CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF SALGUEIRO DA SILVA MOUTA v. PORTUGAL

(*Application no. 33290/96*)

JUDGMENT

STRASBOURG

21 December 1999

FINAL

21/03/2000

In the case of Salgueiro da Silva Mouta v. Portugal,

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

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

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 28 September and 9 December 1999,

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

PROCEDURE

1. The case originated in an application (no. 33290/96) against the Portuguese Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Mr João Manuel Salgueiro da Silva Mouta ("the applicant"), on 12 February 1996.

2. On 20 May 1997 the Commission decided to give notice of the application to the Portuguese Government ("the Government") and invited them to submit observations in writing on its admissibility and merits. The Government submitted their observations on 15 October 1997 after an extension of the time allowed and the applicant replied on 6 January 1998.

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with Article 5 § 2 thereof, the application was examined by the Court.

4. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Fourth Section. The Chamber constituted within that Section included *ex officio* Mr I. Cabral Barreto, the judge elected in respect of Portugal (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr M. Pellonpää, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr G. Ress, Mr. A Pastor Ridruejo, Mr L. Caflisch, Mr J. Makarczyk and Mrs N. Vajić (Rule 26 § 1 (b)).

5. On 1 December 1998 the Chamber declared the application admissible, considering that the complaints lodged by the applicant under Articles 8 and 14 of the Convention should be examined on the merits[1].

6. On 15 June 1999 the Chamber decided to hold a hearing in private on the merits of the case. The hearing took place in the Human Rights Building, Strasbourg, on 28 September 1999.

There appeared before the Court:

(a) *for the Government*

Mr A. HENRIQUES GASPAR, Deputy Attorney-General, *Agent*,
Mr P. GUERRA, Lecturer, Legal Service Training College, *Adviser*;

(b) *for the applicant*

Ms T. COUTINHO, Lawyer, *Counsel*,
Mr R. GONÇALVES, Trainee Lawyer, *Adviser*.

The applicant also attended the hearing.

The Court heard addresses by Ms Coutinho and Mr Henriques Gaspar, and also their replies to questions put by one of the judges.

7. In accordance with the decision of the President of the Chamber of 28 September 1999, the applicant filed an additional memorial on 8 October 1999 in respect of his claims under Article 41 of the Convention. The Government replied on 28 October 1999.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Portuguese national born in 1961. He lives in Queluz (Portugal).

9. In 1983 the applicant married C.D.S. On 2 November 1987 they had a daughter, M. The applicant separated from his wife in April 1990 and has since then been living with a man, L.G.C. Following divorce proceedings instituted by C.D.S., the divorce decree was pronounced on 30 September 1993 by the Lisbon Family Affairs Court (*Tribunal de Família*).

10. On 7 February 1991, during the divorce proceedings, the applicant signed an agreement with C.D.S. concerning the award of parental responsibility (*poder paternal*) for M. Under the terms of that agreement

1. *Note by the Registry*. The Court's decision is obtainable from the Registry.

C.D.S. was to have parental responsibility and the applicant a right to contact. However, the applicant was unable to exercise his right to contact because C.D.S. did not comply with the agreement.

11. On 16 March 1992 the applicant sought an order giving him parental responsibility for the child. He alleged that C.D.S. was not complying with the terms of the agreement signed on 7 February 1991 since M. was living with her maternal grandparents. The applicant submitted that he was better able to look after his child. In her memorial in reply C.D.S. accused L.G.C. of having sexually abused the child.

12. The Lisbon Family Affairs Court delivered its judgment on 14 July 1994 after a period in which the applicant, M., C.D.S., L.G.C. and the child's maternal grandparents had been interviewed by psychologists attached to the court. The court awarded the applicant parental responsibility, dismissing as unfounded – in the light of the court psychologists' reports – C.D.S.'s allegations that L.G.C. had asked M. to masturbate him. It also found, again in the light of the court psychologists' reports, that statements made by M. to that effect appeared to have been prompted by others. The court added:

> "The mother continues to be most uncooperative and it is wholly improbable that her attitude will change. She has repeatedly failed to comply with the Court's decisions. The finding is inescapable that [the mother] has not shown herself capable at present of providing M. with conditions conducive to the balanced and calm life she needs. The father is at present better able to do so. In addition to providing the economic and living conditions necessary to have the child with him, he has shown himself capable of providing her with the balanced conditions she needs and of respecting her right to maintain regular and sustained contact with her mother and maternal grandparents."

13. M. stayed with the applicant from 18 April to 3 November 1995, when she was allegedly abducted by C.D.S. The applicant reported the abduction and criminal proceedings are pending in that connection.

14. C.D.S. appealed against the Family Affairs Court's judgment to the Lisbon Court of Appeal (*Tribunal da Relação*), which gave judgment on 9 January 1996, reversing the lower court's judgment and awarding parental responsibility to C.D.S., with contact to the applicant. The judgment was worded as follows.

> "In the proceedings for the award of parental responsibility for the child M., born on 2 November 1987, daughter of [the applicant] and C.D.S., the decision given on 7 February 1991 confirmed the agreement between the parents as to parental responsibility for the child, contact and the amount of maintenance payable by the father, since custody of M. was awarded to the mother.
>
> On 16 March 1992 [the applicant] applied for a variation of the order granting parental responsibility, alleging that the child was not living with her mother in accordance with what had been decided, but with her maternal grandparents, which – he argued – was unsatisfactory. It was for that reason that the custody arrangements

should be varied so as to allow him to have his daughter and apply to the mother the contact and maintenance arrangements which had hitherto been applied to him.

The child's mother not only opposed the application lodged by the applicant, but also relied on evidence supporting her contention that the child should not remain in the company of her father because he was a homosexual and was cohabiting with another man. After a number of steps had been taken in connection with those proceedings, the following decision was given on 14 July 1994:

'1. Custody and care of the child is awarded to the father, in whom parental responsibility shall be vested.

2. The child may see her mother on alternate weekends, from Friday to Monday. Her mother shall collect her from school on the Friday and bring her back to school on Monday morning before lessons start.

3. The child may also see her mother every Tuesday and Wednesday; her mother shall fetch her from school after lessons and bring her back the following morning.

4. The child shall spend Christmas Eve and Christmas Day alternately with her father and her mother.

5. The child shall spend the Easter holidays with her mother.

6. During the school summer holidays the child shall spend thirty days with her mother. The dates must be agreed on with the father at least sixty days beforehand.

7. The mother shall pay the father maintenance of 30,000 escudos per month, payable before the 8th of every month. Those maintenance payments shall be adjusted once annually on the basis of the inflation index for the previous year published by the INE (National Institute of Statistics).'

That decision specifically governed arrangements applicable to the year 1994. C.D.S., who was dissatisfied with the decision, appealed. She had previously appealed against the decision appearing on page 238, which dismissed an application for a stay of the proceedings, and the decision given at the hearing of 29 April 1994 on the application for an examination of the document appearing on page 233; both those appeals were adjourned and did not have the effect of staying the proceedings.

The appellant sets out the following grounds in her appeal:

…

In his pleadings [the applicant] submitted that the judgment of the first-instance court should be upheld.

State Counsel attached to the Court of Appeal has recommended that the decision be set aside, but not on the grounds relied on by the appellant.

After examining the case, we shall give our decision.

We shall first examine the following facts, which the first-instance court considered to be established.

1. The child, M., who was born on 2 November 1987, is the daughter of [the applicant] and C.D.S.

2. Her parents married on 2 April 1983.

3. Divorce was granted on 30 September 1993 and their marriage dissolved.

4. The parents have been living separately since April 1990, when [the applicant] left his home to go and live with another man, whose first name is L.

5. On 7 March 1991 the Loures Court gave a decision in case no. 1101/90 confirming the following agreement on the exercise of parental responsibility for the child:

> ‘I. The mother shall have custody of the child.
>
> II. The father may visit his daughter whenever he likes provided that he does not disrupt her schooling.
>
> III. The child shall spend alternate weekends and Christmas and Easter with her father.
>
> IV. The child shall spend the father’s holidays with him unless those holidays coincide with those of the mother, in which case the child shall spend fifteen days with each parent.
>
> V. On the weekends which the child spends with her father, he shall collect her from her mother’s house on Saturday at about 10 a.m. and bring her back on Sunday at about 8 p.m.
>
> VI. The child shall go to a kindergarten as soon as possible, the enrolment fees to be paid by the father.
>
> VII. The father shall pay maintenance of 10,000 escudos per month, which shall be adjusted once annually by the same percentage as the net increase in his salary. That sum shall be paid into the account of the child’s mother – account no. …– before the 5th day of the following month.
>
> VIII. The father shall also pay half his daughter’s kindergarten fees.
>
> IX. The father shall pay half of any special expenses for his child’s health.’

6. From April 1992 the child stopped seeing her father on the agreed terms, against his wishes.

7. Until January 1994 the child lived with her maternal grandparents [name] at Camarate [address].

8. From that date the child went to live with her mother and her mother's boyfriend [address] in Lisbon.

9. She continued, however, to stay overnight at her maternal grandparents' house from time to time.

10. On schooldays when the child did not stay overnight with her grandparents, her mother used to drive her to her grandparents' house where she used to stay after school from 5 p.m.

11. During that school year M. was in the first year primary at … school, for which the fees came to 45,400 escudos per month.

12. Her mother has been cohabiting with J. for at least two years.

13. J., who is a business manager, works in the imports and exports sector, the major part of his activity being in Germany where he has immigrant status. His income amounts to some 600,000 escudos per month.

14. The mother, C.D.S., is the manager of DNS, the partners of which are her boyfriend and his brother, J.P.

15. She has been registered with the State agency for employment and vocational training since 17 February 1994.

16. Her expenses are paid for jointly by herself and her boyfriend.

17. She states that she pays 120,000 escudos in rent and spends approximately 100,000 escudos per month on food.

18. The father, João Mouta, is in a homosexual relationship with L.G.C., with whom he has been living since April 1990.

19. He is the head of his sector at A., and his net monthly income, plus commission, comes to just over 200,000 escudos.

20. The child is very close to her maternal grandmother, who is a Jehovah's Witness.

21. Following her failure to comply with the decision referred to in paragraph 5, the child's mother was ordered, on 14 May 1993, to pay a fine of 30,000 escudos because since April 1992 she had been refusing to allow the father to exercise his 'right to contact with his daughter in accordance with the decision given'.

22. On 25 June 1994, after interviewing the father and mother both individually and together, and M. without her parents or her maternal grandmother being present, and the maternal grandmother and the father's partner individually, and performing a psychological examination of M., the court psychologists drew up the following report:

> 'M. is a communicative child of normal intellectual development for her age and above average intelligence. She is very attached to her father and mother, and the

conflict between her parents is a source of some insecurity. She would like her parents to live closer together because she finds it difficult to understand why she has to live with her grandparents and not see her father or to accept this. She has a very good relationship with her father, who is very affectionate and attentive towards his daughter. Both [the applicant] and his ex-wife are affectionate and flexible parents and both invest in their daughter's upbringing and emotional security. The reasons for their separation were subsequently a source of substantial conflict between them, exacerbated by M.'s maternal grandmother, who does not accept [the applicant's] lifestyle and unconsciously tries to keep him away from his daughter. To sum up, both parents are capable of overseeing their daughter's satisfactory psychoaffective development, but we do not feel that it is right for her to live with her grandmother, who exacerbates the conflict between the two parties and fuels it by trying to keep [the applicant] away because she does not accept his lifestyle.'

23. On 16 August 1993 M. told the psychologist and her father that the latter's partner had asked her, while her father was out, to go into the bathroom with him, that he had locked the door and asked her to masturbate him (she made gestures imitative of masturbation) and then told her that she did not need to wash her hands and that she should not say anything to her father. The psychologist stated that the manner in which the child had related that episode had made her doubt the truthfulness of the story, which might have been suggested by repeated promptings. She added that while the daughter was describing the episode, the applicant had been understanding and asked for clarification, which confirmed that the father and daughter had a good relationship.

24. During the interview with the psychologist on 6 December 1993 the child stated that she was still living with her maternal grandmother and that from time to time she stayed with her mother where she would sleep on a sofa in the living room because there was no bedroom for her.

25. In a report dated 17 January 1994, drawn up following a meeting between the daughter and her father, the psychologist concluded that 'although M. has observed during her meetings with her father that he is living with another man, her parental images have been fully assimilated and she presents no problem relating to psychosexual identity, be it her own or that of her parents'.

26. Dr V., a psychiatrist, stated, after interviewing the boyfriend of [the applicant], the child's father, that in his opinion the partner was well adjusted and of satisfactory emotional and cognitive development. He found nothing abnormal about the boyfriend either as an individual or in terms of his relationship with the child's father. He considered it wholly improbable that the episode related by the child, as described in paragraph 23, had really occurred.

27. The final report drawn up by the court psychologists, dated 12 April 1994, indicated that M. was suffering from a degree of insecurity due in part to the conflict between her mother's side of the family and her father, and that she had a defensive attitude which manifested itself in a refusal to confront potentially stressful situations. The child is aware that her family opposes her meetings with her father, their opposition being justified by the child's description of an episode which had allegedly occurred between her and her father's boyfriend, L.G.C., in which L.G.C. had asked her to masturbate him. With regard to that account, it is difficult to imagine how a 6-year-old child could relate in detail an episode which had occurred several years

earlier. The experts conclude in their report that the fact that M. had described in detail the above-mentioned masturbation episode did not mean that it had actually occurred. They reiterate that the father is a very affectionate father, full of understanding and kindness towards his daughter, while also imposing on her, satisfactorily and instructively, limits which were necessary and made her feel secure.

The experts also reiterate that the child's mother is a very affectionate mother, but rather permissive, which is not conducive to a feeling of security, although she is capable of improving. They also conclude that it is not advisable for the child to live with her grandmother because the religious fanaticism present in her environment not only condemns the father, but excludes him on grounds of the individual and emotional choices he has made. This has contributed to sowing confusion in the child's mind and exacerbating her sense of conflict and anxiety, thus compromising her healthy psychoaffective development.

28. At the hearing on 24 January 1994 the following interim decision was given with the agreement of both parents: (I) M. could spend every Saturday from 10 a.m. to 10 p.m. with her father, (II) to that end, her father would fetch her from her mother's house accompanied by her paternal grandmother and/or her paternal great-grandmother.

29. The mother did not allow her daughter to see her father on the terms fixed by the above-mentioned decision.

30. On 22 April 1994 the child psychiatry department of D. Estefânea Hospital decided that M. should be monitored because her feelings of anxiety were such as might inhibit her psychoaffective development.

Those facts, found at first instance, are considered to have been definitively established, without prejudice to the possibility of considering a further factor in delivering this judgment. With regard to the other appeals, since the mother has not submitted any pleadings they are considered to be inoperative under Articles 292 § 1 and 690 § 2 of the Code of Civil Procedure. Apart from the fact that factual evidence has not been submitted, these aspects appear to us to be sufficient to give a ruling here as we understand that the lower court ruled on the essential issue of the case, that is to which of the two parents custody of the child should be awarded. The shortcomings in the decision referred to by State Counsel, although relevant, do not warrant setting it aside.

Let us now examine the appeal:

Article 1905 § 1 of the Civil Code provides that in cases of divorce, judicial separation of persons and possessions, declarations of nullity or annulment of marriage, child custody, maintenance and the conditions of payment are governed by agreement between the parents, that agreement being subject to confirmation by the court; confirmation is refused if the agreement is contrary to the child's interests, including the child's interest in maintaining a very close relationship with the non-custodial parent. Paragraph 2 adds that, in the absence of an agreement, the court shall decide, while protecting the child's interests, including his or her interest in maintaining a very close relationship with the non-custodial parent, it being possible to award custody of the child to one or other parent or, if one of the cases provided for in Article 1918 applies, to a third party or to an educational or welfare establishment.

The Guardianship Act also deals with this point. Section 180(1) of that Act provides that any award of parental responsibility must be in the child's interests.

A judgment of the Lisbon Court of Appeal of 24 April 1974, summarised in *BMJ* (*Bulletin of the Ministry of Justice*) no. 236, p. 189, states: 'The Convention on the Rights of the Child – Resolution of 20 November 1989 of the General Assembly of the United Nations – proclaims with rare concision that children, for the full and harmonious development of their personality, require love and understanding; they should, as far as possible, grow up under the protection and responsibility of their parents and, in any event, in a climate of affection and psychological and material security, with young children not being separated from their mother save in exceptional cases.'

We do not have the slightest hesitation in supporting that declaration, which fully corresponds to the realities of life. Despite the importance of paternal love, a young child needs the care which only the mother's love can provide. We think that M., who is now aged 8, still needs her mother's care. See on this point the judgment of the Porto Court of Appeal of 7 June 1988, in *BMJ* no. 378, p. 790, in which that court held that 'in the case of young children, that is until 7 or 8 years of age, the emotional tie to the mother is an essential factor in the child's psychological and emotional development, given that the special needs of tenderness and attentive care at this age can rarely be replaced by the father's affection and interest'.

The relationship between M. and her parents is a decisive factor in her emotional well-being and the development of her personality, particularly as it has been demonstrated that she is deeply attached to her parents, just as it has been shown that both of them are capable of guiding the child's psychoaffective development.

In the official record of the decision of 5 July 1990 awarding parental responsibility, [the applicant] acknowledged that the appellant was capable of looking after their daughter and suggested that custody be awarded to the mother, a statement he repeated in the present proceedings to vary that order, as recorded in the transcript of the hearing of 15 June 1992, declaring that he wished to waive his initial application for custody of the child because she was living with her mother again. M.'s father expresses the wish that his daughter not stay with her maternal grandparents, referring to the numerous difficulties he encounters when trying to see his daughter, given the conduct of the appellant and her mother who do all they can to keep him away from his daughter because they do not accept his homosexuality.

Section 182 of the Guardianship Act provides that previous arrangements can be varied if the agreement or final decision is not complied with by both parents or if subsequent circumstances make it necessary [to vary] the terms. Consideration needs to be given, however, to whether there is a justified ground for varying the decision awarding custody of the child to her mother.

On examining the content of the initial application for a variation of the order it can be seen that emphasis is placed on the fact that the child was living with her maternal grandparents who are Jehovah's Witnesses. The truth of the matter, however, is that [the applicant] has not produced any evidence to prove that this religion is harmful and has merely stressed the grandparents' stubborn refusal to allow the father and daughter to see each other. To the Court's knowledge, the beliefs of Jehovah's Witnesses do not incite to evil practices, although fanaticism does exist.

Are there adequate reasons for withdrawing from the mother the parental responsibility which was granted her with the parents' agreement?

There is ample evidence in this case that the appellant habitually breaches the agreements entered into by her with regard to the father's right to contact and that she shows no respect for the courts trying the case, since on several occasions, and without any justification, she has failed to attend interviews to which she has been summoned in the proceedings. We think, however, that her conduct is due not only to [the applicant]'s lifestyle, but also to the fact that she believed the indecent episode related by the child, implicating the father's partner.

On this point, which is particularly important, we agree that it is not possible to accept as proven that such an episode really occurred. However, we cannot rule out the possibility that it did occur. It would be going too far – since there is no conclusive evidence – to assert that the boyfriend of M.'s father would never be capable of the slightest indecency towards M. Thus, although it cannot be asserted that the child told the truth or that she was not manipulated, neither can it be concluded that she was telling an untruth. Since there is evidence to support both scenarios, it would be wrong to give greater credence to one than the other.

In the same way, the accepted principle in cases involving awards of parental responsibility is that the child's interests are paramount, completely irrespective of the – sometimes selfish – interests of the parents. In order to establish what is in the child's interests, a court must in every case take account of the dominant family, educational and social values of the society in which the child is growing up.

As we have already stated and as established case-law authority provides**,** having regard to the nature of things and the realities of daily life, and for reasons relating to human nature, custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this (see the Evora Court of Appeal's judgment of 12 July 1979, in *BMJ* no. 292, p. 450).

In the instant case parental responsibility was withdrawn from the mother despite the fact that it had been awarded her, we repeat, following an agreement between the parents, and without sufficient evidence being produced to cast doubt on her ability to continue exercising that authority. The question which therefore arises, and this should be stressed, is not really which of the two parents should be awarded custody of M., but rather whether there are reasons for varying what was agreed.

Even if that were not the case, however, we think that custody of the child should be awarded to the mother.

The fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society, as the appellant rightly points out. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature and let us remember that it is [the applicant] himself who acknowledged this when, in his initial application of 5 July 1990, he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.

No doubt is being cast on the father's love for his daughter or on his ability to look after her during the periods for which she is entrusted to his care, for it is essential that they do see each other if the objectives set out above are to be met, that is ensuring the child's well-being and the development of her personality. M. needs to visit her father if her feelings of anxiety and insecurity are to be dissipated. When children are deprived of contact with their father, their present and future development and psychological equilibrium are put at risk. The mother would be wise to try to understand and accept this if she is not to cast doubt on her own ability to exercise parental responsibility.

At present, the failure to comply with the decision confirming the contact arrangements does not amount to a sufficient reason for withdrawing from the appellant the parental responsibility awarded to her by that decision.

Accordingly, we reverse the judgment of the lower court as regards the child's permanent residence with her father, without prejudice to the father's right to contact during the periods which will be stipulated below.

It should be impressed upon the father that during these periods he would be ill-advised to act in any way that would make his daughter realise that her father is living with another man in conditions resembling those of man and wife.

For all the foregoing reasons the Court of Appeal reverses the impugned decision and rules that the appellant, C.D.S., shall continue to exercise parental responsibility for her daughter, M.

The contact arrangements shall be established as follows:

1. The child may see her father on alternate weekends from Friday to Monday. To that end the father shall fetch his daughter from school at the end of classes on the Friday and bring her back on Monday morning before classes start.

2. The father may visit his daughter at school on any other day of the week provided that he does not disrupt her schooling.

3. The child shall spend the Easter holidays alternately with her father and her mother.

4. The Christmas holidays shall be divided into two equal parts: half to be spent with the father and the other half with the mother, but in such a way that the child can spend Christmas Eve and Christmas Day with one and New Year with the other alternately.

5. During the summer holidays the child shall spend thirty days with her father during the latter's holidays, but if that period coincides with the mother's holidays the child shall spend fifteen days with each of them.

6. During the Easter, Christmas and summer holidays the father shall fetch the child from the mother's house and bring her back between 10 a.m. and 1 p.m. unless the parents agree on different times.

7. In accordance with the date of this decision, the child shall spend the next Easter and Christmas holidays with the parent with whom she did not spend those holidays in 1995.

8. The matter of maintenance payable by the father and the manner of payment shall be examined by the Third Section of the Third Chamber of the Lisbon Family Affairs Court in case no. 3821/A, which has been adjourned pending the present decision regarding the child's future.

Costs are awarded against the respondent."

15. One of the three Court of Appeal judges gave the following separate opinion:

"I voted in favour of this decision, with the reservation that I do not consider it constitutionally lawful to assert as a principle that a person can be stripped of his family rights on the basis of his sexual orientation, which – accordingly – cannot, as such, in any circumstances be described as abnormal. The right to be different should not be treated as a 'right' to be ghettoised. It is not therefore a matter of belittling the fact that [the applicant] has come to terms with his sexuality and consequently of denying him his right to bring up his daughter, but rather, since a decision has to be given, of affirming that it cannot be declared in our society and in our era that children can come to terms with their father's homosexuality without running the risk of losing their reference models."

16. No appeal lay against that decision.

17. The right to contact granted to the applicant by the judgment of the Lisbon Court of Appeal was never respected by C.D.S.

18. The applicant therefore lodged an application with the Lisbon Family Affairs Court for enforcement of the Court of Appeal's decision. On 22 May 1998, in connection with those proceedings, the applicant received a copy of a report drawn up by the medical experts attached to the Lisbon Family Affairs Court. He learnt from this that M. was in Vila Nova de Gaia in the north of Portugal. The applicant made two unsuccessful attempts to see his daughter. The enforcement proceedings are apparently still pending.

II. RELEVANT DOMESTIC LAW

19. Article 1905 of the Civil Code provides:

"1. In the event of divorce …, child custody, maintenance and the terms of payment shall be determined by agreement between the parents, which is subject to confirmation by the ... court

…

2. In the absence of an agreement, the court shall decide on the basis of the interests of the child, including the child's interest in maintaining a very close relationship with the non-custodial parent ..."

20. Certain provisions of the Guardianship Act are also relevant to the instant case.

Section 180

"1. ... a decision as to the exercise of parental responsibility shall be made on the basis of the interests of the child, custody of whom may be awarded to one of the parents, a third party or an educational or welfare establishment.

2. Contact arrangements shall be made unless, exceptionally, this would not be in the child's interests ..."

Section 181

"If one of the parents does not comply with the agreement or decision reached in respect of the child's situation, the other parent may apply to the court for enforcement ..."

Section 182

"If the agreement or final decision is not complied with by both the father and the mother or if fresh circumstances make it necessary to vary the terms, one of the parents or the guardian may apply to the ... court for variation of the award of parental responsibility ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

21. The applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter, M., to his ex-wife rather than to himself exclusively on the ground of his sexual orientation. He alleged that this constituted a violation of Article 8 of the Convention taken alone and in conjunction with Article 14.

The Government disputed that allegation.

22. Under Article 8 of the Convention,

"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."

The Court notes at the outset that the judgment of the Court of Appeal in question, in so far as it set aside the judgment of the Lisbon Family Affairs Court of 14 July 1994 which had awarded parental responsibility to the applicant, constitutes an interference with the applicant's right to respect for his family life and thus attracts the application of Article 8. The Convention institutions have held that this provision applies to decisions awarding custody to one or other parent after divorce or separation (see the Hoffmann v. Austria judgment of 23 June 1993, Series A no. 255-C, p. 58, § 29; see also Irlen v. Germany, application no. 12246/86, Commission decision of 13 July 1987, Decisions and Reports 53, p. 225).

That finding is not affected by the Government's submission that since the judgment of the Court of Appeal did not ultimately vary what had been decided by friendly settlement between the parents on 7 February 1991, there was no interference with the rights of Mr Salgueiro da Silva Mouta.

The Court observes in that connection that the application lodged – successfully – by the applicant with the Lisbon Family Affairs Court was based on, among other things, the fact that his ex-wife had failed to comply with the terms of that agreement (see paragraph 11 above).

A. Alleged violation of Article 8 taken in conjunction with Article 14

23. Given the nature of the case and the allegations of the applicant, the Court considers it appropriate to examine it first under Article 8 taken in conjunction with Article 14, according to which

> "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."

24. Mr Salgueiro da Silva Mouta stressed at the outset that he had never disputed the fact that his daughter's interests were paramount, one of the main ones consisting in seeing her father and being able to live with him. He argued, nonetheless, that the Court of Appeal's judgment, in awarding parental responsibility to the mother exclusively on the basis of the father's sexual orientation, amounted to an unjustifiable interference with his right to respect for his family life. The applicant submitted that the decision in issue had been prompted by atavistic misconceptions which bore no relation to the realities of life or common sense. In doing so, he argued, the Court of Appeal had discriminated against him in a manner prohibited by Article 14 of the Convention.

The applicant pointed out that judgment had been given in his favour by the court of first instance, that court being the only one to have had direct knowledge of the facts of the case since the Court of Appeal had ruled solely on the basis of the written proceedings.

25. The Government acknowledged that Article 8 could apply to the situation in question, but only as far as the applicant's right to respect for his family life with his child was concerned. They stressed, however, that no act had been done by a public authority which could have interfered with the applicant's right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life.

With regard to family life, however, the Government pointed out that, as far as parental responsibility was concerned, the Contracting States enjoyed a wide margin of appreciation in respect of the pursuit of the legitimate aims set out in paragraph 2 of Article 8 of the Convention. They added that in this field, in which the child's interests were paramount, the national authorities were naturally better placed than the international court. The Court should not therefore substitute its own interpretation of things for that of the national courts, unless the measures in question were manifestly unreasonable or arbitrary.

In the instant case the Lisbon Court of Appeal had taken account, in accordance with Portuguese law, of the child's interests alone. The intervention of the Court of Appeal had been prescribed by law (Article 1905 § 2 of the Civil Code and sections 178 to 180 of the Guardianship Act). Moreover, it had pursued a legitimate aim, namely the protection of the child's interests, and was necessary in a democratic society.

The Government concluded that the Court of Appeal, in reaching its decision, had had regard exclusively to the overriding interests of the child and not to the applicant's sexual orientation. The applicant had not therefore been discriminated against in any way.

26. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see the Hoffmann judgment cited above, p. 58, § 31).

It must be determined whether the applicant can complain of such a difference in treatment and, if so, whether it was justified.

1. Existence of a difference in treatment

27. The Government disputed the allegation that in the instant case the applicant and M.'s mother had been treated differently. They argued that the Lisbon Court of Appeal's decision had been mainly based on the fact that, in the circumstances of the case, the child's interests would be better served by awarding parental responsibility to the mother.

28. The Court does not deny that the Lisbon Court of Appeal had regard above all to the child's interests when it examined a number of points of fact and of law which could have tipped the scales in favour of one parent rather than the other. However, the Court observes that in reversing the decision of the Lisbon Family Affairs Court and, consequently, awarding parental responsibility to the mother rather than the father, the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man.

The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M.'s mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72).

2. Justification for the difference in treatment

29. In accordance with the case-law of the Convention institutions, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification, that is 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 (see the Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24).

30. The decision of the Court of Appeal undeniably pursued a legitimate aim, namely the protection of the health and rights of the child; it must now be examined whether the second requirement was also satisfied.

31. In the applicant's submission, the wording of the judgment clearly showed that the decision to award parental responsibility to the mother was based mainly on the father's sexual orientation, which inevitably gave rise to discrimination against him in relation to the other parent.

32. The Government submitted that the decision in question had, on the contrary, merely touched on the applicant's homosexuality. The considerations of the Court of Appeal to which the applicant referred, when viewed in context, were merely sociological, or even statistical, observations. Even if certain passages of the judgment could arguably have been worded differently, clumsy or unfortunate expressions could not in themselves amount to a violation of the Convention.

33. The Court reiterates its earlier finding that the Lisbon Court of Appeal, in examining the appeal lodged by M.'s mother, introduced a new factor when making its decision as to the award of parental responsibility, namely the applicant's homosexuality (see paragraph 28 above). In determining whether the decision which was ultimately made constituted

discriminatory treatment lacking any reasonable basis, it needs to be established whether, as the Government submitted, that new factor was merely an *obiter dictum* which had no direct effect on the outcome of the matter in issue or whether, on the contrary, it was decisive.

34. The Court notes that the Lisbon Family Affairs Court gave its decision after a period in which the applicant, his ex-wife, their daughter M., L.G.C. and the child's maternal grandparents had been interviewed by court psychologists. The court had established the facts and had had particular regard to the experts' reports in reaching its decision.

The Court of Appeal, ruling solely on the basis of the written proceedings, weighed the facts differently from the lower court and awarded parental responsibility to the mother. It considered, among other things, that "custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this (see paragraph 14 above). The Court of Appeal further considered that there were insufficient reasons for taking away from the mother the parental responsibility awarded her by agreement between the parties.

However, after that observation the Court of Appeal added "Even if that were not the case ... we think that custody of the child should be awarded to the mother" (ibid.). The Court of Appeal then took account of the fact that the applicant was a homosexual and was living with another man in observing that "The child should live in ... a traditional Portuguese family" and that "It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations" (ibid.).

35. It is the Court's view that the above passages from the judgment in question, far from being merely clumsy or unfortunate as the Government maintained, or mere *obiter dicta*, suggest, quite to the contrary, that the applicant's homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant's right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man "in conditions resembling those of man and wife" (ibid.).

36. The Court is therefore forced to find, in the light of the foregoing, that the Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention (see, *mutatis mutandis*, the Hoffmann judgment cited above, p. 60, § 36).

The Court cannot therefore find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14.

B. Alleged violation of Article 8 taken alone

37. In view of the conclusion reached in the preceding paragraph, the Court does not consider it necessary to rule on the allegation of a violation of Article 8 taken alone; the arguments advanced in this respect are essentially the same as those examined in respect of Article 8 taken in conjunction with Article 14.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant requested the Court to award him "just satisfaction" without, however, quantifying his claim. In the circumstances the Court considers that the finding of a violation set out in the present judgment constitutes in itself sufficient just satisfaction in respect of the damage alleged.

B. Costs and expenses

40. The applicant requested reimbursement of the costs incurred in lodging his application, including those of himself and his advisers attending the hearing before the Court, namely 224,919 Portuguese escudos (PTE), 5,829 French francs, 11,060 Spanish pesetas and 67 German marks, that is a total sum of PTE 423,217.

He also requested reimbursement of the fees billed by his lawyer and by the adviser who had assisted her in preparing for the hearing before the Court, that is PTE 2,340,000 and PTE 340,000 respectively.

41. The Government left the matter to the Court's discretion.

42. The Court is not satisfied that all the costs claimed were necessary and reasonable. Making an equitable assessment, it awards the applicant an aggregate sum of PTE 350,000 under that head.

As regards fees, the Court considers that the sums claimed are also excessive. Making an equitable assessment and having regard to the circumstances of the case, it decides to award PTE 1,500,000 for the work done by the applicant's lawyer and PTE 300,000 for that done by her adviser.

C. Default interest

43. According to the information available to the Court, the statutory rate of interest applicable in Portugal at the date of adoption of the present judgment is 7% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that there is no need to rule on the complaints lodged under Article 8 of the Convention taken alone;

3. *Holds* that the present judgment constitutes in itself sufficient just satisfaction for the damage alleged;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) 350,000 (three hundred and fifty thousand) Portuguese escudos in respect of costs;
      (ii) 1,800,000 (one million eight hundred thousand) Portuguese escudos in respect of fees;
   (b) that simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 December 1999.

Vincent BERGER Registrar	Matti PELLONPÄÄ President