



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

THIRD SECTION

B. AND P. v. THE UNITED KINGDOM

(Applications nos. 36337/97 and 35974/97)

JUDGMENT

STRASBOURG

24 April 2001

FINAL

05/09/2001

In the case of B. and P. v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,

Mr L. LOUCAIDES,

Mr P. KÜRIS,

Mrs F. TULKENS

Sir Nicolas BRATZA,

Mrs H.S. GREVE,

Mr K. TRAJA, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 14 November 2000 and 3 April 2001,

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

PROCEDURE

1. The case originated in two applications (nos. 36337/97 and 35974/97) against the United Kingdom of Great Britain and Northern Ireland 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 two United Kingdom nationals, B. (“the first applicant”), on 1 August 1996, and P. (“the second applicant”) on 31 January 1997.

2. The first applicant, who had been granted legal aid, was represented by Mr J. Welch, a lawyer practising in London. The second applicant was, exceptionally, granted leave to represent himself (Rule 36 of the Rules of Court). The United Kingdom Government (“the Government”) were represented by their Agent, Mr M. Eaton, and subsequently Ms R. Mandal, both of the Foreign and Commonwealth Office.

3. The applicants alleged violations of their rights to a public hearing and public pronouncement of judgment under Article 6 § 1 of the Convention and of their right to freedom of expression under Article 10.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). They were allocated to the Third Section of the Court (Rule 52 § 1).

5. Having consulted the parties, the President of the Chamber decided that, in the interests of the proper administration of justice, the proceedings in both cases should be conducted simultaneously. The applications were joined on 14 November 2000 (Rule 43).

6. By decisions of 14 September 1999, the Chamber declared the applications partly admissible [*Note by the Registry*. The Court's decisions are obtainable from the Registry].

7. The applicants and the Government filed observations on the merits (Rule 59 § 1).

8. On 2 November 2000 the Vice-President of the Chamber decided, on an interim basis, that the cases should be known by the applicants' initials. This decision was confirmed by the President on 14 November 2000 (Rules 33 § 3 and 47 § 3).

A hearing took place in public in the Human Rights Building, Strasbourg, on 14 November 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Ms R. MANDAL, Foreign and Commonwealth Office,	<i>Agent,</i>
Mr A. MOYLAN QC,	<i>Counsel,</i>
Ms K. BIRCH, Lord Chancellor's Department,	<i>Adviser;</i>

(b) *for the first applicant*

Mr A. MCFARLANE QC,	
Mr T. EICKE,	<i>Counsel,</i>
Mr J. WELCH, Legal Director of Liberty,	<i>Solicitor;</i>

(c) *for the second applicant*

The second applicant represented himself.

The Court heard addresses by Mr McFarlane, the second applicant and Mr Moylan.

9. The Court noted with considerable displeasure that during the hearing, in breach of the Vice-President's order of 2 November 2000, Mr McFarlane and the second applicant referred to the full names of the applicants, their former partners and their children.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

10. On 5 February 1993 the applicant and his cohabitant, X, had a son. X and the child ceased living with the applicant in March 1993.

11. In September 1993 the applicant made an application to the county court for a residence order under section 8(1) of the Children Act 1989. In January 1994 the court made a residence order in favour of X with a specific contact order in favour of the applicant.

12. In 1994 X married Y and commenced divorce proceedings against him early in 1996. The applicant claims that in April or May 1996 his parents received an anonymous letter to which was attached a lengthy affidavit sworn by X setting out in detail her complaints against Y, including drunkenness and violence.

13. On 3 June 1996 the applicant made a further application to the county court seeking a variation of the residence order of January 1994. The judge to whom the case was assigned had already made eleven orders in respect of the applicant's son.

14. On 10 June 1996 the applicant, referring, *inter alia*, to Articles 6 and 10 of the Convention, applied to have the residence application heard in open court with a public pronouncement of the judgment. His application for public proceedings was dismissed at the directions hearing before a judge in chambers on 14 June 1996. According to the transcript of the hearing, the judge dealt with the publicity application as follows:

Judge: Now your application today is for a direction that the [residence] application be heard in open court, public pronouncement of the judgment thereon. Well I can deal with that straightaway. Children's cases are not held in open court. It is not anything to do with the parents, it is for the protection of the child.

Applicant: Yes, I understand that, I would wish for this case to be heard in open court, with public pronouncement of the judgment.

Judge: I have got no power, I don't think, to order it to be held in open court in any event. This Parliament has dictated that it must be held in private, do you see?"

The judge then proceeded to make various directions in respect of the residence application. At the end of the hearing he remarked:

"For the avoidance of doubt I shall direct today that today's hearing is in chambers and, as you know, nobody – including the party to the action – is entitled to disclose outside court anything that has happened in chambers [If] there is any disclosure that will be contempt of court, for which you can be sent to prison, do you understand?"

... I shall also order for the avoidance of doubt that the next hearing will also be in chambers. I do not think it is in [the child's] interest for it to be any other way. ...”

15. The applicant appealed against this decision to the Court of Appeal, which refused leave to appeal on 22 July 1996. In giving judgment, Mrs Justice Bracewell observed:

“Rule 4.16(7) [of the Family Proceedings Rules 1991] states as follows:

‘Unless the Court otherwise directs a hearing of, or directions appointment in, proceedings to which this Part applies shall be in chambers.’

... [T]his particular rule governs proceedings under the Children Act 1989 and provides that hearings are to be held in chambers unless otherwise directed. The Court therefore has a discretion to sit in open court.

The basis of the applicant's application for a hearing in open court was not that there was a point of law and/or that there was any public interest, but in his statement he relies on the following:

- (1) The Social Services and the Court Welfare Officer had withheld information.
- (2) The Court Welfare Officer and the Social Services were biased.
- (3) The mother was unstable and the child was at risk with his mother.

... The Court of Appeal, in a different constitution, has given judgment on precisely this point [in the second applicant's case: see paragraph 23 below]. That decision is binding on this court. ... Rule 4.16(7) provides that child cases shall be heard in private unless there is a special direction to the contrary which would have to be justified by unusual features. The rules plainly indicate a policy of cases being heard in chambers.

In the current case there is nothing to distinguish the proceedings as out of the usual or raising any issues which would justify a public hearing. The judge exercised his discretion properly and judicially ... ”

16. The county court heard the applicant's residence application in chambers on 23 July 1996. The judge observed that he did not consider that it would be in the child's interests that the matter should be public. He dismissed the application to vary the residence order and ordered, under section 91(14) of the Children Act 1989, that no further application for a residence or contact order could be made by the applicant without leave of the court. The judgment was pronounced in chambers. The parties were provided with a copy in writing.

17. The applicant applied to the Court of Appeal for leave to appeal. Leave was refused to appeal against the residence order but was granted to appeal against the order under section 91(14). On 17 November 1997 the Court of Appeal dismissed the applicant's appeal and made an order prohibiting the identification of the child. The judgment was pronounced publicly.

18. On 1 December 1998 the Court of Appeal dismissed an application by the applicant to have the anonymity order set aside. This judgment was also pronounced publicly.

B. The second applicant

19. On 31 October 1995, in the course of proceedings for separation from his wife, the applicant made an application to the county court for a residence order under section 8(1) of the Children Act 1989 in respect of his son (“the residence application”). The applicant represented himself in the proceedings and his wife was represented by counsel.

20. On 15 January 1996 the applicant, referring, *inter alia*, to Articles 6 and 10 of the Convention, made a further application asking for the residence application to be heard in open court with a public pronouncement of the judgment.

21. This application (“the publicity application”) was heard on 29 February 1996 in public. The county court’s judgment in the publicity application was pronounced on 14 March 1996, in public, although the judge underlined that no reference to the child’s identity should be made in any publication concerning the case. It was accepted that there was nothing out of the ordinary about the residence application; the gist of the applicant’s argument was that all cases concerning children should be heard in public. He contended, *inter alia*, that the public had the right to see how decisions were made about children’s lives, and that publicity would serve the interests of justice by encouraging judges, barristers and other professionals involved in such cases to take greater care in their work. In rejecting the applicant’s submissions the judge observed:

“It is all very well for the father ... to say that the hearing of cases in chambers brings about sloppy or lax practice. I personally have no evidence of that. ... It seems to me that, if such practices ... occur ... then they can be placed before the Court of Appeal and if the Court of Appeal so finds that that particular judge can be criticised and if guidance thereafter can be given to the judiciary in general, so much the better.

... Even assuming that ... it would be possible ... to draw my attention to any number of cases which ... have been wrongly decided by the tribunal at first instance and which for one reason or another have not found their way to the Court of Appeal, I am very dubious whether or not the solution to that particular problem is to have those cases heard in public. When one is arguing for principle, one should stick to principle, and I think it a draconian measure to bring about the hearing of these cases in public ... in order to chastise judges or expose lax and inadequate preparation by barristers. I would not wish children to be subjected to any form of embarrassment in order, as I say, to chastise the legal profession.

... But finally I dispose of this case, I am afraid, in a very simplistic manner. The rules of court – the Family Proceedings Rules – ... came into force on 14 October 1991, which coincided with the coming into force of virtually the whole of the substantial provisions of the Children Act. I think I must approach this case in this

manner. The Children Act itself – the preamble – says that it is an Act to reform the law relating to children. ... It was a consolidating Act, trying to bring together the various legislative Acts which had gone before, but it was a reforming Act in many senses. It took a great deal of time going through Parliament. I have no doubt at all that various interested parties and pressure groups gave evidence to various committees. I have no doubt at all that judges of family experience at the very highest level were consulted. During the course of its going through Parliament it would have been debated not only in the Lower House but in the Upper House, where all their Lordships of the House of Lords would doubtless have voiced an opinion on it. ... Not only was the Act a long time coming to the statute book, it was nearly two years before the bulk of it came into effect. During the course of that gestation period, rules of court were argued about endlessly, and the rules of court appeared virtually at the eleventh hour. They were not made until 1 May 1991. There is a long history to that, which is not relevant to this judgment. I can only assume, sitting here, that the question of whether or not children's cases should be heard in open court or in camera was and must have been anxiously considered at all levels during the course of the progress of this Act and the rules under the Act through Parliament. I can only read, and I do so read and interpret 4.16(7), which is the rule to which reference has been made, as being a direction – a rule of court – that hearings of family cases shall be heard and shall continue to be heard in chambers. ... I would want chapter and verse as to what should be put before the judge before he otherwise directs a hearing of a case in open court. I am not prepared in the course of this judgment to give myself any guidelines as to the sort of case that that might be.

It therefore follows that, irrespective of the arguments that have been placed before me ..., I have come to the clear conclusion that all of this must have been contemplated by the legislature, and ... if any change is to be made it should be made by the legislature. I assume that the legislature knew what it was doing and wished, despite all arguments to the contrary, to continue to have Children Act cases heard in chambers. I do not feel that I have any power, even if I wished to do, – which I do not – to hear this particular case in open court. I think I would be breaking the law, in the sense that I would be interpreting in a perverse manner the rules of court laid down under the Children Act. Therefore ... I feel I have no alternative but to direct that the hearing of this case shall be in camera ...”

22. The applicant appealed on 29 March 1996 on the ground, first, that the county court judge had fettered his discretion by indicating that he had no option but to hear the case in private and, secondly, that the exercise by the judge of his discretion was flawed since, if he had exercised it correctly, the only conclusion to which he could have come would have been to hear the entire case in open court.

23. The Court of Appeal dismissed the applicant's appeal on 20 June 1996 (reported as *Re P-B (a minor)* [1997] 1 All England Law Reports 58). In giving judgment, Lord Justice Butler-Sloss said:

“When the Children Act 1989 came into force in October 1991 there were new rules of procedure for the High Court and the County Court contained in the Family Proceedings Rules 1991. Rule 4.16 governs hearings and Rule 4.16(7) states:

‘Unless the court otherwise directs, a hearing of, or directions appointment in, proceedings to which this Part applies shall be in chambers.’

... Despite the arguments advanced by [the applicant], it is abundantly clear that the courts are bound by sub-rule (7) to hear child cases generally in private. That was obviously the intention of the Rules Committee and it follows the long-established practice in the hearing of child cases. Sub-rule (7) allows for all or part of the case to be heard in public. In the light of the long established practice it is unlikely that judges will, other than rarely, hear the evidence relating to the welfare of a child in public. The judgment is in a somewhat different position and it may be that the practice of giving judgment in private is partly due to the parties not asking for it to be heard in public and partly because in the county court, where the vast majority of children's cases are heard, it is less likely that there will be issues of public interest. Where issues of public interest do arise it would seem entirely appropriate to give judgment in open court providing, where desirable in the interests of the child, appropriate directions are given to avoid identification. If the case raises issues of principle or of law, the judgments are increasingly provided to the law reporters and are published in a large number of law reports which report family cases. But the majority of cases are of no interest to anyone beyond the parties and their families.

In answer, therefore, to the appellant's first criticism of the judge that he fettered his discretion, the judge undoubtedly used language which might by reading the judgment in a narrow way be said to restrict him to hearing the case in camera. The judge was, however, recognising that the existing practice of hearing the case in private was restated in sub-rule (7) unless there were unusual features to the case. This was a run of the mill case and the general practice would seem appropriate to this case. In my judgment, the judge ought not to be criticised for a cautious view of the exercise of his discretion.

In answer to the appellant's second point that the exercise of discretion should always be in favour of hearings in open court, it would seem to me that he is directing his arguments to the wrong forum. The wording of sub-rule (7) is clear. The exercise of discretion remains in the hands of the trial judge and it is a matter for the judge in each case to exercise that discretion if called upon to do so. In the absence of an application to hear the case in open court and unusual circumstances, the normal position would remain, as recognised by the wording of the sub-rule, that the evidence would be heard in private."

24. On the same date, 20 June 1996, the Court of Appeal ordered that no one should publish or reveal any information likely to lead to the identification of the applicant's child. Breach of this order would be a contempt of court punishable with up to two years' imprisonment.

25. The county court heard the applicant's residence application in chambers in June 1996. According to the applicant, before the end of the hearing the judge again considered whether he should give judgment publicly. Given the Court of Appeal's decision of 20 June 1996, the judge concluded that he was bound not to, there being no special feature or interest to justify open judgment.

26. On 8 August 1996 the county court ordered that the mother should have custody of the child and granted the applicant access rights. The judgment was pronounced in chambers. The parties were provided with a copy in writing.

27. The applicant did not appeal against the residence order.

28. On 19 December 1996 the House of Lords refused the applicant leave to appeal against the decision of the Court of Appeal of 20 June 1996 concerning his application of 15 January 1996.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Availability to the public of judgments and other documents in cases concerning children

29. The Family Proceedings Rules 1991 provide in Rule 4.23(1) that:

“Notwithstanding any rule of court to the contrary, no document, other than a record of an order, held by the court and relating to proceedings to which this Part applies shall be disclosed, other than to a party, the legal representative of a party, the guardian *ad litem*, the Legal Aid Board, or a welfare officer, without leave of the judge or district judge.”

Persons with a legitimate interest in a child case may apply to the court for leave to inspect and obtain copies of documents or evidence in any particular child-care case and a party may apply for leave to disclose any document to a third party (see *Re EC (Disclosure of Material)* [1996] 2 Family Law Reports 725 and *A County Council v. W and Others (Disclosure)* [1997] Family Law Reports 574).

30. Section 12(1) of the Administration of Justice Act 1960 provides as follows:

“The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say:

(a) where the proceedings

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the Children Act 1989; or

(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor.”

According to section 12(2) of the Act, the above does not apply to the publication of the text or summary of the whole or part of the relevant court order.

THE LAW

I ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

31. The relevant parts of Article 6 § 1 of the Convention provide:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The applicants complained that, in their residence applications concerning their sons, each was denied a public hearing and a public pronouncement of the judgment.

A. Right to a public hearing

32. The Government submitted that the purpose of the presumption that hearings about children should be held in private was, *inter alia*, to protect the private lives of children and to promote the administration of justice by encouraging the parties and witnesses to give full and frank evidence.

In each case the judge had a discretion to hear the case in public and had to consider the matter if requested by one of the parties. This procedure was not inconsistent with Article 6 § 1 and reflected, moreover, the practice adopted in the majority of the member States of the Council of Europe. If the presumption were to be reversed, as suggested by the applicants, it would adversely affect the children’s interests. A requirement to decide on an individual basis in each of the 100,000 or more applications in England and Wales each year would lead to delay, additional costs for the parties and uncertainty and worry for those who hoped for confidentiality.

In both the present cases the domestic courts expressly decided to hear the cases in private. In the first applicant’s case, the judge specifically stated that it would not be in the child’s interests that the matter should be dealt with in public, and in the second applicant’s case the question was examined at length at first instance and detailed reasons given in support of the decision to hold the proceedings in chambers. In both cases the judgments were considered and upheld by the Court of Appeal.

33. The first applicant submitted that, correctly interpreted, Article 6 § 1 provided a general rule that hearings in civil disputes should be public. The second sentence allowed for exceptions to this general rule, but the decision to hold the hearing in private should be taken on an individual basis in each case, and weighty reasons should always be given.

In cases involving children, the interests of the child was one of the issues to weigh in the balance when deciding whether or not the public should be excluded. The other issues to be considered included the interests of the other parties to the litigation, those of concerned family members such as the grandparents, and the general public interest in open justice. The assumption in England and Wales that all proceedings under the Children Act should take place in private was, therefore, contrary to Article 6 § 1. Moreover, it was inconsistent with the position in another United Kingdom jurisdiction, Scotland, where the presumption was for a public hearing.

In the present case there was no evidence of any conflict between the interests of the child and those of the first applicant; certainly, the existence of such a conflict was never claimed by any of the parties to the proceedings. The county court judge did not consider whether or not a public hearing would adversely affect the child; nor did he carry out any balancing exercise before ruling that the proceedings should take place in chambers.

34. The second applicant emphasised that the public right to attend a hearing was an essential safeguard against judicial arbitrariness and helped maintain confidence in the administration of justice. Openness was particularly important in cases involving the residence of children in view of the wide discretion afforded to judges, the inevitability that judges would decide such cases in accordance with their own personal values and morality, and the heavy reliance placed on the views of court welfare officers.

He accepted that his application for residence was “run of the mill”, but submitted that as such it merited being exposed to public scrutiny; the purposes of the publicity requirements in Article 6 § 1 would be defeated if restricted to cases of special interest.

35. The Court observes at the outset that it is not its task to rule on national law and practice *in abstracto*. Instead it must confine itself to an examination of the concrete facts of the cases before it (see, for example, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-1, p. 279, § 67). It notes that neither applicant has alleged that the domestic proceedings were unfair and that their complaints relate solely to the formal requirements of publicity.

36. The Court recalls that Article 6 § 1 of the Convention provides that, in the determination of civil rights and obligations, “everyone is entitled to a fair and public hearing”. The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, a fair hearing, the guarantee of which is one of the foundations of a democratic society (see

Sutter v. Switzerland, judgment of 22 February 1984, Series A no. 74, p. 12, § 26).

37. However, the requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the proviso that “the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”. Moreover, it is established in the Court’s case-law that, even in a criminal-law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 70; *Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000, unreported; *Z v. Finland*, judgment of 25 February 1997, *Reports* 1997-I, p. 348, § 99; and *T. v. the United Kingdom* [GC], no. 24724/94, §§ 83-89, 16 December 1999, unreported).

38. The proceedings which the present applicants wished to take place in public concerned the residence of each man’s son following the parents’ divorce or separation. The Court considers that such proceedings are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice. To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment.

39. The applicants submit that the presumption in favour of a private hearing in cases under the Children Act should be reversed. However, while the Court agrees that Article 6 § 1 states a general rule that civil proceedings, *inter alia*, should take place in public, it does not find it inconsistent with this provision for a State to designate an entire class of case as an exception to the general rule where considered necessary in the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of the parties (see *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, p. 42, §§ 87-88), although the need for such a measure must always be subject to the Court’s control (see, for example, *Riepan v. Austria*, no. 35115/97, § 34, ECHR 2000-XII). English procedural law can therefore be seen as a specific reflection of the general exceptions provided for in Article 6 § 1.

40. Furthermore, English tribunals have a discretion to hold Children Act proceedings in public if merited by the special features of the case, and the judge must consider whether or not to exercise his or her discretion in this respect if requested by one of the parties. Turning to the facts before it, the Court notes that in the first applicant's case, although the county court judge in his ruling of 14 June 1996 appeared to consider that he had no power to order the hearing to take place in public, this misstatement of the domestic law was corrected on appeal, when Mrs Justice Bracewell held that there was a judicial discretion to hear such a case in public but that there was no reason to exercise that discretion in the applicant's case. Moreover, in his judgment of 23 July 1996 the county court judge explained that he had refused the application for a public hearing because he did not think that it was in the child's interests that the matter should be public (see paragraphs 14-16 above). Although before the Court the applicant has stressed his desire to alleviate his parents' anxiety about their grandson by allowing them to attend the hearing, in fact he did not appear ever to have expressly sought leave for them to attend the hearings before the judge in chambers. In the second applicant's case the judges at first instance and on appeal gave careful consideration and detailed explanations of their reasons for holding that the proceedings should continue in chambers (see paragraphs 21 and 23 above).

41. In conclusion, therefore, the Court does not consider that the decision in each applicant's case to hold the hearing of his application for the residence of his son in chambers gave rise to a violation of Article 6 § 1 of the Convention.

B. Right to public pronouncement of judgment

42. In addition, the applicants complained that the county courts' residence judgments were not pronounced publicly.

43. The Government submitted that to pronounce the judgment in public would invalidate the purposes of holding the hearing in private.

In response to a question put at the hearing, counsel for the Government told the Court that orders and judgments in child cases usually included the names and other details of the parties and children and were private documents, although interested third parties might apply for leave to consult the full text or obtain a copy. Judgments of the Court of Appeal and of first-instance courts in cases of special interest were routinely published, with the omission of the names and personal details of the individuals concerned.

44. The applicants pointed out that the provision in Article 6 § 1 of the Convention requiring the public pronouncement of judgments was expressed in unqualified terms and that the Court in *Campbell and Fell* (op. cit., p. 43, § 90) had rejected an argument that this right was subject to any implied limitation. While the Government might enjoy a margin of

appreciation in respect of the method chosen to publish the judgment, there was no discretion to decide to keep it entirely confidential.

At the hearing the applicants expressed the opinion that it would not be sufficient in order to comply with Article 6 § 1 to publish the court order but that the full judgment would have to be made public. The first applicant conceded that, where appropriate, names and other identifying details could be removed, although he considered that this should be decided on a case by case basis. The second applicant was of the view that, although it should be possible to waive the right under Article 6 § 1 to the public pronouncement of judgments, if either party wished for the judgment to be public, the full, unanonymised text would have to be made available.

45. The Court recalls its long-standing case-law that the form of publicity given under the domestic law to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1 (see *Sutter*, cited above, p. 14, § 33). Thus in *Sutter*, for example, it found that the publicity requirement under Article 6 § 1 was satisfied by the fact that anyone who could establish an interest could consult or obtain a copy of the full text of judgments of the Military Court of Cassation, together with the fact that that court's most important judgments were published in an official collection (*ibid.*, § 34).

46. The Court further recalls its above finding that, in view of the type of issues requiring to be examined in cases concerning the residence of children, the domestic authorities were justified in conducting these proceedings in chambers in order to protect the privacy of the children and the parties and to avoid prejudicing the interests of justice. It agrees with the Government that to pronounce the judgment in public would, to a large extent, frustrate these aims.

47. The Court notes that anyone who can establish an interest may consult or obtain a copy of the full text of the orders and/or judgments of first-instance courts in child residence cases, and that the judgments of the Court of Appeal and of first-instance courts in cases of special interest are routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them. It is noteworthy in this respect that the first applicant, despite his desire to share information about his son with the child's grandparents, never made any application either for the grandparents to be present in the county court or for leave to disclose the residence judgment to them.

48. Having regard to the nature of the proceedings and the form of publicity applied by the national law, the Court considers that a literal interpretation of the terms of Article 6 § 1 concerning the pronouncement of judgments would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6 § 1, which is

to secure a fair hearing (see, *mutatis mutandis*, *Sutter*, cited above, p. 14, § 34).

49. The Court thus concludes that the Convention did not require making available to the general public the residence judgments in the present cases, and that there has been no violation of Article 6 § 1 in this respect.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

50. Finally, the applicants complained under Article 10 of the Convention that they were prevented, upon risk of conviction for contempt of court, from revealing any detail of the residence proceedings or judgment. The relevant parts of Article 10 provide:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The first applicant complained in particular that he was unable to share information revealed in the residence proceedings with his parents, who were worried about their grandson. He submitted that the maximum penalty of two years' imprisonment for contempt of court was quite disproportionate to the aim of preventing the disclosure of information to other family members.

51. The Government submitted that the aims of the provision under the Administration of Justice Act 1960 prohibiting the publication of confidential information about child proceedings were to protect the rights of others, to prevent the disclosure of information received in confidence and to maintain the authority of the judiciary. They contended that the provision was necessary in a democratic society and proportionate to the aims pursued.

52. The Court refers to its above findings in connection with Article 6 § 1 of the Convention that it was justifiable, in order to protect the privacy of the children and parties and to avoid prejudicing the interests of justice, to hold the residence proceedings in chambers and to limit the extent to which the county courts' judgments were made available to the general public. In the light of these findings, the Court does not find it necessary to examine the complaint under Article 10 separately.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been no violation of Article 6 § 1 of the Convention as regards the applicants' complaints about public hearings;
2. *Holds* by five votes to two that there has been no violation of Article 6 § 1 of the Convention as regards the applicants' complaints about the public pronouncement of judgments;
3. *Holds* unanimously that it is not necessary to examine separately the applicants' complaint under Article 10 of the Convention.

Done in English, and notified in writing on 24 April 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Sir Nicolas Bratza;
- (b) dissenting opinion of Mr Loucaides joined by Mrs Tulkens.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE Sir Nicolas BRATZA

I agree with the majority of the Court in finding that there has been no violation of the Convention in the case of either applicant.

As to the complaint concerning the holding of the proceedings in camera, I fully share the reasoning of the majority, the decisive point in my view being that in both cases the county court judge exercised his independent discretion to exclude the public from the substantive hearing in the interests of the children concerned.

The complaint about the lack of public pronouncement of the judgments has caused me more difficulty. As the applicants correctly point out, the requirement in Article 6 § 1 that the judgment be pronounced publicly is, in contrast to that concerning the public nature of the hearing itself, expressed in unqualified terms. In this respect, Article 6 of the Convention differs from the equivalent provision in Article 14 of the International Covenant on Civil and Political Rights, which provides:

“The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

Further, in *Campbell and Fell v. the United Kingdom* (judgment of 28 June 1984, Series A no. 80, p. 43, § 90) the Court, noting both the terms of Article 17 of the Convention and the importance of the principle of publication, which had been emphasised in *Sutter v. the United Kingdom* (judgment of 22 February 1984, Series A no. 74), rejected the respondent Government’s argument that the principle could be regarded as subject to an implied limitation in cases in which disciplinary offences by prisoners were adjudicated on.

There is, moreover, force in the applicants’ argument which is reflected in the dissenting opinion of Judge Cremona and others in *Sutter* itself to the effect that:

“If the basic underlying concept of public scrutability is to be a reality, a restricted access to judgments such as existed in the present case, i.e. restricted only to persons who could establish an interest to the satisfaction of a court official, falls short of what is required by that provision of the Convention. Public knowledge of court decisions cannot be secured by confining the knowledge to a limited class of persons.”

Despite the strength of these arguments, I am in the end persuaded that there was in the present cases sufficient compliance with the requirements of Article 6. My reasons can be summarised as follows.

1. It is apparent both from the wording of the respective texts and from the historical background that in the Convention system, as well as in the system established by the Covenant, stricter standards have been imposed as regards the publication of court judgments than as regards the public character of the underlying proceedings. In its original formulation in 1949, the draft of what became Article 14 of the Covenant was in similar terms to that of the present Article 6 of the Convention, the requirement that “the judgment shall be pronounced publicly” being subject to no qualification. This stricter approach was explained as reflecting “the view that some of the factors which might justify a secret hearing would not justify delivery of the judgment in private” (See Marc J. Bossuyt: *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987), p. 284). Following a proposal of the United States, an amendment was accepted in 1950 to add the qualification “except where the interest of juveniles otherwise requires”. In 1952 a further amendment was accepted to add the reference to matrimonial disputes and the guardianship of children (*ibid.*, pp. 285-86).

The *travaux préparatoires* of the Convention, which was signed in November 1950, revealed no similar development. Nevertheless, I do not consider that the eventual difference in wording between the two provisions should necessarily lead the Court to apply a stricter standard when interpreting the Convention. On the contrary, having regard to the fact that the provisions in the two instruments were intended to reflect the same underlying philosophy, I consider that they should so far as possible be interpreted in a consistent manner.

2. It is well established that Article 6 § 1 of the Convention must be read as a whole. There is, as the majority judgment recognises, a logical relationship between the public nature of the proceedings and the public pronouncement of the judgment which is the result of those proceedings. If the public may legitimately be excluded from the hearing for the purpose of protecting the interests of children or the private lives of parties to a matrimonial dispute, the requirement that the judgment should be pronounced publicly should not be interpreted in such a way as to undermine that protection. It seems to me that it is not a satisfactory answer to this point to argue that the judgment could be entirely anonymised so that it contained no details capable of identifying the parties or the children concerned and/or abridged to the point where only the operative part of the court’s decision was made public. Even if such a course could be said to be adequate to protect the interests of the children or the parties concerned, it is difficult to see how the publication of a judgment so anonymised and

abridged could be said to serve the aim of public scrutability of judicial proceedings.

3. It is, moreover, clear from the case-law of the Court that, despite its unqualified terms, the requirement that the judgment shall be pronounced publicly has been interpreted with some flexibility, the Court emphasising that “in each case the form of publicity to be given to the ‘judgment’ under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1” (See *Pretto and Others v. Italy*, judgment of 8 December 1983, Series A no. 71, p. 12, § 26; and see, most recently, *Szücs v. Austria* and *Werner v. Austria*, judgments of 24 November 1997, *Reports of Judgments and Decisions* 1997-VII). Thus, for example, in *Axen v. Germany* (judgment of 8 December 1983, Series A no. 72, p. 14, § 32), public delivery of a decision of a Supreme Court was held to be unnecessary, the requirements of Article 6 being met by the public pronouncement of the judgments of the lower courts. More immediately relevant to the present case, in *Sutter*, cited above, the Court held the requirements of Article 6 to be satisfied by the fact that “anyone who could establish an interest could consult or obtain a copy of the full text of the judgment of the Military Court of Cassation”. It is true that *Sutter* has been subject to some extra-judicial criticism. Nevertheless, there is nothing in my view in the subsequent case-law of the Court to cast a doubt on the authority of the decision: on the contrary, the case was expressly cited without disapproval in *Campbell and Fell* itself and, more recently, in *Szücs* and *Werner*, cited above.

4. The county court judgments in the present case, concerned as they were with contested applications held in camera for residence orders in respect of young children and involving details of the private lives of the parties, fell clearly within the category of judgment to which limited public access might be regarded as justified. As is noted in the judgment of the Court, a copy both of the full text of the judgment and of the orders made would have been available to anyone who could establish a legitimate interest in obtaining it. In particular there is no reason to believe that, had an application been made for the grandparents of the first applicant’s son to attend the hearing or to obtain a copy of the judgment, such an application would have been refused. In addition, as is demonstrated by the case of the first applicant, whose appeal against the refusal of his application for a residence order was dismissed in a publicly pronounced judgment, appeal proceedings are in practice held in open court and the judgment of the Court of Appeal is made fully accessible to the public.

In these circumstances, I consider that there was in the case of both applicants sufficient compliance with the publicity requirements of Article 6 § 1 of the Convention.

DISSENTING OPINION OF JUDGE LOUCAIDES JOINED BY JUDGE TULKENS

We are unable to agree with the majority in respect of their findings that neither the right to a public hearing nor the right to public pronouncement of judgment were violated in this case.

1. As far as the right to a public hearing is concerned we observe the following: in the determination of a person's civil rights and obligations, or of any criminal charge against him, Article 6 § 1 of the Convention, in addition to requiring a "fair" hearing, provides expressly for a right to a "public" hearing. The Article then makes provision for the exclusion of the press and public "*from all or part of the trial*", *inter alia*, "*where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances* where publicity would prejudice the interests of justice" (emphasis added).

In our view, it is evident from the wording of Article 6, regard being had to the above italicised words, that private hearings can take place only in respect of specific proceedings pending before a court if, in the opinion of that court, the conditions set out in Article 6 for a private hearing are actually met, with reference to the nature and circumstances of the specific case.

Private hearings, then, apart from being an exception to the general requirement for public hearings, can be justified only if the needs of a particular case so demand; and this has to be decided by the court in any specific case where such an issue arises. It follows that the exceptional decision to hold a private hearing cannot be decided *in abstracto* or by reference to a category of cases; it must be determined *in concreto* by reference to the particular facts of a case. This, we believe, is the only interpretation which is compatible with the terms of Article 6. For how can the possibility of excluding the press and public from part of the trial, for example, be implemented *in abstracto* or by reference to a category of cases without regard to the facts and circumstances of any concrete case before the court? This is also true for the other conditions for a private hearing under Article 6.

The majority accept that the requirement under Article 6 to hold public hearings is the rule and that private hearings are the exception (see paragraphs 37 and 39 of the judgment). However, the majority proceed with the following proposition with which, for the reasons mentioned above, we entirely disagree:

"However, while the Court agrees that Article 6 § 1 states a general rule that civil proceedings, *inter alia*, should take place in public, it does not find it inconsistent with this provision for a State to designate an entire class of case as an exception to the general rule where considered necessary in the interests of morals, public order or

national security or where required by the interests of juveniles or the protection of the private life of the parties”.

In support of this proposition the majority refer to *Campbell and Fell v. the United Kingdom* (judgment of 28 June 1984, Series A no. 80, p. 42, §§ 87-88). However, this judgment cannot be taken as an authority for the approach of the majority for the following reasons.

The decision to have a private hearing in Mr Campbell’s case did not follow from the application of a rule of *law* obliging the judicial authorities to conduct private hearings as a matter of general principle, as in the present case. Private hearings were conducted in cases like Mr Campbell’s as a matter of *practice*, taking into account specific factors common to these cases (security problems, possible propagation of malicious allegations by a prisoner and the latter’s own wish for privacy) (*ibid.*, pp. 19-20 and 42, §§ 36, 86 and 87).

The application of the practice in question in Mr Campbell’s case was reviewed and accepted by the Court after ascertaining that, on the basis of the particular facts, the concerns raised by the Government existed and justified a private hearing in accordance with Article 6; the Court concluded that there were “sufficient reasons of public order and security justifying the exclusion of the press and public from the proceedings against Mr Campbell” (*ibid.*, p. 42, §§ 86-88).

Not only are the facts of the present cases different from those in the case of Mr Campbell, but, more importantly the decisions to have private hearings in the present cases were not taken by reference to any specific facts applicable to the relevant proceedings but were the direct result of implementing a general rule of law in the absence of any concrete criteria. As a result, this Court is deprived of the possibility to examine whether or not it was necessary to have the hearings in these cases in camera.

We believe that the legal rule in England, to the effect that unless the court directs otherwise hearings of family cases should be in camera, is the reverse of what Article 6 demands, namely, that in civil proceedings such as the present the hearings must be held in public unless the court (and not any general rule of law) decides, exceptionally, in the light of the particular facts, nature or circumstances of the concrete case before it to exclude the press and public from all or part of the trial on any of the grounds specified in Article 6. In actual fact in the present cases, as pointed out above, the courts did not decide to hold private hearings after assessing the relevant facts but proceeded to private hearings because that was the position under the English rules of procedure. This is clearly reflected in the relevant judgments of the domestic courts.

In the second applicant’s case, the county court’s judgment pronounced on 14 March 1996 states:

“I do not feel that I have any power, even if I wished to do – which I do not – to hear this particular case in open court. I think I would be breaking the law, in the sense that I would be interpreting in a perverse manner the rules of court laid down under the Children Act. Therefore, despite all the arguments to the contrary – and again I commend the way in which they were presented to me – I feel I have no alternative but to direct that the hearing of this case shall be in camera.” (See paragraph 21 of the judgment)

In an earlier part of the same judgment the judge observed:

“... But finally I dispose of this case, I am afraid, in a very simplistic manner. The rules of court – the Family Proceedings Rules – ... came into force on 14 October 1991, which coincided with the coming into force of virtually the whole of the substantial provisions of the Children Act. I think I must approach this case in this manner.”

In the judgment of the Court of Appeal of 20 June 1996, Lord Justice Butler-Sloss considered that it was abundantly clear that the courts were bound by the Family Proceedings Rules to hear child cases generally in private. Turning to the decision of the county court judge who had heard the second applicant’s case, Lord Justice Butler-Sloss found that, despite the strong language used in his decision, the judge had correctly recognised that the pre-existing practice of hearing child custody cases in private had been restated in the Family Proceedings Rules 1991, which provided for exceptions only where the case had unusual features. Since the applicant’s case was run of the mill, following the general practice was appropriate.

It is correct, as the majority state in the judgment, that English tribunals have a discretion to hold Children Act proceedings in public if merited by the special features of the case, and that the judge must consider whether or not to exercise his or her discretion in this respect if requested by one of the parties. However, in the light of the foregoing, it is evident that this discretion is the reverse of what is required by Article 6. In exercising his or her discretion the judge proceeds on the premise that all hearings under the Children Act should be in private, without examining the reasons for such a course. It is moreover striking that, on the basis on the material placed before our Court, it appears that this discretion is exercised in favour of a public hearing only in quite exceptional cases.

We believe that the general legal rule against public hearings applied in these cases is incompatible not only with the wording but also with the basic objective and philosophy of the requirement for public hearings under Article 6, namely the protection of litigants against the administration of justice in secret with no public scrutiny and the maintenance of confidence in the courts. As pointed out in *Sutter v. Switzerland* (judgment of 22 February 1984, Series A no. 74, p. 12, § 26):

“By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention”.

The majority refer to certain facts of the specific proceedings in order to justify, in terms of the relevant exceptions under Article 6, their being held in private. In particular they refer to the fact that the proceedings in question “concerned the residence of each man’s son following the parents’ divorce or separation” and that “[t]o enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment” (see paragraph 38 of the judgment). However, these issues were neither raised before the domestic courts nor considered by them when they arrived at their decisions to hold private hearings, which, as mentioned above, followed from an automatic application of the general rule of law in accordance with the Family Proceedings Rules 1991. The reasons for a domestic court’s decision cannot be supplied *ex post facto* and certainly not by this Court.

2. As regards the finding of the majority that the fact that the judgments were not pronounced publicly does not amount to a violation of Article 6, with which finding we also disagree, we would like to state the following.

We should first like to recall that the obligation under Article 6 to pronounce judgments publicly is expressed in unqualified terms and, as pointed out in *Campbell and Fell* (op. cit., p. 43, § 90), that obligation is not subject to any implied limitations. In the words of the Court,

“Bearing in mind the terms of Article 17 and the importance of the principle of publication, the Court does not consider that that principle may be regarded as subject to an implied limitation as suggested by the Government.”

However, the majority rely on *Sutter* (op. cit., p. 14, § 33) and find that the Convention did not require making available to the general public the residence judgments in the present cases because “anyone who can establish an interest may consult or obtain a copy of the full text of the orders and/or judgments of first-instance courts in child residence cases, and that the judgments of the Court of Appeal and of first-instance courts in cases of special interest are routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them” (see paragraph 47 of the judgment).

In *Sutter*, the Court reiterated the principle that publicity of judgments is necessary under Article 6 and clarified that such publicity might be achieved by other means, besides reading them out aloud. It went on to find that the fact that “anyone who could establish an interest may consult or obtain a copy of the full text of judgments of the Military Court of Cassation” amounted to an acceptable form of publicity. The Court neither dispensed with the requirement of publicity nor did it accept that such

publicity could be subject to any limitations. This was made even clearer in the subsequent decision of the Court of 28 June 1998 in *Campbell and Fell*.

The majority seem to have disregarded the fact, confirmed before it by the Government, that, in the case of family proceedings, persons who establish an interest cannot automatically, as of right, consult or obtain a copy of a full text of the relevant orders and/or judgments. Such copies can be obtained by third parties only *if leave is granted* by the judge or district judge (see Rule 4.23(1) of the Family Proceedings Rules 1991, paragraphs 29 and 43 of the judgment). The majority also refer to the fact that “the judgments of the Court of Appeal and of first-instance courts in cases of special interest are routinely published” (see paragraph 47 of the judgment). But again the majority do not seem to have given sufficient weight to the fact that such routine publication concerns only “*cases of special interest*” (see paragraph 43 of the judgment).

The majority further rely on the proposition that since “the domestic authorities were justified in conducting these proceedings in chambers in order to protect the privacy of the children and the parties and to avoid prejudicing the interests of justice ... to pronounce the judgment in public would, to a large extent, frustrate these aims” (see paragraph 46 of the judgment). This was also the argument of the Government.

However, a similar argument was rejected by the Court in *Campbell and Fell*, cited above, which states:

“The Government relied in this context too on problems of security and public order; they further submitted that, if it was considered that the power to exclude the public applied only to the trial as distinct from pronouncement of the judgment, this particular requirement of Article 6 should be read as subject to the implied limitation that members of the public could legitimately be excluded in those cases in which disciplinary offences by prisoners were adjudicated upon.” (pp. 42-43, § 89)

The answer of the Court was given:

“the Court does not consider that [the principle of publication] may be regarded as subject to an implied limitation as suggested by the Government.” (p. 43, § 90)

The majority’s reasoning appears at first sight reasonable. However, what has taken place in a private hearing does not have to be fully reflected in a publicly pronounced judgment and care can be taken to ensure that names and other information which might lead to identification of the parties or details about the family’s personal life can be omitted from the judgment without affecting the clarity of the approach and the solution given by the court to the issues arising in the case, which should be made public in order to achieve the purpose of public scrutiny.

Finally we would like to express our disagreement with the approach of the majority as stated in paragraph 48 of the judgment, according to which a literal interpretation of the provisions of Article 6 concerning the pronouncement of judgments would be “unnecessary for the purposes of

public scrutiny [and] might even frustrate the primary aim of Article 6 § 1, which is to secure a fair hearing”. This conclusion appears to be based on a misconception of the statement in paragraph 34 of the judgment in *Sutter* that “... a literal interpretation of the terms of Article 6 § 1, concerning pronouncement of the judgment, seems to be too rigid and not necessary for achieving the aims of Article 6”.

It is clear from what follows (that is: “The Court thus agrees with the Government and the majority of the Commission in concluding that the Convention did not require the reading out aloud of the judgment delivered at the final stage of the proceedings”) that the Court in *Sutter* was not introducing, by that statement, a general flexibility rule that could justify dispensing with the requirement of publication of judgments in all circumstances. The Court was simply accepting that such publication does not necessarily have to be in the form of “... [a] reading out aloud of the judgment”.

For the above reasons we also disagree with the second conclusion of the majority that “... the Convention did not require making available to the general public the residence judgments in the present cases, and that there has been no violation of Article 6 § 1 in this respect” (see paragraph 49 of the judgment).

In our opinion Article 6 has been violated in this case both because of the private hearing of the relevant proceedings and because of the fact that the judgments were not made available to the public.