



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

CASE OF T.P. AND K.M. v. THE UNITED KINGDOM

(Application no. 28945/95)

JUDGMENT

STRASBOURG

10 May 2001

This judgment may be subject to editorial revision.

In the case of T.P. and K.M. v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,

Mrs E. PALM,

Mr C.L. ROZAKIS,

Mr J.-P. COSTA,

Mr L. FERRARI BRAVO,

Mr L. CAFLISCH,

Mr P. KÜRIS,

Mr J. CASADEVALL,

Mr B. ZUPANČIČ,

Mrs N. VAJIĆ,

Mr J. HEDIGAN,

Mrs W. THOMASSEN,

Mrs M. TSATSA-NIKOLOVSKA,

Mr E. LEVITS,

Mr K. TRAJA,

Mr A. KOVLER,

Lady Justice ARDEN, *ad hoc judge*,

and also of Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 22 November 2000 and 4 April 2001,

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

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”),¹ by the European Commission of Human Rights (“the Commission”) on 25 October 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 28945/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under former Article 25 of the Convention by two British nationals, T.P. and K.M., on 2 August 1995.

3. The applicants allege that K.M. had been unjustifiably taken into care and separated from her mother T.P. and that they had had no access to court or effective remedy in respect of that interference with their rights.

1. *Note by the Registry*. Protocol No. 11 came into force on 1 November 1998.

4. The Commission declared the application admissible on 26 May 1998. In its report of 10 September 1999 (former Article 31 of the Convention), it expressed the opinion by 17 votes to 2 that there had been a violation of Article 8 of the Convention; by 18 votes to 1 that there had been no violation of Article 6 in respect of the first applicant T.P.; by 10 votes to 9 that there had been no violation of Article 6 in respect of the second applicant K.M.; by 18 votes to 1 that there had been a violation of Article 13 in respect of the first applicant; and by 10 votes to 9 that no separate issue arose under Article 13 in respect of the second applicant.¹

5. Before the Court the applicants, who had been granted legal aid, were represented by Mr Robert Sherman, counsel practising in London, and Ms Nuala Mole from the AIRE Centre, London. The United Kingdom Government (“the Government”) were represented by their Agent, Ms Susan McGrory of the Foreign and Commonwealth Office. Having originally been designated before the Commission by the initials T.P. and K.M., the President of the Court acceded to the applicants’ request not to have their names disclosed (Rule 47 § 3).

6. On 6 December 1999, the panel of the Grand Chamber determined that the case should be decided by the Grand Chamber (Rule 100 § 1 of the Rules of Court). The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. The President of the Court decided that in the interests of the proper administration of justice, the case should be assigned to the Grand Chamber that had been constituted to hear the case of *Z. and Others v. the United Kingdom*, application no. 29392/95 (Rules 24, 43 § 2, and 71). Sir Nicolas Bratza, the judge elected in respect of the United Kingdom, who had taken part in the Commission’s examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Lady Justice Arden to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

7. The applicants and the Government each filed a memorial. Third-party comments were also received from Professor Geraldine Van Beuren, Director of the Programme on International Rights of the Child, University of London, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 28 June 2000 (Rule 59 § 2).

1. *Note by the Registry.* The full text of the Commission’s opinion and of the separate opinions contained in the report will be reproduced as an annex to the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but in the meantime a copy of the Commission’s report is obtainable from the Registry.

There appeared before the Court:

(a) *for the Government*

Ms S. MCGRORY, Foreign and Commonwealth Office,	<i>Agent,</i>
Mr D. ANDERSON QC, Foreign and Commonwealth Office,	
Ms J. STRATFORD, Foreign and Commonwealth Office,	<i>Counsel,</i>
Ms S. RYAN, Foreign and Commonwealth Office,	
Ms J. GRAY, Foreign and Commonwealth Office,	
Mr M. MURMANE, Foreign and Commonwealth Office,	<i>Advisers;</i>

(b) *for the applicants*

Mr R. SHERMAN QC,	<i>Counsel,</i>
Ms N. MOLE, of the AIRE Centre,	
Mr H. DERVISH, Solicitor,	<i>Advisers.</i>

The Court heard addresses by Mr Anderson and Mr Sherman.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. T.P., the first applicant, gave birth to her daughter, K.M., the second applicant, on 29 January 1983. T.P. was then aged 17 years.

10. Between 1984 and 1987, the local authority, the London Borough of Newham, suspected that the second applicant was being sexually abused, partly as a result of the second applicant having a persistent urinary tract infection, partly because of her behaviour, including a remark made at the children's hospital where she was admitted for treatment. She had told a social worker that B., the first applicant's then boyfriend, had "hurt my bum". In or about March 1986, surgery took place to re-implant the second applicant's right ureter into her bladder. At a date unspecified, she also had surgery to remove a false second kidney. She continued to have urinary problems and associated infections.

11. There were case conferences held by the local authority on 13 May 1986, 26 June 1986 and 8 October 1986. Concern was expressed, *inter alia*, about the applicants' home situation, where there was "a steady stream of young men" and about the first applicant's ability to protect the second applicant and general parenting skills. The social worker Mr P. had mentioned the possibility of sexual abuse with the first applicant. In a later affidavit, he stated that she appeared angry that it was a concern and

claimed that she never left K.M. alone with anyone and that K.M. would tell her if anyone hurt her.

12. In June 1987, during a visit to their home, social workers obtained information regarding their living arrangements including the fact that XY, the first applicant's boyfriend, lived with the applicants. Concern was expressed regarding the first applicant's care of her daughter and a case conference was held on 2 July 1987 to which the first applicant was not invited. As a result of the conference, the second applicant was placed on the Child Protection Register under the category of emotional abuse. It was also agreed at the conference that the social worker Mr P would obtain the first applicant's consent for the second applicant to have a disclosure interview at a child guidance clinic. A further medical examination of the second applicant at the children's hospital discovered no medical cause for her recurrent urinary infection. The hospital considered it necessary that the second applicant should be admitted to hospital for further tests but agreed to await the outcome of the interview at the child guidance clinic.

13. On 13 November 1987, at a child guidance clinic, the second applicant was interviewed by a consultant child psychiatrist, Dr V., employed by Newham health authority. The social worker, Mr P., was present during the interview whilst the first applicant waited in an adjoining room. The interview was recorded on videotape. The second applicant was aged four years and nine months at this time.

14. In the course of the interview, the second applicant disclosed that she had been abused by someone named X. The first applicant's boyfriend, XY, shared the same first name, X, as the abuser. The transcript recorded *inter alia*:

“Dr V.: (referring to a drawing made by K.M.) Whose face is that then?... Is that anyone, anybody special that face or just any face?

K.M.: X's.

Dr V.: X's face OK. Then who's X? Is X someone you know?

K.M.: My mum's X.

Dr V.: Oh your mum's X. What is that mummy's boyfriend. Is it?

K.M. shakes her head.

...

Dr V.: ... Is X still living at home with you?

K.M.: shakes her head.

Dr V.: He's not.

K.M.: Thrown him out my mum.

Dr V.: Your mum throwed him out did she.

...

K.M.: He's coming in tomorrow.

Dr V.: He's coming in no more.

K.M.: No he's coming in tomorrow.

Dr V.: He's coming in tomorrow. What X.

K.M. nods."

15. The first applicant was then interviewed, again on video, and informed that the second applicant had disclosed that she had been sexually abused by XY. She was told that the second applicant could not be returned home but would be taken to a local hospital for further examination. When the first applicant asked whether or not her daughter was being taken into care, she received no reply. Dr V. also told the first applicant that she could see the recording of the interview with her daughter at some point.

16. After the interview, the first applicant asked her daughter if she had been abused by XY. The first applicant stated that the second applicant denied that she had been abused by XY and told this to Mr P. When the first applicant became agitated and angry, Dr V. and Mr P. both concluded that the first applicant would be unable to protect the second applicant from abuse and that she was attempting to persuade the second applicant to retract her allegation. Mr P. and Dr V. came to the conclusion that it would be necessary to remove the second applicant from the care of her mother immediately. In comments made to the first applicant in her interview, the possibility that in due course she could see the video of the disclosure interview was referred to by Dr V. and Mr P.

17. Later, on 13 November 1987, the local authority applied successfully to Newham magistrates court for a place of safety order. The local authority stated that the second applicant had been abused, had identified XY as the abuser and there was a risk of further direct abuse or that the first applicant would pressure the second applicant into retracting her allegation. The first applicant was not in court. A place of safety order was granted for 28 days.

18. On 18 November 1987, the second applicant was examined by a doctor who found that there were signs consistent with anal interference but no significant vaginal findings.

19. On 24 November 1987, the first applicant, having excluded all men from her home, applied to the High Court for the second applicant to be made a ward of court. The local authority attended the application and argued that they should have care and control of the second applicant in

order to protect her from the risk of abuse. The local authority was awarded care and control of the second applicant and the first applicant was granted limited access. The local authority did not volunteer the video of the interview with the child.

20. Contact between the first and the second applicant was severely restricted between November 1987 and November 1988. The first applicant was permitted initially two hours of supervised contact with her daughter each week at the foster parent's home. Following concerns that the first applicant was trying to induce her daughter to retract her evidence and was causing her distress, that access was altered to no telephone calls and one supervised access visit per week at the social services' office. The second applicant had no contact with her extended family, including her maternal grandmother who was terminally ill and died whilst the second applicant was in the care of the local authority.

21. During this period the second applicant continued to have urinary problems, including incontinence. In April 1988, she underwent another operation, which improved her condition, though she remained subject to frequent infections.

22. During 1988, the first applicant gave birth to a son, D., fathered by XY. D. was made a ward of court but the local authority did not apply to remove D. from the care of his mother and XY.

23. In or about October 1988, Dr B., who had been instructed on behalf of the first applicant in order to assist her in reaching a conclusion regarding the allegations that the second applicant had been sexually abused, obtained the consent of Dr V. to view the video recording of the second applicant's disclosure interview. In his letter dated 17 October 1988 to the first applicant's solicitor, he gave his firm opinion that the interview disclosed a high probability that the second applicant had been abused sexually and that there appeared to be little doubt that she was identifying the mother's boyfriend as the perpetrator. He recommended that the first applicant be allowed to see the video. He referred to Dr V.'s continual insistence that the court would not approve of the first applicant seeing the video and gave his own opinion that the best interests of the second applicant would be served by her mother having access to the fullest possible information. Dr V. informed Dr B. that she would not consent to the first applicant having access to the video until after the full hearing in the wardship trial.

24. On 1 November 1988, during the wardship proceedings regarding D., Registrar Conn ordered that the video be disclosed within seven days. The health authority and Dr V. issued a summons proposing to intervene in the proceedings and applying for the video and transcript not to be made available to the first applicant.

25. In her affidavit of 8 November 1988, Dr V. expressed her opinion that medical confidentiality be attached to the video and that it should only

be disclosed if in the interests of the child, which the circumstances showed was not the case.

“It is my professional belief that for the parties to see the video recording is not in the interests of children, and in particular not in this case. The possible harm to children arises from them being in the position whereby their words or actions, given in confidence, may control events or decisions. Anger, unforgiveness or victimisation may well be directed at the child especially if the purpose of the viewing is to enable a party to seek to establish his or her innocence of alleged Child Sexual abuse or to confirm a party’s view that no Child Sexual abuse has taken place and that the child must be lying.”

She had no objection to the lawyers and medical experts seeing the tape and transcript.

26. By reports dated 11 November 1988, Dr B. and a social worker for the local health authority gave their opinions that it was good and desirable practice for parents to see the interviews involving their children. Dr B. noted generally that the mothers of abused children would often be in a position to clarify details, including the identity of the alleged abuser. He also understood that the video had already been shown by the police to XY in the course of their investigation into the allegations of abuse and considered that it would appear against natural justice to deny the first applicant similar opportunity. He saw no risk of harm flowing to the second applicant from such disclosure.

27. On an unspecified date at or about that time, the first applicant’s solicitors had sight of the transcript. The transcript showed that the second applicant had shaken her head when asked whether the abuser was living at home and that she had identified her abuser as having been thrown out of the house by the first applicant. These matters, which were inconsistent with the identification of XY as the abuser, were raised by the first applicant’s solicitors with the local authority on or about 11 November 1988, when the summons concerning the video was to be heard.

28. On 21 November 1988, at a hearing in the High Court the local authority recommended that the second applicant be rehabilitated to the first applicant and XY for a trial period of four to six months at which point a final proposal would be made. In a report dated 18 November submitted for that hearing, a social worker for the local authority stated that the fact that the second applicant had been sexually abused had been acknowledged by all the psychiatrists in the case, that there was now doubt as to the identity of the abuser but that whoever it was, the second applicant had suffered a seriously damaging experience from which her mother had been unable to protect her. While there had been doubts as to the first applicant’s ability to be a “good enough parent”, it was noted that her situation had changed – she had “matured”, had had a second child and was in a stable relationship with the second child’s father. If over the trial period, any further abuse occurred, it was proposed that the second applicant be removed permanently with a

view to adoption and that D.'s future be assessed. In her affidavit of 21 November 1998, the first applicant said that she had been informed, and believed, that the video and transcript had been reviewed by the local authority who had concluded that her boyfriend XY was no longer a suspected abuser. Mr Justice Lincoln ordered by consent that the second applicant remain a ward of court and that interim care and control be committed to the local authority who had leave to place her with the first applicant. The matter was adjourned for a period of not more than six months.

29. The second applicant remained with the first applicant from that time onwards. In about November 1989, the final hearing took place in the High Court. The local authority advised the judge that there was no longer any concern that required the second applicant to remain a ward of court. The wardship was discharged.

30. On 8 November 1990, the applicants issued proceedings making allegations of negligence and breach of statutory duty against the local authority, the central allegation being that the social worker, Mr P., and the psychiatrist, Dr V., failed to investigate the facts with proper care and thoroughness and failed to discuss their conclusions with the first applicant. The health authority and Dr V. were also named as defendants. The applicants claimed that as a result of their enforced separation each of them had suffered a psychiatric disorder.

31. Both applicants were seen by a psychiatrist who diagnosed that they were suffering from psychological disturbance known as anxiety neurosis. He issued two reports, one dated 21 February 1991 and the second undated, concerning the effects of the separation and proceedings.

32. On 19 November 1992, Master Topley struck out the application as revealing no cause of action on the basis that Dr V. enjoyed immunity in suit as a witness or potential witness in proceedings concerning the abuse of the second applicant and that this acted to bar the applicants' claims. The applicants' appeal to the High Court was dismissed on 17 March 1993 by Judge Phelan who held that no claim could arise from any alleged right to custody of a child which would give rise to an award of damages.

33. In the Court of Appeal, the High Court's striking out decision was upheld on 23 February 1994. The majority found that no claim for breach of statutory duty in respect of sections 1 and 18 of the Child Care Act 1980 could arise, due to the general nature of the duty, the imprecise terms in which it was couched and the fact that the alleged breach of duty took place before the child was taken into care under the statutory duty in question. They held in respect of the claims that Mr P. and Dr V. were liable in damages as professional persons who caused personal injuries that the local authority arranged for the disclosure interview to enable to decide whether or not to intervene in the performance of its statutory functions. The psychiatrist Dr V. was acting in order to advise the local authority and owed

a duty of care to the local authority, not to the first or second applicant. Nor could the local authority be held liable for the negligent mistake made by the social worker in carrying out the statutory function of the local authority to make enquiries. Reference was made to the policy considerations weighing against imposing liability in such matters. However, the Master of the Rolls, Sir Thomas Bingham, dissented and stated that he believed that it could be argued that a common law duty of care was owed to the second applicant by the psychiatrist and the local authority (reported as *M v. Newham LBC*; *X v. Bedfordshire CC* (CA) 2WLR 554). Leave was granted to appeal to the House of Lords.

34. On appeal to the House of Lords, the decision of the majority of the Court of Appeal was upheld on 29 June 1995. Lord Browne-Wilkinson delivered the leading judgment concerning three cases, the Bedfordshire case, the Newham case (the applicants' case) and the Dorset case (reported as *X and Others v. Bedfordshire County Council* [1995] 3 AER 353).

35. As regarded the claims for breach of statutory duty made in both the Newham and Bedfordshire cases, Lord Browne-Wilkinson held:

"... My starting point is that the Acts in question are all concerned to establish an administrative system designed to promote the social welfare of the community. The welfare sector involved is one of peculiar sensitivity, involving very difficult decisions how to strike the balance between protecting the child from immediate feared harm and disrupting the relationship between the child and its parents. In my judgment in such a context it would require exceptionally clear statutory language to show a parliamentary intention that those responsible for carrying out these difficult functions should be liable in damages if, on subsequent investigation with the benefit of hindsight, it was shown that they had reached an erroneous conclusion and therefore failed to discharge their statutory duties. ...

When one turns to the actual words used in the primary legislation to create the duties relied upon in my judgment they are inconsistent with any intention to create a private law cause of action."

36. In respect of the applicants' claim in the Newham case that the local authority and the health authority were vicariously liable for the actions of the social worker, Mr P., and psychiatrist Dr V. respectively, Lord Browne-Wilkinson said as follows:

"In the Newham case [the applicant's case] the pleadings and Mr Munby's submissions make it clear how the case is put. The social worker and the psychiatrist, as professionals, owed a personal duty to the first plaintiff, the child, and to the second plaintiff, the mother, to exercise reasonable professional skills in the conduct of the interview with the child and to make proper enquiries. The social worker and the psychiatrist were each personally in breach of this duty, for which breach their employers ... are vicariously liable. ..."

Like the majority in the Court of Appeal, I cannot accept these arguments. The social workers and the psychiatrists were retained by the local authority to advise the local authority, not the plaintiffs. The subject matter of the advice and activities of the professionals is the child ... the fact that the carrying out of the retainer involves

contact and relationship with the child cannot alter the extent of the duty owed by the professionals under the retainer from the local authority ...

In my judgment in the present cases, the social workers and the psychiatrist did not, by accepting the instructions of the local authority assume any general professional duty of care to the plaintiff children ...

Even if contrary to my view the social workers and psychiatrist would otherwise have come under a duty of care to the plaintiffs, the same considerations which have led me to the view that there is no direct duty of care owed by the local authorities apply with at least equal force to the question whether it would be just and reasonable to impose such a duty of care on the individual social workers and the psychiatrist. ...

In the Newham case [the applicant's case] it is not alleged that the borough council was under any direct duty of care to the plaintiffs: the case is based solely on the vicarious liability of the council and the health authority for the negligence of their servants."

37. In the Bedfordshire case, where the applicant children had argued that the local authority owed them a direct duty of care in the exercise of their child care functions, Lord Browne-Wilkinson stated, insofar as relevant, as follows:

"I turn then to consider whether, in accordance with the ordinary principles laid down in *Caparo* [1990] 2 A.C. 605, the local authority ... owed a direct duty of care to the plaintiffs. The local authority accepts that they could foresee damage to the plaintiffs if they carried out their statutory duties negligently and that the relationship between the authority is sufficiently proximate. The third requirement laid down in *Caparo* is that it must be just and reasonable to impose a common law duty of care in all the circumstances ...

The Master of the Rolls took the view, with which I agree, that the public policy consideration that has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter considerations are required to override that policy (see [1994] 4 AER 602 at 619). However, in my judgment there are such considerations in this case.

First, in my judgment a common law duty of care would cut across the whole statutory system set up for the protection of children at risk. As a result of the ministerial directions contained in "Working Together" the protection of such children is not the exclusive territory of the local authority's social services. The system is inter-disciplinary, involving the participation of the police, educational bodies, doctors and others. At all stages the system involves joint discussions, joint recommendations and joint decisions. The key organisation is the Child Protection Conference, a multi-disciplinary body which decides whether to place the child on the Child Protection Register. This procedure by way of joint action takes place, not merely because it is good practice, but because it is required by guidance having statutory force binding on the local authority. The guidance is extremely detailed and extensive: the current edition of "Working Together" runs to 126 pages. To introduce into such a system a common law duty of care enforceable against only one of the participant bodies would be manifestly unfair. To impose such liability on all the participant bodies would lead to almost impossible problems of disentangling as between the respective bodies the

liability, both primary and by way of contribution, of each for reaching a decision found to be negligent.

Second, the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical well-being of the child but also to the advantages of not disrupting the child's family environment. ... In one of the child abuse cases, the local authority is blamed for removing the child precipitately; in the other for failing to remove the children from their mother. As the Report of the Inquiry into Child Abuse in Cleveland 1987 (Cmnd. 412) ("Cleveland Report 1987") said, at p. 244:

'... It is a delicate and difficult line to tread between taking action too soon and not taking it soon enough. Social services whilst putting the needs of the child first must respect the rights of the parents; they also must work if possible with the parents for the benefit of the children. These parents themselves are often in need of help. Inevitably a degree of conflict develops between those objectives.'

Next, if liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties. For example, as the Cleveland Report makes clear, on occasions the speedy decision to remove the child is sometimes vital. If the authority is to be made liable in damages for a negligent decision to remove a child (such negligence lying in the failure properly first to investigate the allegations) there would be a substantial temptation to postpone making such a decision until further inquiries have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay, the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children.

The relationship between the social worker and the child's parents is frequently one of conflict, the parent wishing to retain care of the child, the social worker having to consider whether to remove it. This is fertile ground in which to breed ill-feeling and litigation, often hopeless, the cost of which both in terms of money and human resources will be diverted from the performance of the social service for which they were provided. The spectre of vexatious and costly litigation is often urged as a reason for not imposing a legal duty. But the circumstances surrounding cases of child abuse make the risk a very high one which cannot be ignored.

If there were no other remedy for maladministration of the statutory system for the protection of children, it would provide substantial argument for imposing a duty of care. But the statutory complaints procedures contained in section 76 of the 1980 Act and the much fuller procedures now available under the 1989 Act provide a means to have grievances investigated though not to recover compensation. Further, it was submitted (and not controverted) that the local authorities Ombudsman would have power to investigate cases such as these.

Finally, your Lordships' decision in *Caparo* [1990] 2 A.C. 605 lays down that in deciding whether to develop novel categories of negligence the court should proceed incrementally and by analogy with decided categories. We were not referred to any category of case in which a duty of care has been held to exist which is in any way analogous to the present cases. Here, for the first time, the plaintiffs are seeking to erect a common law duty of care in relation to the administration of a statutory social welfare scheme. Such a scheme is designed to protect weaker members of society

(children) from harm done to them by others. The scheme involves the administrators in exercising discretion and powers which could not exist in the private sector and which in many cases bring them into conflict with those who, under the general law, are responsible for the child's welfare. To my mind, the nearest analogies are the cases where a common law duty of care has been sought to be imposed upon the police (in seeking to protect vulnerable members of society from wrongs done to them by others) or statutory regulators of financial dealing who are seeking to protect investors from dishonesty. In neither of these cases has it been thought appropriate to superimpose on a statutory regime a common law duty of care giving rise to a claim in damages for failure to protect the weak against the wrongdoer. ... In my judgment, the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrong doings of others."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Local authority's duties in respect of child care

38. Prior to the coming into force of the current legislation, the Children Act 1989, on 14 October 1991, the local authority's duty in respect of child care was governed by the Child Care Act 1980.

Sections 1 and 2 of the Child Care Act 1980 provided that:

"1. It shall be the duty of every local authority to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive or keep them in care.

2(1) Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen-

(a) that he has neither parent nor guardian or has been and remains abandoned by his parents or guardian or is lost;

(b) that his parents or guardian are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing; and

(c) in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child, it shall be the duty of the local authority to receive the child into their care under this section."

B. Place of safety orders

39. Under section 28(1) of the Children and Young Persons' Act 1969 any person, including a local authority could apply to a magistrate for the authority to detain a child and take him/her to a place of safety. There was

power to grant the application if the magistrate was satisfied that the applicant had reasonable cause to believe *inter alia* that the child's proper development was being avoidably prevented or neglected or that he/she was being ill-treated or exposed to moral danger. The order could last a maximum of 28 days, with no possibility of extension. Before the expiry of the order, it was necessary for the local authority to institute care proceedings under section 1 of the 1969 Act or to make the child a ward of court if it wished either to intervene in the exercise of parental control.

40. The place of safety order was replaced with the emergency protection order under section 44 of the Children Act 1989, which came into force on 14 October 1991. This provided for removal of a child on emergency grounds for a maximum period of 72 hours.

C. Complaints procedures concerning local authorities

41. Section 76 of the Child Care Act 1980 permitted the Secretary of State to cause an inquiry to be held into any matter relating, *inter alia*:

“the functions of the social services committee of a local authority, in so far as those functions relate to children.”

42. Pursuant to Part III of the Local Government Act 1974, as amended, the Local Commissioner for Administration (the Local Government Ombudsman) had the function, *inter alia*, of investigating written complaints by persons who claim to have sustained injustice “in consequence of maladministration in connection with ... action taken in exercise of administrative functions of local authorities”. On conclusion of an investigation, Local Government Ombudsmen could recommend an appropriate remedy, including the payment of compensation, where maladministration was found.

D. Wardship

43. The power of the High Court to make a child a ward of court derives from its inherent jurisdiction. The effect is that the court assumes responsibility for the child and may make orders concerning any aspect of the child's life. The child's welfare must be the first consideration of the court.

44. As soon as the originating summons was issued, the custody of the child vested in the court. From that moment, the parties to the proceedings, including the local authority, only had such power and authority over the child as was conferred by the court.

E. Actions against the local authority for damages

45. In England and Wales, there is no single tort which imposes liability to pay compensation for civil wrongs. Instead there are a series of separate torts, for example, trespass, conversion, conspiracy, negligence, defamation etc.

46. Negligence arises in specific categories of situations. These categories are capable of being extended. There are three elements to the tort of negligence: a duty of care, breach of the duty of care and damage. The duty of care may be described as the concept which defines the categories of relationships in which the law may impose liability on a defendant in damages if he or she is shown to have acted carelessly. To show a duty of care, the claimant must show that the situation comes within an existing established category of cases where a duty of care has been held to exist. In novel situations, in order to show a duty of care, the claimant must satisfy a threefold test, establishing:

- that damage to the claimant was foreseeable;
- that the claimant was in an appropriate relationship of proximity to the defendant;
- that it is fair, just and reasonable to impose liability on the defendant.

These criteria apply to claims against private persons as well as claims against public bodies. The leading case is *Caparo Industries v. Dickman* ([1990] 2 AC 605).

47. If the courts decide that as a matter of law there is no duty of care owed in a particular situation, that decision will (subject to the doctrine of precedent) apply in future cases where the parties are in the same relationship.

48. The decision in *X and Others v. Bedfordshire County Council* ([1995] 3 AER 353) is the leading authority in the United Kingdom in this area. It held that local authorities could not be sued for negligence or for breach of statutory duty in respect of the discharge of their functions concerning the welfare of children. The leading judgment is reported at length in the facts above (see paragraphs 45-46).

49. Since the *X. and Others* case, there has been two further significant judgments regarding the extent of liability of local authorities in child care matters.

50. The Court of Appeal gave judgment in the *W and Others v. Essex County Council* ([1998] 3 All ER 111, judgment of 2 April 1998). This case concerned the claims by a mother and father (first and second plaintiffs),

who had agreed to act as foster parents, that the defendant local authority placed G, a 15 year old boy, in their home although they knew that he was a suspect or known sexual abuser. During G's stay in their home, the plaintiffs' three children (fourth to sixth plaintiffs) were all sexually abused and suffered psychiatric illness. The plaintiffs brought an action against the local authority and the social worker involved, claiming damages for negligence and for negligent misstatement. On the defendants' application to strike out the statement of claim as disclosing no reasonable cause of action, the judges struck out the parents' claims but refused to strike out the claims of the children. The Court of Appeal upheld his decision. The headnote for the judgment summarised the Court of Appeal's findings as follows:

“(1) ... In the instant case, the giving of information to the parents was part and parcel of the defendants' performance of their statutory powers and duties, and it had been conceded that it was arguable that those decisions fell outside the ambit of their discretion. Accordingly, since it had also been conceded that the damage to the children was reasonably foreseeable and that there was sufficient proximity, the question for the court was whether it was just and reasonable to impose a duty of care on the council or the social worker. Having regard to the fact that the common law duty of care would cut across the whole statutory set up for the protection of children at risk, that the task of the local authority and its servants in dealing with such children was extraordinarily difficult and delicate, that local authorities might adopt a more defensive approach to their duties if liability in damages were imposed, that the relationship between parents and social workers was frequently one of conflict and that the plaintiff children's injuries were compensatable under the Criminal Injuries Compensation Scheme, it was not just and reasonable to do so. It followed that no duty of care was owed to the plaintiff parents ...

(2) (Stuart-Smith LJ dissenting) It was arguable that the policy considerations against imposing a common law duty of care on a local authority in relation to the performance of its statutory duties to protect children did not apply when the children whose safety was under consideration were those in respect of whom it was not performing any statutory duty. Accordingly, since in the instant case, the plaintiff children were not children for whom the council had carried out any immediate caring responsibilities under the child welfare system but were living at home with their parents, and express assurances had been given that a sexual abuser would not be placed in their home, their claim should proceed ...”

51. On further appeal by the parents, the House of Lords on 16 March 2000 held that it was impossible to say that the psychiatric injury allegedly suffered by the parents, flowing from a feeling that they had brought the abuser and their children together or from a feeling of responsibility for not having detected the abuse earlier, was outside the range of psychiatric injury recognised by the law, nor was it unarguable that the local authority had owed a duty of care to the parents. The parents' claim could not be said to be so certainly or clearly bad that they should be barred from pursuing it to trial and their appeal was allowed.

52. The House of Lords gave judgment on 17 June 1999 in *Barrett v. the London Borough of Enfield* ([1999] 3 WLR 79). That case concerned the claims of the plaintiff, who had been in care from the age of ten months to seventeen years, that the local authority had negligently failed to safeguard his welfare causing him deep-seated psychiatric problems. The local authority had applied to strike out the case as disclosing no cause of action. The House of Lords, upholding the plaintiff's appeal, unanimously held that the case of *X and Others v. Bedfordshire County Council* did not in the circumstances of this case prevent a claim of negligence being brought against a local authority by a child formerly in its care.

53. Lord Browne-Wilkinson, in his judgment in that case, commented as follows on the operation of the duty of care:

“(1) Although the word ‘immunity’ is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence. (2) In a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, e.g. some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases. In all these cases and many others the view has been taken that the proper performance of the defendant's primary functions for the benefit of society as a whole will be inhibited if they are required to look over their shoulder to avoid liability in negligence. In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered. (3) In English law, questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company (see *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605), that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case.”

F. Striking out procedure

54. At the relevant time, Order 18 rule 19 of the Rules of the Supreme Court provided that a claim could be struck out if it disclosed no reasonable cause of action. This jurisdiction has been described as being reserved for “plain and obvious cases”, in which a claim was “obviously unsustainable”.

55. In applications to strike out, the courts proceeded on the basis that all the allegations set out in the claimant's pleadings were true. The question for the courts was whether, even assuming that the claimant could

substantiate all factual allegations at trial, the claim disclosed a reasonable cause of action.

56. The striking out procedure, now contained in the Part 3.4(2) of the Civil Procedure Rules in force since 1999, is regarded as an important feature of English civil procedure, performing the function of securing speedy and effective justice, *inter alia* by allowing it to be decided promptly which issued need full investigation and trial and disposing summarily of the others. By means of this procedure, it can be determined at an early stage, with minimal cost to the parties, whether the facts as pleaded reveal a claim existing in law.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. The applicants complained that K.M. had been unjustifiably removed from her mother, T.P.'s care in violation of their right to respect for family life. Article 8 as relevant provides:

“1. Everyone has the right to respect for his ... family life...

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

58. The Government disputed that there had been any failure to comply with the requirements of Article 8 of the Convention, while the Commission found by 17 votes to 2 that there had been a violation of Article 8 in that the first applicant was not provided with a proper, fair or adequate opportunity to participate in the decision-making procedures following the removal of the second applicant as an emergency measure.

A. The parties' submissions

59. The applicants submitted that the removal of the second applicant was not necessary or supported by relevant and sufficient reasons and that the procedures for removing the child completely disregarded requirements in Article 8 that there must be inherent procedural safeguards. They considered that the removal was not in accordance with law as the decision of the court was based on the local authority's wrongful assertions that the factual basis existed justifying an emergency order. Since the abuser was

not living in the house, there was no immediate emergency and the matter should properly have been dealt with at a hearing on notice, at which the first applicant could appear and be represented. They submitted that the *ex parte* place of safety order procedure was abused in practice, being imposed for too long a period, without the grounds being sufficiently focussed on emergencies.

60. The applicants submitted that the authorities' reaction to the disclosure interview was also incompatible with the requirements of Article 8. Dr V. and Dr P. should have picked up the second applicant's references to X as not necessarily referring to the first applicant's boyfriend and taken further investigative steps to establish who X was. It was indicated in the interview that the abuse had stopped and the abuser thrown out of the house. The first applicant's reaction of shock and anger to the interpretation placed on the interview that her boyfriend was the abuser was natural in the circumstances. The removal of the second applicant was a manifest error which should not have occurred.

61. The applicants argued that the authorities failed to pay proper attention to what the child told them and failed, for almost a year, to give the first applicant the opportunity to view the evidence on which they based their conclusions. They adopted the Commission's views that it was vital for parents to be fully informed about serious allegations relating to the abuse of their children and that the authorities should have made the video material available to the first applicant as soon as practically possible.

62. The Government submitted that the removal of the second applicant was in accordance with law and pursued the legitimate aim of protecting her welfare, as it was implemented to protect her from the risk of sexual abuse the occurrence of which evidence strongly supported. The emergency nature of the measure had been justified by the clear and strong indications of abuse given by the second applicant and the legitimate concern by the local authority as to whether the first applicant was able to protect her from further abuse.

63. The Government denied that the first applicant was not provided with a proper, fair or adequate opportunity to participate in the decision-making procedures following the removal of the second applicant, as found by the Commission. Though the place of safety order was made *ex parte*, it was for a maximum of one month and the applicant could apply to the court at any time to have the order revoked. She was also able, as she did, to invoke the wardship jurisdiction of the High Court. The first applicant could have applied to that court for, *inter alia*, care and control of the second applicant to be returned to her or for the second applicant to reside with her. They submitted that it was open to the first applicant to put such evidence as she considered appropriate before the court with a view to supporting these applications.

64. The Government pointed out that the first applicant could have applied to the court for disclosure of the video. She was represented by lawyers throughout and she had not provided any explanation for why this step was not taken. Securing the video was the obvious starting point for any challenge to the justification for the separation of mother and child. They emphasised that all involved in the case were convinced that the second applicant had been a victim of sexual abuse and was in need of protection which her mother could not provide. In that context the identity of the abuser was a secondary issue. Furthermore, when the mistake concerning the identification of the abuser came to light, the subsequent steps taken were speedy, adequate and not disputed by the first applicant.

B. The Court's assessment

65. The Court notes that it is not disputed that the measures by which the second applicant was removed into care by the local authority until she was returned home a year later disclosed an interference with the applicants' right to respect for their family life under Article 8 § 1 of the Convention. It has therefore examined whether this interference complied with the requirements of the second paragraph of Article 8, namely, whether it was "in accordance with the law", pursued an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society".

1. "In accordance with the law"

66. The applicants disputed that the removal of the second applicant was lawful as it was based on a wrongful assessment of the need for an emergency measure derived from the mistaken interpretation by Dr V. and Mr P. of the second applicant's disclosures as to the identity of the abuser.

67. The Court recalls that the place of safety order was issued by the court under section 28 of the Children and Young Persons Act 1969. The local authority had applied to the court, stating that the second applicant had been abused, had identified XY as the abuser and there was a risk of further direct abuse or that the first applicant would pressure the second applicant into retracting her allegation (see paragraph 17 above). The court had jurisdiction to issue the order where the party applying to the court had reasonable cause to believe *inter alia* that the child's proper development was being avoidably prevented or neglected or that he/she was being ill-treated (see paragraph 39 above). Since it is accepted that there was strong evidence that the second applicant had been abused, the Court is not persuaded that the factual error made by the local authority as to the identity of the abuser is such as to deprive the exercise of the court's power to issue the order of its basis in domestic law.

68. The removal, and the continuance of the care measure under the wardship jurisdiction of the High Court, were consequently “in accordance with the law”.

2. *Legitimate aim*

69. In the Court’s view, the removal and subsequent measures were clearly aimed at protecting the “health or morals” and the “rights and freedoms” of the child. Accordingly they pursued legitimate aims within the meaning of paragraph 2 of Article 8.

3. *“Necessary in a democratic society”*

(a) General principles

70. In determining whether the impugned measures were “necessary in a democratic society”, the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court’s task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see the *Hokkanen v. Finland* judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55, and, *mutatis mutandis*, the *Bronda v. Italy* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1491, § 59).

71. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed (see, amongst other authorities, the *Johansen v. Norway* judgment of 7 August 1996, *Reports* 1996-III, p. 1003, § 64).

72. The Court further recalls that whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures

of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8:

“[W]hat has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as ‘necessary’ within the meaning of Article 8.” (see the *W. v. the United Kingdom* judgment of 8 July 1987, Series A no. 121-A, pp. 28-29, §§ 62 and 64).

73. It has previously found that the failure to disclose relevant documents to parents during the procedures instituted by the authorities in placing and maintaining a child in care meant that the decision-making process determining the custody and access arrangements did not afford the requisite protection of the parents’ interests as safeguarded by Article 8 (see the *McMichael v. the United Kingdom* judgment of 24 February 1995, Series A no. 307-B, p. 57, § 92).

(b) Application in the present case

74. As concerns the measure taken to remove the second applicant into care, the Court considers that this was supported by relevant and sufficient reasons, namely, the strong suspicions that she had been abused and the doubts which existed as to the first applicant’s ability to protect her (see paragraphs 10 to 16 above). In that latter context, it may be noted that the abuse had taken place in the first applicant’s home without her apparently being aware and that the first applicant’s reaction, however natural in the circumstances, tended towards a denial of the allegations. It also appears from the interview that while at one point the second applicant had described the abuser as having been thrown out of the house, at another point she referred to X as coming to the house the next day (see paragraph 14 above).

75. The Court is not persuaded however that the mistake made by Dr V. and Mr P. in assuming that the second applicant was referring to the first applicant’s boyfriend XY was of such a nature as to deprive the decision to remove the second applicant into care of a legitimate basis. The second applicant was less than five years old at the time of the interview and the process of questioning her was a sensitive and delicate one, as was interpreting the sense of her responses, verbally and with regard to her body language. The second applicant frequently did not speak in grammatical sentences and appeared to contradict herself on several occasions. The fact that the second applicant shook her head would not necessarily indicate an unequivocal denial of the question put. Dr B., the consultant psychiatrist instructed by the first applicant, commented positively on the way in which Dr V. handled the interview and agreed with her conclusions as to the

existence of the abuse and the identity of the abuser (see paragraph 23 above).

76. The Court finds therefore that the use of the emergency procedure to take the second applicant into care may be regarded as a proportionate measure and “necessary in a democratic society” for protecting the second applicant’s health and rights.

77. The second applicant remained in care until 21 November 1988, when the High Court ordered that she be returned home. That decision was

taken shortly after the transcript of the video was disclosed to the applicant's solicitor. At that stage it became apparent that the local authority had mistakenly identified the abuser X as XY. In recommending that the second applicant returned home, the local authority also referred to the evidence that in the intervening period the first applicant had matured and shown herself more capable of providing a stable and secure environment for the second applicant. The second applicant was then returned to the first applicant's care for a trial period subject to supervision and review in case of renewed problems. It was one year before the High Court ended its supervisory wardship role (see paragraphs 27 to 29 above).

78. The Court reiterates that the seriousness of measures which separate parent and child requires that they should not last any longer than necessary for the pursuit of the child's rights and that the State should take measures to rehabilitate the child and parent, where possible (see the *Hokkanen v. Finland* judgment, cited above, p. 20, § 55 and the authorities cited there). During the separation, access between the applicants was severely restricted and there was no contact with the second applicant's wider family. Her grandmother died during this period. Notwithstanding therefore that the initial measure was justified, the Court has examined whether the procedures which followed were compatible with the requirements of Article 8 in ensuring that they protected the interests of the first applicant and second applicant in this respect.

79. The Court notes that the Commission criticised the place of safety order as imposing a measure lasting 28 days. This was however the maximum length of time possible and a parent was able to apply to the court within that period to have the measure lifted. In the present case, the first applicant brought the matter before the High Court within eleven days. The Court does not find therefore that the place of safety order by itself disclosed any disproportionate obstacle to the first applicant's ability to challenge the removal of her daughter into care.

80. The Court does however consider that it is essential that a parent be placed in a position where he or she may obtain access to information which is relied on by the authorities in taking measures of protective care. A parent may claim an interest in being informed of the nature and extent of the allegations of abuse made by his or her child. This is relevant not only to the parent's ability to put forward those matters militating in favour of his or her capability in providing the child with proper care and protection but also to enable the parent to understand and come to terms with traumatic events effecting the family as a whole. There may be instances where disclosure of a child's statements may place that child at risk. There can be no absolute right by a parent to view, for example, the videos of interviews conducted by medical professionals.

81. Nonetheless, the potential importance of the contents of such interviews renders it necessary for careful consideration to be given to

whether they should be disclosed to the parents. In this case the revelations of abuse by the second applicant as recorded on the video and transcript were relied on by the local authority in obtaining the emergency measure of a place of safety order and in justifying the continuation of care measures before the High Court. The local authority, which is charged with the duty of protecting the child and is a party in the court proceedings, may reasonably not be regarded by a parent as being able to approach the issue with objectivity. The question whether crucial material should be disclosed should therefore not be decided by the local authority, or the health authority responsible for the medical professional who conducted the interview.

82. The Government have submitted that there was nothing to stop the first applicant from applying to the High Court for disclosure of the interview at any point. The applicant responded that she had no reason to suspect that the interview disclosed an error of identification by the professionals or that it would make a difference to her position. The Court considers that the power of the High Court in its wardship jurisdiction to take decisions concerning the welfare of the child in local authority care is an important safeguard of the interests of parent and child. However, this is not an instance where it should be the sole responsibility of the parent, or lie at his or her initiative, to obtain the evidence on which a decision to remove their child is based. The positive obligation on the Contracting State to protect the interests of the family requires that this material be made available to the parent concerned, even in the absence of any request by the parent. If there were doubts as to whether this posed a risk to the welfare of the child, the matter should have been submitted to the court by the local authority at the earliest stage in the proceedings possible for it to resolve the issues involved.

83. The Court concludes that the question whether to disclose the video of the interview and its transcript should have been determined promptly to allow the first applicant an effective opportunity to deal with the allegations that her daughter could not be returned safely to her care. The local authority's failure to submit the issue to the court for determination deprived her of an adequate involvement in the decision-making process concerning the care of her daughter and thereby of the requisite protection of their interests. There was in this respect a failure to respect their family life and a breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

84. The applicants complained that they had been denied access to court in determination of their claims of negligence against the local authority, invoking Article 6 which provides as relevant in its first paragraph:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

85. The Government denied that there was any civil right in issue in the case or any restriction on access. The Commission found by 10 votes to 9 that there had been a violation of Article 6 in respect of the second applicant on the basis that the House of Lords had applied an exclusionary rule concerning the liability of local authorities in child care matters which constituted in the circumstances a disproportionate restriction on her access to court. It found by 18 votes to 1 that there had been no breach of Article 6 in respect of the first applicant, whose claims were found to have been dismissed without recourse to any exclusionary rule.

A. The parties' submissions

1. The applicants

86. The applicants submitted that their negligence claim was plainly arguable as a matter of domestic law, relying *inter alia* on the Osman case (Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII). Negligence was a tort of general application and there was no prior authority excluding the courts' jurisdiction to hold a local authority liable in the performance of its statutory powers to remove children into care. There was a strong argument that public policy considerations required that a duty of care be imposed and there was no prior decision excluding liability. The applicants also pointed to the fact that the Legal Aid Board granted legal aid to pursue the claims to the House of Lords; that the Court of Appeal granted leave to appeal to the House of Lords, the precondition for such leave being that the claim was arguable in domestic law; that the Master of the Rolls, in the Court of Appeal, found that a duty of care could arguably arise; and that in previous cases, local authorities had paid settlements in negligence cases, on the basis that they were potentially liable. There was a serious dispute in domestic law therefore as to the existence of any exclusionary principle, which has continued since and Article 6 was applicable. They denied that their claims had been restricted to asserting that the local authority and health authority were vicariously liable for the negligence of their employees, Mr P. and Dr V., referring to their written pleadings as covering wider grounds of liability.

87. In the applicants' view therefore, the exclusionary rule applied by the House of Lords permitted the applicants' claims to be struck out without determining the facts and without a trial. This applied regardless of the merits or the seriousness of the harm suffered. Designed to protect local authorities' from wasting resources on having to defend an action at all, this

amounted in practical effect to immunity and acted as a restriction on access to court.

88. The application of a blanket rule which excluded the determination of the applicants' claims irrespective of the seriousness of the harm suffered, the nature and extent of negligence involved, or the fundamental rights which were at stake, constituted a disproportionate restriction on their right of access to court. They emphasised the severity of the damage suffered by them against which the public policy arguments against imposition of liability had little weight, namely, the alleged risk of frivolous litigation, the increased cautiousness of social services in fulfilling their functions or the difficulty or the sensitivity of the issues. They referred to the Court's finding in the *Osman* case, that the domestic courts should be able to distinguish between degrees of negligence or harm and give consideration to the justice of a particular case (cited above, § 151). An exclusionary rule on that basis should be capable of yielding to competing human rights considerations on the facts of a particular case.

2. The Government

89. The Government submitted that Article 6 guaranteed a fair trial in the determination only of such civil rights and obligations as are (at least arguably) recognised at national law. It does not bear on the substantive question of whether a right to compensatory damages exists in any given situation. The proceedings brought by the applicants established that no right existed. The decision to strike out their claim was a decision as to the scope of the domestic law. By ruling that a right of action did not exist in a particular set of circumstances, the courts were applying substantive limits to tort liability, as the legislature might do in statute (see, for example, the *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, p. 16, § 36). There was no established cause of action which was restricted. Accordingly, Article 6 § 1 was not applicable.

90. The Government argued in the alternative that there was no immunity applied which could be regarded as a restriction on access to court. The applicants' claims, relying on the alleged vicarious liability of the local authority, had been dismissed on grounds of lack of proximity. There could in their view be no doubt that the dispute was subject to a fair and public hearing in compliance with the guarantees of Article 6. The striking out procedure was an important way of securing the speedy and cost-effective determination of cases that were hopeless in law. It achieved those aims without inhibiting claimants' rights to present any arguments to a court in their favour. Thus, as factual matters were assumed to be those pleaded, the claimants were not prejudiced by the lack of hearing of evidence, while they could put forward any arguments in their favour to persuade the court that their claim was sustainable as a matter of law.

91. Assuming that their arguments on the above failed, the Government argued that any restriction on access to court was nonetheless in pursuit of a legitimate aim and proportionate. It aimed to preserve the efficiency of a vital sector of public service. The exclusion of liability was strictly limited in scope to the category of cases to which it applied, actions for misfeasance, vicarious liability for employees remaining unaffected. The domestic courts had themselves weighed up the public policy issues for and against liability in light of the principles of English tort law and the social and political philosophy underlying those principles. A very substantial margin of appreciation would therefore be appropriate in any international adjudication.

B. The Court's assessment

1. Applicability of Article 6 of the Convention

92. The Court recalls its constant case-law to the effect that “Article 6 § 1 extends only to *contestations* (disputes) over (civil) ‘rights and obligations’ which can be said, at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) ‘rights and obligations’ in the substantive law of the Contracting States (see the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 46, § 81; the *Lithgow and Others v. the United Kingdom* judgment of 8 July 1986, Series A no. 102, p. 70, § 192; the *Holy Monasteries v. Greece* judgment of 9 December 1994, Series A no. 301, p. 37, § 80). It will however apply to disputes of a “genuine and serious nature” concerning the actual existence of the right as well as to the scope or manner in which it is exercised (*Bentham v. the Netherlands* judgment of 23 October 1985, Series A no. 97, p. 15, § 32).

93. In the present case, the applicants were claiming damages on the basis of alleged breach of statutory duty and negligence, a tort in English law which is largely developed through the case-law of the domestic courts.

94. The Court is satisfied that at the outset of the proceedings there was a serious and genuine dispute about the existence of the right asserted by the applicants under the domestic law of negligence, as shown *inter alia* by the grant of legal aid to the applicants and the decision of the Court of Appeal that their claims merited leave to appeal to the House of Lords. The Government's submission that there was no arguable (civil) ‘right’ for the purposes of Article 6 once the House of Lords had ruled that no duty of care arose has relevance rather to any claims which were lodged or pursued subsequently by other plaintiffs. The House of Lords' decision did not remove, retrospectively, the arguability of the applicants' claims (see the *Le Calvez v. France* judgment of 25 July 1998, *Reports* 1998-V, § 56). In

such circumstances, the Court finds that the applicants had, on at least arguable grounds, a claim under domestic law.

95. Article 6 was therefore applicable to the proceedings brought by these applicants alleging negligence by the local authority. The Court must therefore examine whether the requirements of Article 6 were complied with in those proceedings.

2. Compliance with Article 6 of the Convention

96. The Court, in the Golder case, held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and expeditiousness, would be meaningless if there was not protection of the pre-condition for enjoyment of those guarantees, namely, access to court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36).

97. Article 6 § 1 “may ... be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 § 1” (see the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, § 44). Where there is a serious and genuine dispute as to the lawfulness of such an interference, going either to the very existence or the scope of the asserted civil right, Article 6 § 1 entitles the individual “to have this question of domestic law determined by a tribunal” (see the Sporrang and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, § 81; see also the Tre Traktörer AB v. Sweden judgment of 7 July 1989, Series A no. 159, § 40).

98. The right is not however absolute. It may be subject to legitimate restrictions, for example, statutory time-limits or prescription periods, security for costs orders, regulations concerning minors and persons of unsound mind (see, the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-3, §§ 51-52; the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 80-81, §§ 62-67; the Golder judgment, cited above, p. 19, § 39). Where the individual’s access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and in particular whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). If the restriction is compatible with these principles, no violation of Article 6 will arise.

99. It is claimed by the applicants in this case that the decision of the House of Lords, finding that the local authority owed no duty of care, deprived them of access to court as it was effectively an exclusionary rule, or immunity from liability, which prevented their claims being decided on the facts.

100. The Court observes, firstly, that the applicants were not prevented in any practical manner from bringing their claims before the domestic courts. Indeed, the case was litigated with vigour up to the House of Lords, the applicants being provided with legal aid for that purpose. Nor is it the case that any procedural rules or limitation periods were invoked. The domestic courts were concerned with the application brought by the defendants to have the case struck out as disclosing no reasonable cause of action. This involved the pre-trial determination of whether, assuming the facts of the applicants' case as pleaded were true, there was a sustainable claim in law. The arguments before the courts were therefore concentrated on the legal issues.

101. Nor is the Court persuaded that the applicants' claims were rejected due to the application of an exclusionary rule. The decision of the House of Lords found, applying ordinary principles of negligence law, that the local authority could not be held vicariously liable for any alleged negligence of the doctor and social worker. Lord Browne-Wilkinson noted that the applicants had not argued any direct duty of care was owed to them by the local authority (see paragraph 36 above). It cannot therefore be maintained that the applicants' claims were rejected on the basis that it was not fair, just and reasonable to impose a duty of care on the local authority in the exercise of its child care functions. The applicants have submitted that this ground was included in their original statement of claim and in the written pleadings on appeal. Since however this ground was not in fact relied upon in the proceedings conducted before the House of Lords, the Court cannot speculate as to the basis on which the claims might have been rejected if they had been so formulated and argued.

102. The decision of the House of Lords did end the case, without the factual matters being determined on the evidence. However, if as a matter of law, there was no basis for the claim, the hearing of evidence would have been an expensive and time-consuming process which would not have provided the applicants with any remedy at its conclusion. There is no reason to consider the striking out procedure which rules on the existence of sustainable causes of action as *per se* offending the principle of access to court. In such a procedure, the plaintiff is generally able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of an adversarial procedure (see paragraphs 54 to 56 above).

103. The applicants may not claim therefore that they were deprived of any right to a determination on the merits of their negligence claims. Their

claims were properly and fairly examined in light of the applicable domestic legal principles concerning the tort of negligence. Once the House of Lords had ruled on the arguable legal issues that brought into play the applicability of Article 6 § 1 of the Convention (see paragraphs 92 to 95 above), the applicants could no longer claim any entitlement under Article 6 § 1 to obtain any hearing concerning the facts. There was no denial of access to court and, accordingly, no violation of Article 6 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

104. The applicants complained that they had not been afforded any remedy for the damage which they had suffered as a result of the interference by the local authority in their family life, invoking Article 13 of the Convention which provides:

“Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

105. The applicants submitted that the rejection of their claims by the House of Lords deprived them of any effective remedy within the national legal system for the violation of Article 8 which they suffered. While the remedy required by Article 13 need not always be judicial in character, in their case a judicial determination was required. This was because the tort of negligence was the only remedy in national law capable of determining the substance of their complaint and which (but for the alleged immunity) would closely match the requirements of the Convention. Also the accountability of public officials, central to both Articles 8 and 13, required a right of access to court whereby the individual could hold the responsible officials to account in adversarial proceedings and obtain an enforceable order for compensation if the claim was substantiated. The wording of Article 13 also prohibited the creation of immunities for public officials and any such immunity must be regarded as contrary to the object and purpose of the Convention.

106. The Government which disputed that Article 8 had been violated submitted that there was no arguable claim of a violation for the purposes of engaging Article 13. If contrary to that submission there was an arguable breach, they submitted that Contracting States were afforded a measure of discretion as to the manner in which they conformed with their obligation to provide an effective remedy. They argued that the court in the wardship proceedings was amply equipped to deal with the substance of the Article 8 complaint which was the separation of the first and second applicants, and did in fact deal with the matter without delay when brought to its attention. In their view, this was not a case where pecuniary compensation was a necessary remedy. The harm suffered by the separation of mother and child

was by its nature likely to be irremediable in terms of damages. There were in any event a number of remedies available to the applicants which should be taken into account. The applicants had the possibility of complaining to the Local Government Ombudsman who had power to investigate alleged maladministration and recommend an appropriate remedy, including the payment of compensation. There was also a statutory complaints procedure under the section 76 of the Child Care Act 1980, by which the Secretary of State could hold an inquiry into a local authority's exercise of its child care functions.

107. As the Court has stated on many occasions, Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 also varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law. (see, amongst other authorities, the *Aydın v. Turkey* judgment of 25 September 1997, *Reports* 1997-VI, pp. 1985-86, § 103).

The Court considers that, where an arguable breach of one or more of the rights under the Convention is in issue, there should be available to the victim a mechanism for establishing any liability of State officials or bodies for that breach. Furthermore, in appropriate cases, compensation for the pecuniary and non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress.

108. The applicants have argued that in their case an effective remedy could only be provided by adversarial court proceedings against the public body responsible for the breach with the possibility of obtaining damages. The Government have countered with the argument that the High Court was able to provide adequate redress for the essence of the applicants' complaints by exercising its wardship jurisdiction to bring their separation to an end and that pecuniary compensation is not necessary. The Court recalls that it has found a breach of Article 8 in respect of the procedures following the taking into care of the second applicant. In particular, it found that the issue of disclosure of the video of the interview, and its transcript, should have been dealt with promptly to allow the first applicant the effective opportunity of meeting the allegations that her daughter could not be safely returned to her care. In these circumstances, the exercise of the court's powers to return the child almost a year later was not an effective

remedy. It did not provide redress for the psychological damage allegedly flowing from the separation over this period.

109. The Court considers that the applicants should have had available to them a means of claiming that the local authority's handling of the procedures was responsible for the damage which they suffered and obtaining compensation for that damage. It does not agree with the Government that pecuniary compensation would not provide redress. If, as is alleged, psychiatric damage occurred, there may have been elements of medical costs as well as significant pain and suffering to be addressed. The Court does not consider it appropriate in this case to make any findings as to whether only court proceedings could have furnished effective redress, though judicial remedies indeed furnish strong guarantees of independence, access to the victim and family and enforceability of awards in compliance with the requirements of Article 13 (see, *mutatis mutandis*, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, § 67). The possibility of applying to the ombudsman and to the Secretary of State did not however provide the applicants with any enforceable right to compensation.

110. The Court finds that in this case the applicants did not have available to them an appropriate means for obtaining a determination of their allegations that the local authority breached their right to respect for family life and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. Consequently, they were not afforded an effective remedy and there has, accordingly, been a violation of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damages

112. The applicants claimed a just and equitable sum in non-pecuniary loss to reflect the damage caused by the removal of the second applicant from the first applicant for a year. This had physical and psychiatric consequences, including the trauma of separation and the anxiety, insecurity and uncertainty suffered during the separation. On her return home, the second applicant experienced a transient emotional disturbance, consisting mainly of manifestations of anxiety through a range of symptomatic

behaviours. In a report of 21 February 1991, Dr B commented that the second applicant had settled back into domestic routine and that though she was not manifesting any particular anxiety at that time, she might yet undergo delayed emotional reactions to this most disruptive period of her life both in relation to the abuse and the unnecessary enforced separation. As regarded the first applicant, he commented on the anxiety, depression and despair which she suffered due to events, involving inability to sleep, proneness to emotional breakdown, intense anxiety, guilt loss of appetite and weight loss. Though she had become more settled and confident after her daughter's return, she still carried a very bitter anger towards the local authority and Dr V.

113. As they had been victims of an exceptionally serious breach of Article 8, spanning a year, the applicants submitted that a substantial award of compensation was appropriate. It should also reflect the domestic damage scales which would have been applicable to them if they had succeeded in their negligence claims, namely, for the first applicant a sum of 15,000 pounds sterling (GBP) to 30,000 and for the second applicant GBP 25,000 to 35,000. In addition they claimed a sum of GBP 10,000 each in respect of the delay in obtaining either access to court or an effective remedy for their grievances, plus interest on those sums from 1990.

114. The Government disputed that there was any clear case of negligence made out and considered that, as noted by the domestic courts, there was the gravest doubt that the second applicant's claims against the Dr V could have been established on the facts. They maintained that separation had been, at least initially, justified by the abuse to which the second applicant had been victim. The psychiatric reports relied on by the applicants were over nine years old and there was no indication that physical or psychiatric treatment was required by either applicant. They disputed that national scales of assessment should be taken into account and in any event the applicants' problems would have fallen into a category of minor seriousness. In their submission, a finding of a violation constituted in the circumstances of this case just satisfaction.

115. The Court recalls that the applicants were re-united after a year's separation (see paragraph 29 above). Though it cannot be asserted that they would have been reunited earlier if the video had been available at the initial stage of the procedure, it cannot be excluded either that it might have reduced the duration of their separation. They thereby suffered a loss of opportunity. In addition, the applicants certainly suffered non-pecuniary damage through distress and anxiety and in the case of the first applicant through feelings of frustration and injustice.

116. The Court thus concludes that the applicants sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention (see, for example, *Elsholz v. Germany* [GC], no. 25735/94, §§ 70-71, ECHR 2000-VIII).

117. Making an assessment on an equitable basis, it awards the sum of GBP 10,000 each to the applicants.

B. Costs and expenses

118. The applicants claimed a total of GBP 37,046.60, inclusive of value-added tax (VAT). This included GBP 12,398.55 for the applicants' solicitors, GBP 16,520.55 for their counsel and GBP 8,127.50 for Ms Nuala Mole, of the AIRE Centre who assisted counsel. Claim was made for 68.7 hours work by the solicitors, 134 hours for counsel and 59 hours for Ms Mole, in addition to time spent travelling and attending the hearings on admissibility before the Commission and on the merits before the Court.

119. The Government disputed that three sets of lawyers should have been involved. While they accepted the hourly rates claimed, they considered the total number of hours claimed by these lawyers to be excessive, particularly since they relied heavily on the submissions made in the case of *Z. and Others v. the United Kingdom* (no. 29392/95) heard by the Court at the same time. In their view, a sum of GBP 20,000 would be reasonable for costs and expenses.

120. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, 25.3.99, § 79). The Court observes that this case, and the case of *Z. and Others v. the United Kingdom* were heard together, both before the Commission and the Court. There was, as regarded the issues under Articles 6 and 13, a joint approach adopted and the observations were co-ordinated. It finds the sums claimed in those circumstances to be high and is not persuaded that they were necessarily incurred or are reasonable as to quantum.

121. In light of these matters, the Court awards the sum of GBP 25,000 for legal costs and expenses, inclusive of VAT.

C. Default interest

122. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that there has been no violation of Article 6 of the Convention;
3. *Holds* that there has been a violation of Article 13 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants each, within three months, 10,000 (ten thousand) pounds sterling in respect of non-pecuniary damage;
 - (b) 25,000 (twenty five thousand) pounds sterling in respect of costs and expenses, inclusive of VAT;
 - (c) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;
5. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 May 2001.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Lady Justice Arden is annexed to this judgment.

L.W.
P.J.M.

CONCURRING OPINION OF LADY JUSTICE ARDEN

I agree that a sum of money should be awarded to the applicants as just satisfaction for the violations which the Court has found of Articles 8 and 13. However, I would have preferred to award to each applicant the sum of GBP 6,000, rather than the sum of GBP 10,000, for the following reasons.

The applicants undoubtedly suffered some injury to their psychological health in the period late 1987 to early 1991 as a result of their separation. However that period is now over ten years ago and there is no evidence of any ongoing or delayed injury. Accordingly the actual psychiatric damage which they suffered was minor in nature.

As the Court has said in its judgment today in *Z v. the United Kingdom*, the awards made in comparable domestic cases are a relevant, though not decisive, consideration. The current range of figures published as guideline figures for cases of comparable psychiatric damage in England and Wales is between GBP 500 – GBP 2,250 (Guidelines for the Assessment of General Damages in Personal Injury Cases, The Judicial Studies Board, 4th edition, 1998). The Court of Appeal in England has recently reviewed the levels of damages for non-pecuniary loss. It increased the level of awards in some cases but concluded that damages below the figure of GBP 10,000 did not require any increase (*Heil v. Rankin & Ors* [2000] 2 WLR 1173). In these circumstances, the guideline figures given above can be taken to represent the appropriate level of awards for minor psychiatric damage in England and Wales at the present time. Moreover, in view of the recent review, the Court can, with respect to the injury to health which the applicants suffered, place greater reliance on the national rates of assessment in this particular case than it might otherwise have been able to do.

In assessing just satisfaction in this case there are, as explained in the Court's judgment, factors to be taken into account apart from injury to health. They include the loss of the opportunity of an earlier reunion and, in the case of the first applicant, feelings of frustration and injustice.

Having weighed all the relevant factors, I would, as I have said, have preferred to award the lesser sum of GBP 6,000 to each applicant on the grounds that this would have been sufficient in the circumstances to give the applicants just satisfaction under the Convention. I agree that, even though the applicants have sought different sums as just satisfaction, their cases are so similar that it is appropriate in this case to award each of the applicants the same amount and to draw no distinction between them.