil Code was not applicable to the applicant's case as she had lost her legal status as a parent as a result of the adoption. An analogous application of the Article was, according to a decision of the Federal Constitutional Court of 9 April 2003 (no. 1 BvR 1493/96), not possible. Article 1685 of the Civil Code was applicable, but would not grant contact rights to the applicant as she did not fulfil the legal requirements. The applicant could not be considered as a person who had cared for the children for an extended period of time. In fact, she had only cared for them for two weeks. Even if the criteria of the Federal Constitutional Court in the

above-mentioned decision – whether there was a social and family relationship – were applied, the applicant could not be granted contact, as she had not created a significant social and family relationship with the children. The time of pregnancy and the two weeks after the birth did not suffice. The Civil Code grants to the adoptive parents the sole right to establish, grant or deny contact with the children even in respect of the natural mother. Furthermore, the court argued that the children, who were only three years old, might be overwhelmed by the fact that they had two mothers.

34. On 28 July 2003 the court also dismissed the applicant's claim in regard to the right to receive information about the children. Article 1686 of the Civil Code was not applicable, as the applicant was not a parent any more. Insofar as Article 1686 might be construed more widely, it would not apply to the applicant as her case did not fall under the scope of Article 1685 of the Civil Code.

2. Proceedings before the Schleswig Court of Appeal

35. On 11 August 2003 the applicant filed an appeal with the Schleswig Court of Appeal. She mainly complained that the Reinbek District Court had neither decided on Article 1666 of the Civil Code as a potential basis of her claim nor on whether a contractual agreement existed; furthermore, her petition for an expert opinion on the children's best interests had been ignored. She further argued that the criteria of a "long duration", when applied to parent-child relationships, had to be interpreted from the perspective of the child, whose concept of time differed from that of adults. The natural mother was always a "relevant person" in the sense of Article 1685 of the Civil Code, and this evaluation did not change even after the natural mother ceased to have legal responsibilities. Regarding the right to information, she argued that although she had consented to the adoption, she remained the natural mother and the constitutional protection of the family applied to her. Even the Federal Constitutional Court had acknowledged that during pregnancy a psycho-social relationship between mother and the foetus was established (judgment of 29 January 2003 – 1 BvL 20/99 and 1 BvR 933/01). Lastly, she complained about the length of the proceedings.

36. On 22 October 2003 the applicant was granted legal aid.

37. On 30 January 2004 the Schleswig Court of Appeal (10 UF 199/03 and 10 UF 222/03) dismissed the applicant's appeal against the decisions of the Reinbek District Court of 21 and 28 July 2003. Two hearings, one on 15 December 2003 and the other on 30 January 2004, had taken place. Regarding the length of the proceedings before the district court, the Schleswig Court of Appeal found that that court had dealt adequately with the complex case within seven and a half months. Concerning the contact rights of the applicant, the court found that only Article 1685 Civil Code was applicable. Although the applicant was the children's natural mother,

she did not belong to the circle of people who had lived in "domestic community" with the child for a long period of time. According to the court, only foster parents are covered by this terminology. Furthermore, in order to determine "a long period of time" one had to establish whether a child had come to accept that his or her "relevant surroundings" (*Bezugswelt*) were with the individual in question. In the present case, the time of pregnancy was irrelevant, as an unborn child does not have a concept of its surroundings. Article 1685 Civil Code was in line with the constitutional protection of the family. The natural mother ceased to have contact or custody rights at the moment of adoption. The legal provisions regarding adoption were aimed at the undisturbed development of the child, and they served the best interests of the adopted child, who had to be fully integrated into the adoptive family; the biological family became irrelevant in accordance with the law. Even if the criteria of the judgment of the Federal Constitutional Court of 9 April 2003 regarding the natural father of a child born out of wedlock were applied, the natural mother would have to have lived with the children for a considerable time, which was not the case here. As the applicant knew, the right to contact on the basis of a contractual agreement could not be enforced by the family courts, as they were not empowered to regulate such matters. Article 1666 of the Civil Code did not give grounds for a different solution.

38. Having considered the claim for the right to receive information about the children under Article 1686 of the Civil Code, the court found that the applicant had ceased to be a parent at the moment of adoption. As the legal basis was unambiguous and the circle of people who had a right to such information was strictly limited to the parents, the court found no room for a different interpretation.

3. Proceedings before the Federal Constitutional Court

39. On 8 March 2004 the applicant raised a constitutional complaint regarding the denial of her rights to receive information about and have contact with the twin sisters after their adoption.

40. In a decision of 13 December 2007, served on the applicant's representative on 19 December 2007, a panel of three constitutional judges refused to admit the constitutional complaint.

E. Other developments and proceedings

41. The applicant also commenced proceedings in June 2003 concerning the appointment of a *guardian ad litem* for the twin sisters, in order for the children to be able to raise a constitutional complaint against the adoption decision of the guardianship division of the Reinbek District Court of 21 June 2001 (no. 2 XVI 1/01). These proceedings are the issue of another complaint before this Court (application no. 30296/08).

42. The applicant divorced her husband and is now remarried. She had a child with her new husband in 2003.

43. By letter of 16 December 2011 this Court informed the applicant that on 3 December 2011 the Law on a remedy against lengthy court proceedings and criminal investigations (Federal Law Gazette Part I, 2011, page 2302 et seq.) had come into force in the Federal Republic of Germany.

II. RELEVANT DOMESTIC LAW

A. Article 6 § 1 and 2 of the Basic Law

> "(1) Marriage and the family shall enjoy the special protection of the State.
>
> (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty."

B. Relevant provisions of the Civil Code

1. Parental custody, principles

44. Article 1626 provides that parents have the duty and the right to care for their minor children (parental care). Parental custody encompasses both care for the person and for the property of the children.

45. By judgment given on 29 January 2003 (1 BvL 20/99, 1 BvR 933/01) the Federal Constitutional Court accepted the legislator's decision originally to grant parental authority over children born out of wedlock to the mother. The Federal Constitutional Court considered that, quite apart from the biological bond, mother and child developed a relationship during pregnancy which was continued after birth.

2. Provisions on adoption

46. Article 1747 stipulates that the consent of the parents is necessary for the adoption of a child. Consent may not be given until the child is eight weeks old. It is effective even if the person who gives consent does not know the adoptive parents, who have already been chosen.

47. Article 1750 provides that the consent must be declared to the family court and recorded by a notary. The consent becomes effective on the date it is received by the family court. It may not be given subject to a condition or a stipulation as to time. It is irrevocable.

48. Pursuant to Article 1751 § 1, after the consent of one parent to adoption the parental custody of this parent is suspended and the right to have personal contact with the child may not be exercised.

49. Pursuant to Article 1754, insofar as it is relevant to this case, adoption has the effect that the adopted child attains the legal status of the

child of the adoptive parents. Parental custody is held by the adoptive parents jointly. Article 1755 provides that when the adoption takes effect, the relationship of the child and its descendants to its previous relatives and the rights and duties arising from this are extinguished.

50. Article 1758 § 1 provides that facts pertaining to the adoption and its circumstances may not be revealed or inquired into without the approval of the adoptive parent and of the child, unless special reasons of public interest make this necessary.

51. The terms "open" or "half-open" adoption are not used in the Civil Code.

3. Provisions on contact with a child

52. Under Article 1684 § 1, a child is entitled to have contact with both parents; each parent is obliged to have contact with, and entitled to have contact with, the child.

53. Under Article 1685 §§ 1 and 2 in the version applicable when the courts of first instance and the appeal court decided in this case, grandparents and siblings had a right to contact the child if this served the best interests of the child. The same applied to the spouse or former spouse and the civil partner or former civil partner of a parent, where this person had lived in domestic community with the child for a long period, and to persons with whom the child had spent a long period of time as a foster child.

54. Under the current version – valid since 23 April 2004 – persons with whom the child has a close relationship (*enge Bezugspersonen)* have a right to contact with the child if it serves its best interests and if they have or have had "actual responsibility" for the child (a "social and family relationship"). It is assumed that actual responsibility has been taken if the person has lived for a long period of time in domestic community with the child. The law had to be changed because the Federal Constitutional Court, by judgment of 9 April 2003 (1 BvR 1493/96, 1724/01), declared Article 1685 in its old version incompatible with Article 6 § 1 of the Basic Law regarding natural fathers who had a "social and family relationship" with their children.

4. Provision on information on a child

55. In accordance with Article 1686, each parent may, when it is justified, request information from the other parent on the personal circumstances of the child, to the extent that this is not inconsistent with the best interests of the child. Disputes are decided by the family court.

5. Provision on urgent measures in the best interest of the child

56. Pursuant to Article 1666 in the version applicable before July 2008 the family court was empowered to take the necessary measures if the

parents were not willing or were not able to avert a danger to the physical, mental or psychological best interests of a child caused by abuse of parental custody, neglect of the child or by any other failure of the parents to carry out their duty.

C. Law on a remedy against lengthy court proceedings and criminal investigations

57. Under this Act (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*), which came into force on 3 December 2011, a national remedy against the excessive length of court proceedings and criminal investigations was created. According to its Article 23, the transitory provision, the new remedy is applicable to pending cases as well as to cases where the proceedings have terminated on the national level but which already form part of an application to the European Court of Human Rights.

D. International Conventions

1. 1967 European Convention on the Adoption of Children

58. Germany signed the 1967 Convention in April 1967 and ratified it in November 1980. It entered into force in Germany on 11 February 1981.

The relevant provisions of the Convention read as follows:

> "Article 20
>
> 1. Provision shall be made to enable an adoption to be completed without disclosing to the child's family the identity of the adopter.
>
> 2. Provision shall be made to require or permit adoption proceedings to take place *in camera*."

2. European Convention on the Adoption of Children (revised 2008)

59. The revised European Convention on the Adoption of Children was opened for signature on 27 November 2008 and entered into force on 1 September 2011. Germany has not signed the revised Convention. The relevant provisions of the 2008 Convention read as follows:

> "Article 22
>
> 1. Provision may be made to enable an adoption to be completed without disclosing the identity of the adopter to the child's family of origin.
>
> 2. [as Article 20 § 2 above]."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

60. The applicant complained that the decisions of the German courts denying her the right to have contact with and receive information about the children of whom she is the natural mother violated her right to respect for her family and private life under Article 8 of the Convention, which reads as follows:

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

61. The Government contested that argument.

A. Admissibility

62. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

63. The applicant emphasised in particular that her consent to the placement of her children for adoption did not automatically end her "family life" within the meaning of Article 8 of the Convention. By signing the deed she had merely waived her right as a legal parent, but not as a natural mother.

64. The applicant stressed that as the natural mother of the adopted children, contact with them and information about their well-being formed at least a part of her "private life", as it concerned an important part of her identity even though she had ceased to have legal rights over the children. Refusal to allow a natural mother contact with her child after it had been adopted was disproportionate, especially in this case, where the adoptive parents, the Bielefeld Youth Office and the applicant had agreed to a "half-open" adoption, which meant that the applicant would be informed about the development of the children and would be able to meet them twice a year.

2. The Government's submissions

65. The Government argued that there had been no interference with the applicant's right to respect for her family life. All forms of family relationship had been extinguished at the latest at the time of the adoption. Citing *Schneider v. Germany*, no. 17080/07, § 80, 15 September 2011, the Government pointed out that biological kinship between a biological parent and child alone, without any further legal and factual elements indicating the existence of a close personal relationship, was insufficient to attract the protection of Article 8 of the Convention. The Government noted that in the case at hand the children never lived with the applicant.

66. The Government conceded that the applicant's relationship with her adopted children might fall within the scope of Article 8 of the Convention under the notion of "private life". They acknowledged that the fact of the children's existence would always be an important aspect of the applicant's life history, given that she was their natural mother. However, they doubted that the decisions of the domestic courts regarding contact and information rights infringed the applicant's right to respect for her private life. The Government pointed out that the applicant had been informed about the legal effects of the placement order. They further stressed that the alleged arrangements concerning a "half-open" adoption were made only after the applicant had placed the children for adoption. At the time of consenting to the adoption, the applicant had had no grounds whatsoever to assume that she would be able to continue any form of relationship with the children.

3. Assessment by the Court

(a) Whether there has been an interference or a positive obligation

67. The Court observes at the outset that the instant application exclusively concerns the domestic courts' refusal to grant the applicant contact with and information about her natural children. The applicant does not, in fact, contest the validity of her consent to the placement of the newborn children for adoption.

68. The Court notes that the relationship of the applicant with her children fell under the protection of Article 8, under the notion of "family life", at the time when the children were born. The relationship between the applicant and the children might have ceased to fall within the scope of "family life" when the applicant signed the deed which irrevocably placed the children for adoption at the civil law notary's office on 9 November 2000.

69. The Court reiterates that biological kinship between a natural parent and a child alone, without any further legal or factual elements indicating the existence of a close personal relationship, might be insufficient to attract the protection of Article 8 (see *Schneider v. Germany*, cited above, 17080/07, § 80, and *Hülsmann v. Germany* (dec.), no. 33375/03,

18 March 2008). Notwithstanding that the Court has in some cases considered that even "intended family life" might, exceptionally, fall within the ambit of Article 8, (see *Anayo v. Germany*, no. 20578/07, § 57, 21 December 2010), the Court observes that in the present case the existing family relationship was intentionally severed by the applicant. However, the Court considers that the determination of remaining or newly established rights between the applicant, the adoptive parents and her biological children, even if they fall outside the scope of "family life", concern an important part of the applicant's identity as a biological mother and thus her "private life" within the meaning of Article 8 § 1.

70. The Court observes that the applicant complains about the decisions of the German courts refusing her the right to have contact with, and the right to receive information about, the adopted children. The Court reiterates that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. In the instant case, there are elements which suggest that the German courts' decisions could be considered in the light of a positive obligation. However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see, for instance, *Mikulić v. Croatia*, no. 53176/99, § 58, ECHR 2002-I; *Evans v. the United Kingdom* [GC], no. 6339/05, § 75, ECHR 2007-I; and *S.H. and Others v. Austria* [GC], no. 57813/00, § 88, ECHR 2011).

(b) Justification under paragraph 2 of Article 8

71. The Court will thus continue its examination by determining whether the impugned court decisions were "in accordance with the law" pursued an aim or aims that are legitimate and can be regarded as "necessary in a democratic society".

(i) In accordance with the law

72. The Court notes that neither Article 1684 nor Article 1685 of the Civil Code conferred on biological parents a right to have contact with their children as such. The same can be said for Article 1686 of the Civil Code which does not give them a right to have information about their adopted children.

73. The Court further notes that when examining the applicant's request the domestic courts did not limit their legal analysis to a literal reading of

the provisions of the Civil Code. In conformity with a decision of the Federal Constitutional Court, they construed the named provisions beyond their literal wording insofar as they asked whether a "social and family relationship" between the children and the applicant had already been established and whether for this reason contact would serve the best interests of the children. In applying this standard the domestic courts took the individual circumstances of the case into account. In coming to the conclusion that such a relationship had not yet been established between the applicant and the twin children, the domestic courts emphasised in particular the short period of nineteen days that they had actually spent together after the children's birth. In this context, the Court reiterates that is is not its task to deal with errors of fact or law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention (see *Garcia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

74. Under the pertinent provisions, the termination of the applicant's legal right as a parent is the consequence of her consent to the deed before the civil law notary. By this act her rights to contact with the children and information about them terminated. In conformity with the statutory law, the applicant was made aware of the legal consequences of placing the children for adoption by a civil law notary prior to signing the adoption deed. The Court notes that the explanations given by the civil law notary regarding the statutory law were not in dispute. According to the declaration adopted before the notary, there was no allusion made to a "half-open adoption" in this context. The Court further notes that civil law notaries are lawyers who have undergone special counseling training before being admitted to the notary bar.

75. The Court observes that the domestic courts had established in separate proceedings that the adoption deed in the pertinent case was valid. The domestic courts established, on the basis of an expert report, that the applicant had been capable of understanding the impact of the adoption deed and of acting accordingly. As a consequence of this the applicant's parental rights were finally extinguished when the adoption took effect in accordance with Article 1755 of the Civil Code.

(ii) Legitimate aim

76. The Court observes that the German provisions on anonymous adoption, by not providing a right to contact with and information about the adopted children, aim at protecting the adopted child's private and family life. At the core of this lies the intention to safeguard the adopted child's right to develop and bond with his or her adoptive parents. The same applies to the adoptive parents who also hold a right to protect their private and family life, including a corresponding right to bond with their adopted children and to develop undisturbed family life. In pursuing this aim the

German provisions are in conformity with Article 20 of the 1967 European Convention on the Adoption of Children, as well as with Article 22 of the 2008 revised version of that Convention, although the Court takes note that Germany has neither signed nor ratified this revised Convention. The Conventions provide for anonymous adoptions, the purpose of which, according to the explanatory reports of those conventions, is to avoid difficulties which may arise from the natural parents' knowledge of the adopter's identity. The Court observes in this context that even if the more recent Convention allows for less strict regulations on adoption, it does not favour such an approach. In this context it is also necessary to take into account if a State has rules on foster care which allow natural parents to retain, to a great extent, their legal status as parents. This is the case for Germany. The Court notes that the applicant was made aware of the existence of foster care prior to the adoption process even if, as the applicant alleges, the information given was not comprehensive (compare paragraph 12, above).

77. The decision of the Schleswig Court of Appeal was aimed at complying with the legislator's will to give preference to a newly established family relationship between the children and their adoptive parents, with whom the children actually lived and who were providing parental care on a daily basis. The courts further emphasised the importance of allowing the very young children to develop in their adoptive family without disruption.

78. In the light of these considerations the Court accepts that the decisions at issue pursued the legitimate aim of protecting the rights and freedoms of others.

(iii) Necessary in a democratic society

79. The question the Court now has to address is whether the decisions of the domestic courts with regard to contact and information were necessary to pursue the aforementioned aim and struck a fair balance between the rights of the children in question, the adoptive family and the private life of the applicant as the children's natural mother.

80. In this context the Court notes that the adoptive parents had given – a representative of the Youth Office being present – the applicant reason to expect a "half-open" adoption and had consented orally to at least an exchange of information about the children after the adoption.

81. Although the terms "open" and "half-open" adoption are not used in the Civil Code, the Court takes note of the Government's argument that German law permitted "open" and "half-open" forms of adoption. Under such an agreement there could be contact of a greater or lesser degree of intensity – either direct or mediated by the Youth Office – between the adoptive parents, the child and the biological parents. The Government further explained that such forms of adoption were dependent on the

consent of the adoptive parents, who held custody rights and exercised parental care in the best interests of the child. Regarding the agreement in the case at hand, the Government emphasised that it only contained reference to the applicant's right to have information about the children. The Government assessed the legal value of such arrangements as mere declarations of intent which were not enforceable against the adoptive parents' will. According to the Government, making such decisions enforceable was not considered expedient as adoptive parents should have freedom in the exercise of their custody rights. The Government further pointed to Article 1750 of the Civil Code, which stipulated that a declaration of consent to adoption could not be made subject to any condition or have any condition attached to it later.

82. The applicant argued, in line with the Government, that an "open" or "half-open" adoption only differed from a classic adoption to the extent that details as to the identity of the adoptive parents were disclosed. Concerning the "agreement", she emphasised that she had demanded that an agreement on contact rights and information be made before she signed the deed ceding her parental rights. However, the Youth Office had urged her to cede her rights first and had only afterwards arranged a meeting between her and the adoptive parents.

83. The Court notes that nothing indicates that either the Youth Office or the prospective adoptive parents had wanted to deviate from the German statutory law on adoption, which provides for an anonymous adoption but permits disclosure of identity by the adoptive parents themselves.

84. The Court emphasises that the oral arrangements between the applicant and the adoptive parents were concluded after the applicant had been informed by an independent lawyer, a civil law notary, about the legal consequences of her intention to declare her irrevocable consent to the adoption. The Court notes that the requirement that formal legal advice be provided by an independent lawyer is an essential safeguard against misunderstandings of the nature of the deed, which cannot be revoked and cannot have conditions attached to it later.

85. To the Court this clearly indicates that the applicant understood the "arrangements" in the way the Government described them: namely, as a declaration of intent in the context of a prospective voluntary setting aside of anonymity by the adoptive parents. This is also made clear by the specific circumstances of the conclusion of the agreement which was only made orally and did not contain any details on the right to information and the right to contact.

86. The adoption process, seen as a whole and including the court proceedings, was fair and ensured the requisite protection of the applicant's rights. The Court reiterates that the legal rights of the applicant with regard to her biological children were severed as a result of acts she had taken in full knowledge of the legal and factual consequences. In view of this the

Court finds the decision of the German authorities to attach greater weight to the privacy and family interests of the adoptive family to be proportionate. There is no indication that the domestic courts failed to sufficiently establish the relevant facts, in particular the personal links between the applicant and the children, although they did not order an expert opinion on the children's best interests. As the children were adopted as newborns and were still very young at the time of the domestic proceedings, the interests of the adoptive family to enjoy and build a family life together with the children undisturbed by attempts by the children's biological parent to re-establish contact prevailed.

87. The foregoing considerations are sufficient to enable the Court to conclude that there has not been a violation of Article 8 of the Convention.

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

88. The applicant further complained under Article 14 of the Convention taken in conjunction with Article 8 that she was discriminated against in comparison to step- or foster parents, who had a potential right to contact with children formerly in their care if that contact was deemed suitable for the children. Article 14 provides:

> "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."

89. The Court notes that the domestic courts applied Articles 1684 § 1 and 1685 §§ 1 and 2 of the Civil Code in exactly the way they would have done if the applicant had been either a stepmother or a foster parent. It observes, in particular, that even a stepmother or foster parent would not have qualified for such rights in the applicant's position, because the short period of time she actually lived with her natural children, did not, in the domestic courts' view, allow her to establish a social and family relationship with them. It follows that the applicant's complaints under Article 14 in conjunction with Article 8 concerning both the guardianship and contact proceedings must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

90. The applicant had originally complained that the length of the proceedings before the domestic courts had been excessive and that the domestic law did not provide for an effective remedy.

91. By letter of 27 June 2012 the applicant informed the Court that she did not wish to pursue her complaint under Article 6 and Article 13, as she was not inclined to make use of the new domestic remedy against lengthy court proceedings.

92. The Court notes that the applicant wishes to withdraw her complaint as she does not wish to pursue it at the domestic level. The circumstances therefore lead to the conclusion that the applicant does not intend to pursue her application in this regard (Article 37 § 1 (a) and (b) of the Convention). In addition, there is no reason pertaining to respect for human rights as defined in the Convention or its Protocols that requires the Court to continue the examination of this complaint (Article 37 § 1 (c) *in fine*). Accordingly, these complaints are to be struck out.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to strike out the application out of its list of cases in so far as it relates to the complaints under Article 6 § 1 and Article 13 of the Convention;

2. *Declares*, unanimously, the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 5 June 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Power-Forde joined by Judge Zupančič is annexed to this judgment.

M.V.
C.W.

DISSENTING OPINION OF JUDGE POWER-FORDE JOINED BY JUDGE ZUPANČIČ

I accept that the respondent State is entitled, in principle, to make provision within its legislation for the lawful adoption of children. I take no issue with the permanent effects of adoption as set out in §1754 and §1755 of the German Civil Code. Pursuant to those provisions, adoption changes the legal status of the child vis-à-vis his or her adoptive parents. Further, the relationship of a child to his or her birth mother and the rights and duties arising therefrom are extinguished upon the making of an adoption order.

My difficulties in this case relate to the State's positive obligations under Article 8. My concerns are somewhat accentuated by the very proactive role taken by the authorities in encouraging the applicant to have her children adopted. Though, clearly, overwhelmed by the situation in which she found herself, it would appear that she was, to say the least, discouraged from exploring alternatives to adoption. This can be seen in the fact that notwithstanding their knowledge of her obvious personal and financial difficulties, the applicant was advised by the authorities that she would have to pay for foster care in the event that she pursued that option.

My difficulties with the State's discharge of its positive obligations are two-fold. They concern, firstly, the State's failure to provide clear legal principles governing the operation of so-call 'half-open' adoptions and, secondly, its failure to ensure that independent evidence of the applicant's capacity to consent to adoption was available having regard to her particular vulnerability at the time of the events in question.

The Absence of Legal Clarity in Relation to 'Half-open' Adoption

The government acknowledges that German law permits of such an arrangement as a 'half-open' form of adoption.[1] This, depending on the circumstances, may involve some contact between the birth mother and her child post adoption and may be mediated by the Youth Welfare Office. The government cites Section 1626(1) of the Civil Code as the legal basis to such half-open adoptions. In addition to this acknowledgment, it is clear that the domestic courts in Germany also recognise the concept of 'half-open' adoption. The Reinbek District Court which, on 21 June 2001, made the adoption order in this case confirmed that 'a half-open adoption was agreed on.' It further confirmed that arrangements made between the applicant, the adoptive parents and the Youth Welfare Office in this case 'remain valid.'

Despite such confirmation from the respondent State, the majority notes that the term 'half-open adoption' is not to be found in the German Civil Code. The uncertainty thus begins. Further, notwithstanding the fact that the validity of the tri-partite agreement was noted by the domestic court that

1. See in its submissions of 13 June 2012 at § 23.

made the adoption order in this case, it appears that this 'valid' agreement was entirely incapable of being enforced if the adoptive parents choose not to honour its terms.

It is not entirely correct to assert (as does the majority) that the applicant ceded her rights at the moment she signed her consent to adoption on 9 November 2000. Under domestic law, her right to parental custody was '*suspended*' at that stage. Her consent only became effective and thus, irrevocable, on the date it was '*received by the family court'*. No other court date being mentioned in the judgment such receipt, it may be assumed, became effective on 21 June 2001 when the Court took judicial notice of the decision of the applicant together with the half-open nature of the adoption agreed upon between the three parties. It then made the adoption order, accordingly. It was only at that point that the applicant's rights which, previously had been suspended, were now extinguished.

Importantly, during that six month period and before the adoption order was made, the Adoption and Special Care Department stated in an expert report that an agreement had been reached in November 2000 (that is, just two weeks after consent had been declared but six months prior to the making of the adoption order) - that the adoptive parents would, once a year, send photographs and a report.[1] This agreement, to which the authorities were party, clearly, led the applicant to believe that she would continue to receive information about her children after they had been adopted. Whilst the district court recognised that photographs would be sent to her, annually, this did not transpire after the adoption order was made. The adoptive parents retained the exclusive power to decide whether or not such an agreement was to be honoured and the applicant was left without recourse. The fact that statutory bodies can enter into 'half-open' adoption agreements with birth mothers before an adoption order is made creates, unfortunately, the entirely false and misleading impression that such agreements can have a binding effect upon the subsequent adoption that follows.

There can be few, if any, decisions of greater magnitude in a person's private or family life than the decision to allow one's children to be adopted. Given the gravity of what is issue, there ought to be no room for the kind of vagueness and uncertainty that prevailed in this case. There is, to my mind, a positive obligation on a State that permits of such 'half-open' adoptions to ensure that legal clarity is unequivocally available to a vulnerable birth mother who enters into such a pre-adoption arrangement. Where the State is

1. Whilst the judgment notes that the agreement was reached '*in the presence of*' the authorities, it is clear from the submissions received that their role was a good deal more proactive than that of passive observers. The Government accepts that a written agreement was reached about the photographs and reports prior to the adoption order being made. It points to a letter sent by the adoptive parents to the applicant in March 2001 which refers to their *'agreement reached with the mother and the Youth Welfare Officer'*.

party to or involved in the making of such an agreement with a birth mother, it is incumbent upon the authorities to ensure that she is left in no doubt as to its utter worthlessness in the event that adoptive parents withdraw therefrom after an adoption order is made. To my mind, the State should not be complicit in a situation where vulnerable mothers take such a vital decision concerning their private and family life based on agreements that are entirely unenforceable. The general lack of clarity and the failure to provide the applicant with any procedures whereby the validity of the 'half-open' adoption agreement could have been tested and, if necessary, enforced demonstrates a failure on the part of the respondent State to have clear and unambiguous legal principles regulating such a vital area of the applicant's private and family life.

The Absence of Evidence of Capacity to Consent

There is clear evidence before the Court that the applicant was psychologically traumatised at the time when she made her decision to consent to adoption. The domestic authorities were aware of the fact that the applicant had been suffering from 'depression', 'panic attacks' and 'suicidal tendencies' (§ 11). It is common knowledge that such conditions may have an impact upon a person's capacity to make a free and informed decision. Given the obvious psychological difficulties under which the applicant laboured shortly after having given birth, it seems to me that the authorities were obliged to dispel any doubts as to her capacity to make a free and informed consent prior to encouraging and facilitating the adoption of her children. Despite earlier diagnoses of 'depression', 'panic attacks' and 'suicidal tendencies', no objective psychiatric assessment of the applicant's capacity to consent was made at the relevant time. A belated examination of her earlier capacity cannot replace the need for such an assessment to be made at the time when her decision was taken. To my mind, once on notice of such clear vulnerability on the part of the applicant, the authorities were obliged to ensure that it had independent expert evidence of capacity to consent prior to its facilitation and encouragement of adoption in this case. I do not suggest that in every case of adoption the authorities are obliged to obtain independent expert evidence of capacity to consent. However, where there are clear indications that questions arise in relation to such capacity then, in my view, such an obligation arises.

For the reasons set out herein, I find that the State failed to discharge its positive obligations under Article 8 of the Convention and that there has therefore been a violation of that provision in this case.