



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

COURT (PLENARY)

CASE OF NIELSEN v. DENMARK

(Application no. 10929/84)

JUDGMENT

STRASBOURG

28 November 1988

In the Nielsen case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr N. VALTICOS,
Mr B. GOMARD, *ad hoc judge*,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 and 30 April, on 22 June and on 24 October 1988,

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

PROCEDURE

1. The case was brought before the Court on 14 May 1987 by the European Commission of Human Rights ("the Commission") and eight days later by the Government of Denmark ("the Government"), within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 10929/84) against Denmark lodged with the Commission in 1984 by Mr Jon Nielsen, a Danish citizen, under Article 25 (art. 25).

* Note by the registry: The case is numbered 7/1987/130/181. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Denmark recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the Government's application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 5 paras. 1 and 4 (art. 5-1, art. 5-4) of the Convention.

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to participate in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included, as *ex officio* members, Mr J. Gersing, the elected judge of Danish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 May 1987 the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr R. Macdonald, Mr J. De Meyer and Mr J.A. Carrillo Salcedo (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Subsequently, Professor B. Gomard, who was appointed by the Government on 8 April 1988 to sit as an *ad hoc* judge in the case, and Mr A. Spielmann, substitute judge, replaced Mr Gersing and Mr Macdonald, who were unable to attend (Article 43 of the Convention and Rules 22 para. 1, 23 para. 1 and 24 para. 1) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant regarding the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the Order and directions of the President of the Court, the registry received:

- (a) on 19 November 1987, the Government's memorial;
- (b) on 15 February 1988, the applicant's claims under Article 50 (art. 50);
- (c) at different dates between 5 April and 7 June 1988, various documents lodged, as the case might be, by the Government or the applicant, in particular the relevant extracts from the applicant's medical files.

On 4 February 1988 the Delegate of the Commission notified the Registrar that he did not wish to present any comments in writing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 9 March 1988 that the oral proceedings should commence on 26 April 1988 (Rule 38).

6. Following deliberations held on 26 April 1988, shortly before the hearing, the Chamber, by unanimous decision, relinquished jurisdiction in favour of the plenary Court (Rule 50).

7. The hearing took place in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately prior to its opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr T. LEHMANN, Under-Secretary

for Legal Affairs, Ministry of Foreign Affairs, *Agent,*

Mr I. FOIGHEL, Professor, Dr. Juris, *Counsel,*

Mr B. VESTERDORF, Head of Division,

Ministry of Justice,

Ms N. HOLST-CHRISTENSEN, Head of Section,

Ministry of Justice,

Mr C.-C. HASSELBALCH, Head of Section,

Ministry of Foreign Affairs,

Advisers;

- for the Commission

Mr H. DANELIUS,

Delegate;

- for the applicant

Mr J. JACOBSEN, advokat,

Counsel,

Mr A. BOELSKIFTE, advokat,

Ms H. CHRISTENSEN,

Advisers.

The Court heard addresses by Mr Lehmann and Mr Foighel for the Government, by Mr Danelius for the Commission and by Mr Jacobsen for the applicant, as well as their replies to its questions.

8. In the course of its final deliberations on 24 October 1988, the Court decided that it was not necessary, as the applicant had requested, to require the Government to produce the remainder of the medical files concerning him (see paragraph 4 above).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

1. Background: the first custody proceedings and the applicant's first placement in a child psychiatric ward

9. The applicant, Jon Nielsen, is a Danish citizen, born in 1971.

10. His parents lived together from 1968 until 1973. They were not married and, in accordance with Danish law, only the mother had parental

rights over the child. After the parents separated in 1973, the applicant remained with the mother and the father had access to him on a "gentlemen's agreement" basis. However, this arrangement did not function well and in 1974 the father obtained a specific right of access through the competent authorities.

11. It appears that a closer relationship developed between the applicant and his father during the following years. The Danish legislation at the time, however, did not provide special procedures for having the custody rights transferred from the mother to the father, and the father introduced an application to the European Commission of Human Rights (no. 7658/76) complaining about his situation on 21 September 1976. During the proceedings before the Commission, the Custody and Guardianship of Children Act 1976 (*myndighedsloven*, "the 1976 Act", see paragraphs 40-41 below) was amended with effect from 1 October 1978, so that a court might vest parental custody in the father of a child born out of wedlock, when certain conditions were fulfilled. As a result the Commission, on 5 December 1978, rejected the application on the ground that the father could no longer claim to be a victim of an alleged violation of the Convention (Decisions and Reports no. 15, pp. 128-130).

12. The father had regular access to the applicant until the summer of 1979, when the applicant apparently refused to return to the mother after a two-week holiday with the father. The social authorities were contacted and, with the consent of all parties, the applicant was placed in a children's home. However, he disappeared from the home and returned to the father. On 6 August 1979, the father instituted proceedings before the City Court of Ballerup (*Ballerup ret*) to have the custody rights transferred to him according to the new law. Father and child also went "underground" until 8 October 1979, when the father was arrested by the police. He was released on 12 October 1979.

13. On 9 October, after the father's arrest, the social authorities, with the consent of the mother, placed the applicant in the Department of Child Psychiatry in the county hospital, Nordvang. On 23 October, the father's right of access was suspended. The father's appeal against this decision was rejected by the Ministry of Justice on 12 November. The applicant disappeared from Nordvang on 11 December 1979 and thereafter started to live in hiding with his father again.

14. In the custody proceedings before the City Court of Ballerup (see paragraph 12 above), the court held on 11 July 1980 that a transfer of custody to the father was not in the interest of the child.

15. The applicant's father appealed against this judgment to the Court of Appeal for Eastern Denmark (*Østre Landsret*). On 25 November 1980, the parties agreed that the applicant should undergo a child psychiatric examination by Professor Tolstrup. This examination resulted in a report of

16 February 1981, in which Professor Tolstrup concluded (translation from Danish):

"After considering the case, I find it in the best interest of the child that the custody rights remain with the mother. Since the boy is developing nervously it is recommended that he and the mother, after [the applicant] has returned to her, get child psychiatric support. ..."

On 9 March 1981, the Court of Appeal upheld the City Court's judgment. The applicant nevertheless remained in hiding with his father, staying with various families in Denmark.

2. The institution of the second custody proceedings and the applicant's placement in the Child Psychiatric Ward of the State Hospital

16. In November 1982, after having lived "underground" for more than 3 years, the applicant's father again instituted proceedings before the City Court of Ballerup in order to have the custody rights transferred to him. Since he was wanted by the police, on suspicion of having kidnapped the applicant, the father did not attend the hearings in person, but only through his lawyer. Before the City Court the applicant's mother maintained that the applicant had been harmed due to the abnormal circumstances under which he had lived with his father and that she would accept Professor Tolstrup's recommendation and obtain support from the Child Psychiatric Ward (den børnepsykiatriske afdeling) of the State Hospital (Rigshospitalet), a university and general hospital, for a transitional period (see paragraph 15 above).

In its judgment of 11 April 1983, the City Court found that the circumstances of the case did not reveal a need for a transfer of the custody rights.

17. The applicant's father appealed to the Court of Appeal, but on 22 September 1983 the Court of Appeal upheld the City Court's judgment. Leave was subsequently granted by the Ministry of Justice to bring the case before the Supreme Court (Højesteret) (see paragraph 37 below).

18. Directly after the hearing in the Court of Appeal on 22 September 1983, at which both the father and the applicant were present, the father was arrested by the police and charged with depriving the mother of the exercise of her parental rights in violation of section 215, read in conjunction with section 261 paragraphs 1 and 2, of the Danish Penal Code. The applicant was placed in a children's home.

19. The mother, advised by the Social Welfare Committee of Herlev County and Professor Tolstrup, and with the recommendation of her family doctor, requested that the applicant, who was by then 12 years old, be admitted to the State Hospital's Child Psychiatric Ward since it was clear that he did not want to stay with her. On 26 September 1983, the applicant was admitted to the Ward by Professor Tolstrup who was Chief Physician at the Ward. On 29 September, the Social Welfare Committee recorded its

approval, pursuant to section 33 of the Social Assistance Act (see paragraph 44 below), that the applicant was to be placed away from home in accordance with his mother's wish.

20. According to Professor Tolstrup, who was responsible for the applicant's treatment at the State Hospital, the procedure followed in connection with admission was the usual one: the holder of the parental rights made the request, the family doctor recommended admission and the responsible chief physician of the ward accepted to admit the applicant.

3. The applicant's challenge of the lawfulness of his placement in the Child Psychiatric Ward

21. By letter of 23 December 1983 to the Ministry of Justice, the applicant's father, on behalf of the applicant, questioned the lawfulness of the applicant's "detention" at the State Hospital contrary to the applicant's wish. He maintained, inter alia, that the provisions of the hospitalisation of Mentally Ill Persons Act 1938 (Lov om sindssyge personers hospitalsophold, Act no. 118 of 13 April 1938, as amended by Act no. 225 of 7 June 1972 - "the 1938 Act"; see paragraphs 47-50 below) regarding compulsory admission to hospital had not been observed.

The Ministry of Justice submitted the matter to the Chief Physician at the Child Psychiatric Ward. In accordance with the information he gave, the Ministry replied, on 28 December 1983, that the applicant had not been admitted in accordance with the 1938 Act, but on the basis of a decision by his mother as holder of the custody rights, and that it could not make a determination in the matter.

22. On 1 January 1984, the applicant's representatives nevertheless petitioned the Copenhagen City Court (Københavns byret) under chapter 43a of the Administration of Justice Act (retsplejeloven) (see paragraph 39 below) for a decision on the lawfulness of the applicant's placement in the State Hospital. The defendant, the Ministry of Justice, pleaded dismissal, maintaining that the applicant had not been subjected to administrative deprivation of liberty under the 1938 Act.

23. In its judgment of 6 January 1984, the Copenhagen City Court upheld the Ministry of Justice's plea for dismissal on the following grounds (translation from Danish):

"Considering that [the applicant] ... has been admitted to the Child Psychiatric Ward of the State Hospital, Copenhagen, on the basis of a decision made by [his mother], who is the holder of parental rights, [the applicant's] detention at the State Hospital is not covered by the [1938] Act and it is therefore not subject to judicial review according to chapter 43a of the Administration of Justice Act. For this very reason the petition must be dismissed."

24. The applicant appealed, through the father, to the Court of Appeal arguing, in particular, that if he had not been a minor he could have challenged the lawfulness of his detention in the State Hospital before the

courts. He added that, although the holder of the custody rights had, according to section 19 of the 1976 Act (see paragraph 40 below), an extensive right to make decisions concerning the child, such a right should be subject to certain restrictions; a totally involuntary detention ought to be an interference which could only be carried out administratively and thus under the conditions mentioned in Article 71 of the Danish Constitution (see paragraph 38 below), irrespective of any decision by his mother.

The State Attorney (Kammeradvokaten) again maintained that the case did not concern administrative deprivation of liberty and was thus outside the scope of chapter 43a of the Administration of Justice Act. In the alternative he alleged that, if the case disclosed deprivation of liberty within the meaning of chapter 43a, the father would be unable to act on behalf of the child since at that time he had no, and had never had any, parental rights over the child.

25. Rejecting the State Attorney's latter argument, the Court of Appeal stated in its judgment of 15 February 1984 (translation from Danish):

"The question whether a minor should be subjected to treatment in a hospital is normally decided by the holder of parental rights and such measures cannot be challenged by means of chapter 43a of the Administration of Justice Act.

Concerning the treatment of mentally deranged persons, inter alia in public hospitals, special rules apply according to the [1938 Act], cf. chapter 43a of the Administration of Justice Act. From what has been established in this case it appears that [the applicant] does not suffer from any mental illness and according to the above there has been no question of admittance for treatment of a mental illness. The decision to admit [the applicant] to the Child Psychiatric Ward of the State Hospital after the disturbances he has been through and the decision on his temporary stay there were taken by his mother, who has the parental rights over him. The appellant's claim for judicial review under chapter 43a of the Administration of Justice Act cannot therefore be granted and the decision of the Copenhagen City Court to dismiss the case is upheld."

26. The applicant's representatives asked the Ministry of Justice, according to section 371 of the Administration of Justice Act, for leave to appeal to the Supreme Court. However, on 14 March 1984 the Ministry refused leave since the Ministry was of the opinion that the judgment would not be overruled by the Supreme Court.

4. The National Health Authority's investigation

27. On 23 December 1983, Mr Jacobsen, as representative of the father, also sent copies of the complaints to the Ministry of Justice to the National Health Authority (Sundhedsstyrelsen, an authority under the Ministry of the Interior). On 10 January 1984, he requested that this authority carry out an investigation of whether the applicant was forced to visit his mother and whether Professor Tolstrup could lawfully prevent him from visiting the applicant. The National Health Authority found the legal issues raised by

the father to be beyond its authority, but decided nevertheless, on its own account, to take up the question of how the applicant had been treated from a medical point of view.

28. In the course of the National Health Authority's investigation Professor Tolstrup submitted, on 6 January 1984, the following report regarding the circumstances of the applicant's stay at the State Hospital to the Medical Health Officer of Copenhagen (Københavns Stads læge) (translation from Danish):

"[The applicant] has expressed his dislike of staying here, but at no time has he attempted to run away. We have not been able and have not wanted to prevent him from running away, which he could have done, inter alia, when he left the Ward together with the other children, e.g. to visit museums or to go for a hair cut. Also in this respect he has been in hospital on the same terms as the other patients of the Ward.

...

The treatment involves environmental therapy at the Ward and regular talks with [the applicant].

...

At no time has he been given treatment involving medication.

Since 23 October 1983, his mother has visited the Ward regularly during the usual visiting hours on Sundays and Wednesdays. Since 11 November 1983 [the applicant] has visited his mother at home. The visits were at first short, but since 10 December 1983 he has been able to spend the weekends there. Christmas Eve and Christmas Day were spent with his mother and so was New Year's Day.

...

I wish to add that the patients at the Ward are not 'compulsorily detained' in the usual sense of the expression in [the 1938 Act]. The Child Psychiatric Ward of the State Hospital is an ordinary hospital ward run in principle on the same conditions as the other wards of the State Hospital. As the Ward is situated on the seventh floor in a building with a number of somatic wards, the main entrance of each block has a latch (smæklås) to prevent the children of the ward, some of whom may be inclined to rush around impulsively, from running about in the hospital or running into town, and possibly being a nuisance to the patients in other wards of the hospital or exposing themselves to danger. This measure is to be compared with the locked front door in a family house. As mentioned above, the children often go out with the staff, e.g. to playgrounds or to visit museums. During their stay in hospital the children are not normally confined to bed, and the Ward offers many possibilities for different activities under homelike conditions. Thus it is entirely misleading ... to talk about 'institutional detention'."

The treatment given to the applicant at the Hospital was explained in more detail by Professor Tolstrup in a report to the Danish Supreme Court on 19 June 1984 (see paragraph 37 below) (translation from Danish):

"The treatment consisted of environmental therapy and individual talks. In the environmental treatment endeavours were made to let him experience relaxed, homelike surroundings together with adults who were neutral in relation to the previous conflicts concerning custody. Endeavours were also made to protect him from pressure by the media, which however could not be completely averted, because when he went outside the Ward he could read the headlines of the newspapers, and through a completely free and very extensive correspondence he could follow the media reports. As a whole, Jon seemed to be happy and secure in the Ward, and the objective of the environment therapy had been largely achieved at the time of discharge. However, at that time Jon had a continued need for ambulatory therapy of individual talks."

In his report, Professor Tolstrup also pointed out that the applicant had been allowed to pay visits to his father in prison every other week since November 1983 (in total seven such visits took place).

29. The applicant's development in the course of his treatment at the Ward was described by Professor Tolstrup in a report on 7 March 1984 to the Social Welfare Committee of Herlev County (translation from Danish):

"... During the treatment, including the environmental therapy and the personal talks, at the Child Psychiatric Ward since New Year 1984, [the applicant] has continued to grow more relaxed, more extrovert and spontaneous and he is now able to show his feelings better. This applies to his relationships both with the staff and with the other children in the Ward. During the entire stay at the hospital he has as before, apart from the first couple of days, been allowed to move about freely just like the other children. In other words, he has gone to the library on his own, has joined visits to museums in town, been to the swimming pool, skating rink, etc.

His relationship with his mother also underwent a similar favourable development in the same period. He saw his mother every weekend and participated in the family life together with his mother, her friend, and his sister. At first he was a bit shy to leave his home, apparently for fear of being recognised. On 2 February 1984, he started school again in his old class, and the Ward prepared his return together with the school. He has taken up contact with his old school mates when visiting his mother during weekends. In connection with the school's winter holiday, he had his longest stay with his mother from Friday 10 February until Wednesday 15 February 1984. During this holiday, the whole family went for a couple of days to his mother's parents in Jutland. It was obvious that [the applicant] enjoyed this family outing ..."

30. As part of the National Health Authority's investigation the Medical Health Officer of Copenhagen was also requested to visit the ward in which the applicant was placed. In her report of 8 February 1984, she stated (translation from Danish):

"The Child Psychiatric Ward currently keeps 18 children in continuous treatment, the average period of therapy being about five or six months.

...

[The applicant] was not at home while I was there but in school. During the past weeks, he has been attending the same elementary school he used to go to and where he apparently feels at ease. Every day he goes to and from the school by cab, alone.

...

Much is done to make the children feel at home. [The applicant] takes swimming lessons together with other children in the Ward accompanied by one of the staff members. He has also gone sledge riding and may visit school friends. The entrance door to all children's wards is locked, partly to prevent the young children from running all over the hospital premises where they might hurt themselves in lifts or lose their way. The entrance door is locked also in order to minimise the substantial risk of theft.

[The applicant] is allowed to leave the Ward if he asks for permission to go, for instance, to the library. He moves around unaccompanied on these occasions.

My conclusion is that [the applicant] is staying in an environment as similar as possible to a real home and that he is by no means kept there against his will. On the contrary, he is allowed to move about outside the Ward all by himself or in the company of staff members and/or other children ..."

31. In its final report of 15 February 1984, the National Health Authority concluded (translation from Danish):

"On the present material the National Health Authority does not find any reason for not approving Professor Tolstrup's medical evaluation the essence of which was that [the applicant] was trapped in a neurotic state requiring treatment, a development which the Authority views as the result of the most unusual circumstances in which [the applicant] had been living with his father during the past few years. If these circumstances had continued, the risk of a further move towards a personality-stunting, chronically neurotic state of mind would, in the opinion of the Authority, have been extremely likely.

Nor does the National Health Authority see any reason for criticising the medical treatment which [the applicant] received while hospitalised and which was designed to integrate him in normal human relationships ..., and included talks at regular intervals with [the applicant] and his mother, since the Authority, things being what they were, would find it irreconcilable with the welfare of [the applicant] to deny him relevant treatment. According to the information available to the Authority, [the applicant] is now so well that he may probably be discharged by the end of February 1984. By then, the period of his hospitalisation will not have exceeded the average period. While hospitalised [the applicant] has been allowed to visit his father regularly at Vestre Fængsel [prison].

To sum up: The National Health Authority sees no reason for criticising Professor Tolstrup or the Child Psychiatric Ward of the State Hospital for their medical treatment of [the applicant]."

32. The applicant has not repudiated the above statements (see paragraphs 28-31). However his representative has added before the Commission that:

"The Child Psychiatric Ward is definitely a closed ward. The door to the Ward was locked and [the applicant] was totally unable to receive visitors except with the agreement and under the surveillance of the staff at the Ward ... [The applicant] was unable to leave the hospital if he so wished. ...

[He] was not permitted to phone [his father's counsel] or his father, who was in prison charged with the kidnapping of the applicant, who had actually been the active party in the kidnapping. [The applicant] was under almost constant surveillance: he was unable to make social contacts; persons from outside the hospital were unable to get in contact with him without special permission ..."

33. According to information submitted by the Government in response to a request by the Court, no children had ever been admitted under the compulsory procedure in the 1938 Act (see paragraph 47 below) to the ward in which the applicant was placed and this ward had never had any patients suffering from mental illnesses of a psychotic nature.

5. The applicant's discharge from the Child Psychiatric Ward

34. It was planned that the applicant should be discharged to his mother's home on 22 February 1984. However, on that day he disappeared from the hospital. His mother reported the disappearance to the police. On 8 March, the police found the applicant, who had stayed with various families in Jutland, and brought him back to the State Hospital in Copenhagen where he was readmitted to the Child Psychiatric Ward at his mother's request.

35. On 27 March 1984, the father, who had been detained on remand since his arrest on 22 September 1983 (see paragraph 18 above), was sentenced to 9 months' imprisonment by the Court of Appeal. Having regard to the time spent in detention on remand, he was released on the same day.

36. The applicant was discharged from the hospital on 30 March 1984 and placed in the care of a family not officially known to the father.

6. The outcome of the second custody proceedings

37. The question whether to transfer the custody rights from the mother to the father was, as mentioned above (see paragraph 17), brought before the Supreme Court following the decision of the Court of Appeal on 22 September 1983. Before the Supreme Court Professor Tolstrup maintained, in a report of 19 June 1984, that it would be in the best interest of the applicant that the parental rights remained with his mother. This opinion was supported by the Medico-Legal Council (Retslægerådet) in a statement of 9 August 1984. However, on 21 August 1984 the Supreme Court, by a majority of five votes to two, overruled the Court of Appeal's decisions and awarded custody of the applicant to his father. The majority in their judgment said (translation from Danish):

"The respondent [the mother] must be considered well suited to exercise custody and there seems to be no reason to believe that the appellant [the father] should not be suited to handle this task. As the desirability of continued child-psychiatric support is not found to counterbalance the need for a decision now on the question as to which parent Jon is to reside with, these judges find that out of consideration for his welfare it is desirable that custody of him be granted to the appellant in accordance with Jon's own wish, regardless of whether his attitude to his parents may be due to a one-sided

influence during his stay with the appellant. Their decision is therefore to find for the appellant."

The applicant now lives with his father.

II. RELEVANT DOMESTIC LAW

1. Protection of personal liberty under the Danish Constitution

38. Section 71 of the Danish Constitution (Danmarks Riges Grundlov) protects the right to personal liberty. Under paragraph 6 deprivations of liberty outside criminal procedure, not executed by order of a judicial authority and not warranted by legislation relating to aliens, are made subject to judicial review.

2. Chapter 43a of the Administration of Justice Act

39. Chapter 43a of the Administration of Justice Act deals with judicial review of administrative deprivations of liberty. Its introductory section 468 states that, unless otherwise provided by statute, its provisions apply only to detentions outside criminal procedure not executed by order of a judicial authority.

3. The Custody and Guardianship of Children Act 1976

40. The Danish rules on parental custody are laid down in the Custody and Guardianship of Children Act 1976 (myndighedsloven, Act No. 554 of 16 November 1976 - "the 1976 Act"). According to this Act, children and young persons under 18 years of age are under parental custody unless they have contracted marriage.

The holder of the parental rights has, according to section 19, a duty to provide for the care and welfare of the child and has power to take decisions on the personal life of the child.

Parental rights over children born out of wedlock are, according to section 28, vested in the mother. Under that section, as amended in 1978 (see paragraph 11 above), they may however be transferred to the father where required out of special regard for the welfare of the child.

41. At the relevant time, the Act contained no provisions on the child's participation in decision-making concerning the child's personal life. On 6 June 1985 it was amended (Act No. 230) and, according to a new section 26 and section 33 sub-section 3, any minor who has attained the age of 12 is normally to be heard before a decision on custody, access rights or appointment of a guardian is made. The hearing of the child may however be omitted if it can be assumed to be unnecessary or harmful to the child.

4. The Social Assistance Act 1974

42. According to section 20 of the Social Assistance Act 1974 (Lov om social bistand, Act No. 333 of 19 June 1974) (translation from Danish):

"Any person who becomes aware that a child or a young person under 18 years of age is exposed to neglect or degrading treatment on the part of the parents or other educators or lives under conditions liable to imperil his health or development shall be under a duty to notify the local social welfare committee."

43. According to section 32 it shall be the duty of the local social welfare committee to supervise the conditions under which the children within its area live and to support their parents in their upbringing and care. Sub-section 4 specifies that the committee shall give the holder of the parental rights or the person who in actual fact takes care of the child special guidance and support if the child has difficulties in relation to his environment, his school or the community, or if the child is otherwise living under unsatisfactory conditions.

44. In the context of its advisory and supervisory duties under the Act, the local social welfare committee may, according to section 33, "as far as possible in cooperation with the child and his home", inter alia "provide for the child to be placed away from home" where such a supportive measure is "required in the interests of the child, cf. section 32, sub-section 4".

45. According to the Act, the social welfare authorities may however have to provide supportive measures even in the absence of consent from the holder of parental rights. Section 123 specifies (translation from Danish):

"[1] Where absolutely necessary in the interests of the welfare of the child, the local social welfare committee may, until the child attains the age of 18, without the consent of the person having the parental rights over the child, decide

(i) to remove the child from his home;

(ii) to commit the child to the psychiatric department of a hospital or to a mental hospital with the acceptance of the chief physician of the hospital, even though the general conditions prescribed in the legislation on the hospitalisation of mentally ill persons are not satisfied;

(iii) to refuse to let the child return home or place the child elsewhere, notwithstanding the fact that the initial care was established with the consent of the person having the parental rights over the child.

(2) Where the supportive measures according to sub-section 1 have exceeded one year, the local social welfare committee shall reconsider the case. Where the young person is 18 years of age, the supportive measures can only be maintained with his or her consent."

Before a decision under this section is taken, the holder of the parental rights, the guardian, the child, the attorney and any other adviser shall,

according to section 125, have the opportunity to make a statement to the local social welfare committee.

46. A decision to remove the child from his home under section 123 (see paragraph 45 above) can, according to section 128, be appealed against to the Social Appeals Board by the person who has parental rights over the child, the person who in actual fact exercises those rights or, if the matter relates to a person who is not subject to parental authority, the young person himself or his guardian.

These persons may also, under section 129, have the decision of the Social Appeals Board brought before the Court of Appeal.

5. The hospitalisation of Mentally Ill Persons Act 1938

47. According to section 3 of the hospitalisation of Mentally Ill Persons Act 1938, a patient can only be committed to a mental hospital on a written medical recommendation based on a medical examination made within the last four weeks before the committal. Apart from patients who are admitted at their own request, the medical recommendation shall be made by a medical practitioner who is not an employee of the mental hospital.

48. The responsible chief physician shall decide, pursuant to section 4 of the Act, whether the conditions for committal are fulfilled and whether the patient shall be treated for his illness.

49. According to section 9, a discharge may be requested by the patient himself or the following persons: the holder of the parental rights, the guardian, the trustee, the husband or wife, a son or daughter if of age, the father or mother, or another close relative.

Where discharge is refused by the responsible medical officer, the person making the request can bring the case before the Minister of Justice.

If the Minister of Justice also refuses the discharge, the person who made the request shall be advised that judicial review of the lawfulness of the detention may be sought in accordance with chapter 43a of the Administration of Justice Act (see paragraph 39 above).

50. The situations in which the responsible medical officer may refuse a discharge are set out in section 8. These are either that the patient is dangerous to himself or others, or that the discharge would considerably reduce the prospects for the patient's recovery. Outside these situations a discharge may be refused only if it must be presumed to cause considerable disadvantages for the patient himself and the Ministry of Justice endorses the refusal.

Where discharge has been refused by the Minister of Justice, the issue of discharge may not be raised again within a period of four months either from the date of the Minister of Justice's decision or, where the issue of lawfulness has been brought before a court, from the date of the court's decision.

6. Admission of minors to hospital - extract from the Report on the Principles on the Use of Compulsion in the Field of Psychiatry

51. In 1985 the Ministry of Justice appointed a committee to consider possible amendments to the 1938 Act (see paragraphs 47-48 above), in particular with regard to the use of compulsion. The committee was composed of legal and medical experts as well as representatives of patients' organisations. In April 1986, the committee published the "Report on the Principles on the Use of Compulsion in the Field of Psychiatry" (Principbetænkning om tvang i psykiatrien, no. 1068/1986).

52. The existing legal situation in respect of admission to hospital of minors not suffering from mental illnesses covered by the 1938 Act was described as follows (translation from Danish):

"The holder of the parental rights shall, inter alia, provide the required medical treatment for the child and can in this connection decide where the child shall stay, if need be in a hospital, provided, of course, that the hospital accedes to the request for admission. Admission to a hospital of a child for treatment of physical disorders presents no problems. The holder of the parental rights can with the consent of the medical officer decide on admission to a hospital and detention there, notwithstanding the protests of the child, and the child has no possibility of having tried whether the admission to the hospital and the detention there were justified since this decision rests solely with the holder of the parental rights. To say that the medical doctor, who admits or receives the child into the hospital, by complying with the request of the holder of the parental rights, has made a decision which the child itself may request to be reviewed in court would be meaningless, as indirectly it would constitute an interference with the statutory right of the holder of the parental rights to make decisions, within the limits of the law, on the personal life of the child. The control required is here exercised by the medical officer admitting the child to the hospital or by the hospital doctors, who, as we know, will oppose any unnecessary hospitalisation of minors. Up till now there have been no unpleasant experiences in practice which can justify a possible legal adjustment of the right of parents to have their children hospitalised for treatment of physical disorders.

Where a child is admitted to hospital to be treated for mental disorders, the legal position is described in 4 B above [section dealing with the situation under the 1938 Act, not reproduced here], provided that a child is involved here whose opinion will have to be considered and who is admitted as mentally ill. This implies that the exercise of the powers inherent in parental custody must give way to the [1938 Act] with the effect that the parents cannot per se decide that the minor shall be hospitalised contrary to his wishes, and that the parents cannot, on the other hand, have the minor discharged if the chief physician finds that the conditions for compulsory detention have been fulfilled.

The problem arises, however, where the child is hospitalised to be treated for a mental disorder of a non-psychotic nature. Since only mentally ill persons are covered by the [1938 Act], this Act cannot be expected to restrict the exercise of parental rights in these cases. It is therefore natural to treat on the same legal footing as physical disorders, mental disorders other than psychoses, with the consequence that the decision of the holder of the parental rights prevails, provided that the chief physician can justify the hospitalisation of the child for treatment." (pp. 390-392 of the report)

...

"Here [i.e. in the case of mental disorders outside the scope of the 1938 Act], the protection of the child - as in the case of physical disorders - is to be sought in the fact that the medical officer under professional responsibility must assess whether the request made by the holder of the parental rights for admission to a hospital can be considered justified." (p. 395 of the report)

The report did not suggest any changes to the existing legal situation described above.

PROCEEDINGS BEFORE THE COMMISSION

53. In his application of 15 February 1984 to the Commission (no. 10929/84), the applicant alleged that his placement at the Child Psychiatric Ward constituted a breach of Article 5 para. 1 (art. 5-1) of the Convention. He also alleged a breach of Article 5 para. 4 (art. 5-4) in that he had not had any possibility of taking proceedings by which the lawfulness of the detention could be decided by a court.

54. The Commission declared the application admissible on 10 March 1986. In its report of 12 March 1987 (Article 31) (art. 31), the Commission concluded, by eleven votes to one, that there had been a violation of Article 5 para. 1 (art. 5-1) - ten members basing themselves on the second sentence and two on the first - and, by ten votes to two, also of Article 5 para. 4 (art. 5-4). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to the present judgment.

AS TO THE LAW

55. The applicant alleged that his committal to the Child Psychiatric Ward at the State Hospital constituted a deprivation of liberty contrary to the provisions of paragraphs 1 and 4 of Article 5 (art. 5-1, art. 5-4), which read:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

56. The Government argued before the Court, as they did before the Commission, that the applicant's complaint was inadmissible under Article 27 para. 2 (art. 27-2) as being incompatible, *ratione personae*, with the provisions of the Convention. They submitted that the protection accorded by the Convention applied only to the individual's fundamental civil and political rights vis-à-vis the State and, in the present case, the State had no share in taking the impugned decision to have the applicant committed to the Child Psychiatric Ward: this decision had been taken solely by the holder of the parental rights, the mother, subject to medical control, and she could also at any time have the applicant discharged if she so wished.

The applicant asked the Court to reject the Government's preliminary objection. With the majority of the Commission, he maintained that the final decision on hospitalisation had been taken by the Chief Physician of the Ward (see paragraph 20 above) as his consent was a condition *sine qua non* for the hospitalisation. In addition, the applicant contended that as the social authorities had decided under section 33 of the Social Assistance Act (see paragraph 19 above) to place the applicant away from home, albeit with the mother's consent, they had, firstly, joined the mother in the hospitalisation decision and, secondly, deprived her of the substance of her right to discharge the applicant should she so wish; any discharge not agreed to by the social authorities would have led to proceedings for the compulsory placement of the applicant outside his home in accordance with section 123 of the Social Assistance Act (see paragraph 45 above).

57. The Court does not consider that the applicant's complaints fall clearly outside the provisions of the Convention (see, amongst others and *mutatis mutandis*, the Lutz judgment of 28 August 1987, Series A no. 123-A, p. 21, para. 49). The complaints relate, as the Delegate of the Commission pointed out, to the interpretation and application of the Convention (Article 45) (art. 45), and raise questions going to the merits of the case, which cannot be tried merely as preliminary issues. The Government's arguments will therefore be dealt with in the following section of the present judgment.

II. THE MERITS OF THE COMPLAINTS UNDER ARTICLE 5 (art. 5)

58. According to its wording, Article 5 (art. 5) applies to "everyone". The protection afforded by this provision clearly also covers minors, as is confirmed by, *inter alia*, sub-paragraph (d) of paragraph 1 (art. 5-1-d). This point has not been in dispute before the Court.

59. The present case, however, concerns the hospitalisation of a minor at the request of his mother, who was at the relevant time the sole holder of parental rights over him according to Danish law (see paragraphs 10 and 19 above).

60. The Government maintained that Article 5 (art. 5) is not applicable in the present case. Their main contentions may be summarised as follows: Article 5 (art. 5) was only designed to protect individuals against deprivations of liberty carried out by a public authority whereas, in the instant case, the decision as to the applicant's hospitalisation was solely that of the mother and there was in any event no deprivation of liberty within the meaning of Article 5 (art. 5).

In the opinion of the Commission, on the other hand, the responsibility of the State was engaged by the hospitalisation of the child and there was a deprivation of liberty to which Article 5 (art. 5) applied.

The Court will examine the issues as to the applicability of Article 5 (art. 5) thereby raised.

61. It should be observed at the outset that family life in the Contracting States encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children. The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside and also impose, or authorize others to impose, various restrictions on the child's liberty. Thus the children in a school or other educational or recreational institution must abide by certain rules which limit their freedom of movement and their liberty in other respects. Likewise a child may have to be hospitalised for medical treatment. Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognized and protected by the

Convention, in particular by Article 8 (art. 8). Indeed the exercise of parental rights constitutes a fundamental element of family life (see the *R v. the United Kingdom* judgment of 8 July 1987, Series A no. 121-C, p. 117, para. 64).

62. The majority of the Commission found, however, that the final decision on the question of hospitalisation of the applicant was not taken by the holder of parental rights but by the Chief Physician of the Child Psychiatric Ward of the State Hospital, thus engaging the responsibility of the State under Article 5 para. 1 (art. 5-1). The mother's consent was, in the majority's opinion, not sufficient to relieve the State from this responsibility.

The applicant agreed with this view. He added that State responsibility also followed from the decision taken by the Social Welfare Committee of Herlev County under section 33 of the Social Assistance Act to place him away from home with the consent of his mother (see paragraph 56 above).

63. In the Court's view, the decision on the question of hospitalisation was in fact taken by the mother in her capacity as holder of parental rights.

It is true that the Chief Physician could have refused to admit the applicant to the Child Psychiatric Ward if hospitalisation was not justifiable on medical grounds. However, as the Government pointed out, this function is only the expression of the principle that public hospitals are not required to and will not admit persons who are not in need of medical assistance, though it is at the same time indirectly a safeguard against possible abuse of parental rights (see paragraph 52 above).

As to the social authorities' involvement under section 33 of the Social Assistance Act (see paragraph 19 above), this was only concerned with providing help in finding a place outside the home in which the applicant could live. Under Danish law, it implied no limitations on the mother's parental rights, and, as the Government observed at the hearing before the Court, the right to decide about the hospitalisation continued to be vested in her alone as the holder of those rights. The applicant also alleged that her powers were limited in that any discharge contrary to the social authorities' opinion would have led to proceedings under section 123 of the Social Assistance Act for the compulsory placement of the applicant (see paragraph 56 above). There is however no indication that the social authorities were in fact contemplating any such compulsory measure or that the conditions set out in section 123 for the taking of such a measure would have been satisfied.

Thus, neither the Chief Physician's nor the social authorities' involvement in the case altered the mother's position under Danish law as sole person with power to decide on the hospitalisation of the applicant or on his removal from hospital. Seen in relation to the mother's parental powers, the assistance rendered by the authorities was of a limited and subsidiary nature. Accordingly, the Court finds that the applicant's

admission to and stay in the Child Psychiatric Ward were decided by the mother in the exercise of her parental rights.

64. Article 5 (art. 5) therefore is not applicable in so far as it is concerned with deprivation of liberty by the authorities of the State, but the question remains, however, whether the Article is applicable in the circumstances of the present case in regard to such restrictions on the applicant's liberty as resulted from the exercise of the mother's parental rights.

65. The applicant claims that his hospitalisation did amount to a deprivation of liberty on the grounds that the Child Psychiatric Ward was a closed ward, he was unable to receive visitors except in agreement with the staff of the Ward, special permission was required in order for him to make telephone calls and also for persons outside the hospital to get into contact with him, and he was under almost constant surveillance.

66. The Government contended that not only does Article 5 (art. 5) not apply to deprivation of liberty resulting from the acts of private persons, and in particular from the decisions of the mother in the instant case in the exercise of her parental rights, but that the restrictions imposed on the applicant's freedom of movement during his stay in the Child Psychiatric Ward cannot be said to amount to a deprivation of liberty within the meaning of this Article (art. 5).

67. In order to determine whether there was in the instant case a deprivation or restriction of liberty to which Article 5 (art. 5) applies, the Court must have regard to the applicant's actual situation while placed in the Ward, taking into account such factors as the type, duration, effects and manner of implementation of the measures in question (see, *inter alia*, the *Guzzardi* judgment of 6 November 1980, Series A no. 39, pp. 32-33, paras. 91-93, and the *Ashingdane* judgment of 28 May 1985, Series A no. 93, p. 19, para. 41).

68. It is clear that the domestic authorities involved all considered that the mother's decision to have the applicant hospitalised was a lawful exercise of parental powers under Danish law and was also well-founded.

When appealed to by the father as representative of the applicant, the Danish courts found that the hospitalisation decision fell within the mother's competence as holder of parental rights and therefore was not subject to the provisions of the 1938 Act or in the nature of an administrative decision subject to judicial review (see paragraphs 21-26 above). The Chief Physician accepted the request for admission because he found that the applicant was in a neurotic state requiring treatment and that hospitalisation was in the interest of the applicant's health (see paragraphs 15, 19 and 31 above). This opinion was approved by the Social Welfare Committee of Herlev County (see paragraph 19 above).

69. The Court is satisfied that the mother, when taking her decision on the basis of medical advice from her family doctor and from Professor

Tolstrup, had as her objective the protection of the applicant's health (see paragraphs 15 and 19-20 above). This is certainly a proper purpose for the exercise of parental rights.

70. There is also no reason to find that the treatment given at the Hospital and the conditions under which it was administered were inappropriate in the circumstances.

The applicant was in need of medical treatment for his nervous condition and the treatment administered to him was curative, aiming at securing his recovery from his neurosis. This treatment did not involve medication, but consisted of regular talks and environmental therapy (see paragraphs 28-29 above).

The restrictions on the applicant's freedom of movement and contacts with the outside world were not much different from restrictions which might be imposed on a child in an ordinary hospital: it is true that the door of the Ward, like all children's wards in the hospital, was locked, but this was to prevent the children exposing themselves to danger or running around and disturbing other patients; the applicant was allowed to leave the Ward, with permission, to go for instance to the library and he went with other children, accompanied by a member of the staff, to visit playgrounds and museums and for other recreational and educational purposes; he was also able to visit his mother and father regularly and his old school friends and, towards the end of his stay in hospital, he started going to school again; in general, conditions in the Ward were said to be "as similar as possible to a real home" (see paragraphs 27-32 above).

The duration of the applicant's treatment was 5 1/2 months. This may appear to be a rather long time for a boy of 12 years of age, but it did not exceed the average period of therapy at the Ward and, in addition, the restrictions imposed were relaxed as treatment progressed (see paragraph 29 above).

At the hearing before the Court, the applicant also alluded to the possibility that his treatment in the Ward constituted an abuse of psychiatry. The Court is however satisfied that no such abuse took place. Neither the accounts given by Professor Tolstrup in his reports to the Medical Health Officer of Copenhagen and to the Social Welfare Committee of Herlev County or to the Supreme Court (see paragraphs 28-29 above) reveal anything to that effect. For its part the National Health Authority concluded, after an independent investigation of the applicant's treatment, that it saw no reason for criticising Professor Tolstrup or the Ward for the medical treatment given (see paragraph 31 above).

71. The Commission, in reaching the conclusion that the present case did involve a deprivation of liberty within the meaning of Article 5 (art. 5), attached particular weight to the fact that the case concerned "detention in a psychiatric ward of a 12-year-old boy who was not mentally ill and that the applicant, when he disappeared from the hospital, was found and brought

back to the hospital by the police". The Government's counter-argument, that there was no deprivation of liberty because the child was subject to parental authority, was, in the opinion of the Commission, not valid: in its view, although the wishes of very young children regarding the question of hospitalisation and treatment in psychiatric wards cannot be decisive, the present case "concerned a normally developed 12-year-old who was capable of understanding his situation and to express his opinion clearly".

72. The Court accepts, with the Government, that the rights of the holder of parental authority cannot be unlimited and that it is incumbent on the State to provide safeguards against abuse. However, it does not follow that the present case falls within the ambit of Article 5 (art. 5).

The restrictions imposed on the applicant were not of a nature or degree similar to the cases of deprivation of liberty specified in paragraph 1 of Article 5 (art. 5-1). In particular, he was not detained as a person of unsound mind so as to bring the case within paragraph 1 (e) (art. 5-1-e). Not only was the child not mentally ill within the meaning of the 1938 Act, but the Psychiatric Ward at the Hospital was in fact not used for the treatment of patients under the 1938 Act or of patients otherwise suffering from mental illnesses of a psychotic nature. Indeed, the restrictions to which the applicant was subject were no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital. The conditions in which the applicant stayed thus did not, in principle, differ from those obtaining in many hospital wards where children with physical disorders are treated.

Regarding the weight which should be given to the applicant's views as to his hospitalisation, the Court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. There is no evidence of bad faith on the part of the mother. Hospitalisation was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which clearly is not covered by paragraph 1 of Article 5 (art. 5-1).

Nor did the intervention of the police, which would have been appropriate for the return of any runaway child of that age even to parental custody, throw a different light on the situation.

73. The Court concludes that the hospitalisation of the applicant did not amount to a deprivation of liberty within the meaning of Article 5 (art. 5), but was a responsible exercise by his mother of her custodial rights in the interest of the child. Accordingly, Article 5 (art. 5) is not applicable in the case.

This being so, it is not necessary in the instant case to go further into the question of interpretation of the first sentence of Article 5 para. 1 (art. 5-1) which was raised by a minority of the Commission (see paragraph 54 above) or into that of the possible application of Article 5 (art. 5) to

situations in which there is a deprivation of liberty resulting from the action of a private person.

FOR THESE REASONS, THE COURT

1. Rejects unanimously the Government's objection that the application is incompatible with the provisions of the Convention;
2. Holds by nine votes to seven that Article 5 (art. 5) of the Convention is not applicable in the present case.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 28 November 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint dissenting opinion of Mr Thór Vilhjálmsson, Mr Pettiti, Mr Russo, Mr Spielmann, Mr De Meyer, Mr Carrillo Salcedo and Mr Valticos;
- (b) joint dissenting opinion of Mr Thór Vilhjálmsson, Mr Pettiti, Mr Russo, Mr Spielmann, Mr De Meyer and Mr Valticos;
- (c) joint dissenting opinion of Mr Pettiti and Mr De Meyer;
- (d) separate opinion of Mr Pettiti;
- (e) dissenting opinion of Mr Carrillo Salcedo.

R.R.
M.-A.E.

NIELSEN v. DENMARK JUDGMENT
JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON,
PETTITI, RUSSO, SPIELMANN, DE MEYER, CARRILLO SALCEDO AND
VALTICOS

JOINT DISSENTING OPINION OF JUDGES THÓR
VILHJÁLMSSON, PETTITI, RUSSO, SPIELMANN, DE
MEYER, CARRILLO SALCEDO AND VALTICOS

(Translation)

The majority of the Court took that view that the applicant's committal to the Children's Psychiatric Ward of the State Hospital from 26 September 1983 to 30 March 1984 did not constitute a deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention, but was the result of the exercise by the applicant's mother of custodial rights in the interests of the child. In consequence, the Court held that Article 5 (art. 5) did not apply and that, accordingly, it was not necessary in the present case to enquire into the interpretation of the first sentence of Article 5 para. 1 (art. 5-1) or the possible application of Article 5 (art. 5) to situations in which a deprivation of liberty occurs through the action of a private individual.

We cannot subscribe to this view, and in this respect we find ourselves in agreement with the conclusion reached by the Commission. We consider that the specific conditions in which the applicant was admitted to the hospital and placed, against his will, in the psychiatric ward, and the length and nature of the committal, are important criteria in determining whether the applicant was deprived of his liberty. Like the Commission, we attach great importance to the fact that the committal lasted over a period of several months and involved the placing in a psychiatric ward of a twelve-year-old boy who was not mentally ill. In our view, that constituted a deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention (see paragraphs 108, 109 and 111 of the Commission's report).

The respondent State is accountable for this deprivation. It not only tolerated it, but also associated itself with it through the action and assistance of its organs and officials.

NIELSEN v. DENMARK JUDGMENT
JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON,
PETTITI, RUSSO, SPIELMANN, DE MEYER AND VALTICOS
JOINT DISSENTING OPINION OF JUDGES THÓR
VILHJÁLMSSON, PETTITI, RUSSO, SPIELMANN, DE
MEYER AND VALTICOS

(Translation)

Having taken the view, expressed in the above opinion, that Article 5 (art. 5) applies to the present case, we consider that there has been a violation of Article 5 para. 4 (art. 5-4) in this case, because the applicant was detained in a psychiatric hospital over a period of several months, during which period he did not have the right to take proceedings in a court because he was not suffering from a mental disorder, whereas, paradoxically, he would have had such a right if he had in fact been mentally ill.

JOINT DISSENTING OPINION OF JUDGES PETTITI AND
DE MEYER*(Translation)*

In our view there has also been a violation of the first paragraph of Article 5 (art. 5-1).

The applicant's committal could not be based on any of the grounds which could have justified it under this paragraph (art. 5-1).

It did not constitute the normal exercise of parental authority or the normal practice of psychiatry. In fact it represented an abuse of both.

As the Court of Appeal for Eastern Denmark noted on 15 February 1984: "there has been no question of admittance for treatment of a mental illness"¹. The evidence shows that the applicant's committal occurred in the context of a conflict between his mother and his father regarding custody. "It was clear that (the applicant) did not want to stay with her (his mother)"², and had better relations with his father, to whom the Danish Supreme Court ultimately awarded custody by its judgment of 21 August 1984³.

His committal, in such circumstances, to a psychiatric establishment did not greatly differ from, for instance, the sort of committal which is effected in order to secure family property. It was of the same type as committals which take place only too frequently, for non-therapeutic purposes.

¹ para. 25 of the judgment.

² para. 19 of the judgment.

³ para. 37 of the judgment.

SEPARATE OPINION OF JUDGE PETTITI

(Translation)

Further to the joint observations put forward in the preceding opinions, I would make the following additional points.

1. The Government's implicit assumption that the Nielsen boy's situation could be treated as equivalent to that of a child placed in an ordinary hospital was clearly erroneous. The two situations are in no way comparable. No further explanation is needed. Clearly parents are in the best position to decide what measures to take for the education and health care of their children, but when it comes to measures amounting to internment, the situation is very different.

It is my view that the dispute as to the nature of the establishment where Jon Nielsen was placed and the category of patients could not in any case provide the basis in this instance for the reasoning adopted by the Court.

The hospital had at least a section or a floor set aside for the care of children suffering from psychiatric disorders and there Jon was placed.

Even though the other children were "disturbed" rather than mentally ill, the child was undoubtedly affected by being placed there.

2. It is clear that the State's responsibility is incurred even under the terms of domestic law.

The child's committal in the first place, even if suggested by the mother or the family doctor, is decided by the administrative authorities. In this case they justified their decision by the need for a psychiatric assessment, but such an assessment is usually of short duration. The Government have supplied no evidence to justify keeping the child in the establishment for a period of several months following the assessment. Throughout this period, the administrative authorities remained responsible.

Moreover, this type of responsibility is referred to in the Council of Europe recommendations in this field, in relation to which Denmark has formulated no reservation.

It is true that, in this case, the intention behind the national authorities' action was to provide social assistance and that the hospital in question was an excellent establishment, but the authorities left too much to the mother's initiative and their supervision of the continued hospitalisation was too distant.

The Court's decision of course reflected the specific facts of the case, but its analysis concerned principally the justification for the admission, whereas it was essentially the prolongation of the stay in hospital which was at issue.

It should also be noted that the national authorities contradicted themselves by relying at times on the child's condition and the doctor's diagnosis to justify the measures taken, and, at others, on the responsibility

derived from the mother's parental authority to demonstrate that the State was not responsible.

The report of the Danish ministerial committee (see paragraph 52 of the judgment) confirms that the child's situation constituted a deprivation of liberty and that he could not have recourse to the remedy available to the mentally ill.

"The problem arises, however, where the child is hospitalised to be treated for a mental disorder of a non-psychotic nature. Since only mentally ill persons are covered by the [1938 Act], this Act cannot be expected to restrict the exercise of parental rights in these cases. It is therefore natural to treat on the same legal footing as physical disorders, mental disorders other than psychoses, with the consequence that the decision of the holder of the parental rights prevails, provided that the chief physician can justify the hospitalisation of the child for treatment." (pp. 390 - 392 of the report)

...

"Here [i.e. in the case of mental disorders outside the scope of the 1938 Act], the protection of the child - as in the case of physical disorders - is to be sought in the fact that the medical officer under professional responsibility must assess whether the request made by the holder of the parental rights for admission to a hospital can be considered justified." (p. 395 of the report)

The report did not suggest any changes to the existing legal situation described above.

3. In a field as sensitive as that of psychiatric committal, within the framework of the European Convention, in particular under Article 5 (art. 5) thereof, unremitting vigilance is required to avoid the abuse of legislative systems and hospital structures. The first sentence of Article 5 para. 1 (art. 5-1) is of fundamental importance for the whole Article (art. 5).

In almost all the countries of the Council of Europe, and for a variety of different reasons, the supervision of psychiatric committals gives rise to problems. The judicial authorities are not always in a position to intervene immediately in the event of abuse or errors of diagnosis.

Precisely because of the vulnerability of those who are the subject of committal decisions, the protection of Article 5 (art. 5) must take full effect, even more so than in relation to detention under the ordinary law.

The Nielsen case involved a minor who was already the victim of parental conflict and who could only have been very disturbed by living with the other children in the ward. Furthermore, even for adults, so-called "voluntary" committal may be just as sensitive as "compulsory" committal and must be subject to full supervision.

Contemporary psychiatry has had to confront conflicts of principle when States other than those of the Council of Europe have used deprivations of liberty abusively against "those who thought differently", under the cover of detention in a psychiatric establishment.

The European Convention has the merit of providing a mechanism of protection which can be applied in every type of case, from the least to the

most serious, and which takes account of progress made in one or other of the States in the legislative or social field.

The underlying philosophy and direction of the Convention dictate that every deprivation of liberty must be examined with the greatest care in order to afford protection to everyone.

DISSENTING OPINION OF JUDGE CARRILLO SALCEDO

(Translation)

Having taken the view, expressed in the above opinion, that Article 5 (art. 5) is applicable, I consider that there has been a violation of the first sentence of Article 5 para. 1 (art. 5-1) in this case.

In my view, the applicant's committal to the psychiatric ward, against the background of disagreements between his parents concerning custody, raises the question whether, under the Convention, committal to a psychiatric ward on the decision of the parent with custody may be classified as a deprivation of liberty within the meaning of Article 5 para. 1 (art. 5-1), for which the State is responsible.

The administrative authorities acted throughout with the consent of the mother, the holder of parental rights over the child. Moreover, the medical experts considered all along, even in the Supreme Court, that it would be preferable for parental rights to remain with the mother, in the interests of the child (statement of Professor Tolstrup of 19 June 1984 and statement of the Medico-Legal Council of 9 August 1984 (see paragraph 37 of the judgment)). However, on 21 August 1984 the Supreme Court quashed the first-instance judgment and awarded the father custody.

The Commission found that the State was responsible because the Chief Physician of the State Hospital accepted the applicant's admission to the psychiatric ward. For its part, the Court decided that the applicant's hospitalisation did not constitute a deprivation of liberty within the meaning of Article 5 (art. 5), but was the result of the exercise by the mother of custodial rights in the interests of the child.

I cannot agree with this decision, because I consider that, for the purposes of the Convention, the issue is whether the fact that a parent may legally, and without being subject to any judicial review, place a child who is in his custody in a psychiatric ward constitutes a violation of the guarantee set out in the first sentence of Article 5 para. 1 (art. 5-1).

Like Mr Frowein, in his partly concurring, partly dissenting opinion (Commission's report, pp. 35-37), I think that Article 5 (art. 5) is constructed in a very clear way. The first sentence of paragraph 1 (art. 5-1) imposes a positive obligation on States to protect the freedom of persons subject to their jurisdiction by legislation and other action, while the second sentence of paragraph 1 (art. 5-1), and sub-paragraphs (a) to (f) (art. 5-1-a, art. 5-1-b, art. 5-1-c, art. 5-1-d, art. 5-1-e, art. 5-1-f), protect individuals against specific deprivations of liberty resulting from the action of the public authorities.

In the present case, I do not think that the requirements of the first sentence of Article 5 para. 1 (art. 5-1) were complied with, in view of the supervision provided for under the Danish Social Assistance Act, and the

fact that the applicant's admission to the psychiatric ward of the Hospital was recommended by the family doctor and approved by the Chief Physician of the psychiatric ward in the exercise of his professional duties.

In my view, the issue is not, as the majority of the Commission thought, a child's right to oppose a decision of a parent with custody, but the absence in Danish law of adequate procedures for judicial review in connection with the committal of a child to a psychiatric hospital by the parent with custody, where, as in this case, the child in question is not mentally ill and there are disagreements concerning custody.