AS TO THE ADMISSIBILITY OF

Application No. 32712/96
by A.
against the United Kingdom

Application No. 32818/96
by Dorothy Byrne and
Twenty-Twenty Television limited
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 23 October 1997, the following members being present:

Mrs J. LIDDY, President
MM M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 6 June 1996 by A. against the United Kingdom, registered on 22 August 1996 under file No. 32712/96, and the application introduced on 12 June 1996 by Dorothy Byrne and Twenty-Twenty Television limited against the United Kingdom, registered on 29 August 1996 under file No. 32818/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The first (A) and second (Dorothy Byrne) applicants are British citizens born in 1947 and 1952, respectively. The third applicant is a limited liability company registered in Wales in 1982 and involved in television production. The applicants are represented before the Commission by Richard John Manuell, a solicitor practising in London.

A. Particular circumstances of the case

The facts as submitted by the applicants may be summarised as follows. The first applicant had an intimate relationship with B (who was married) for a number of years, during which time B became a member of Parliament, a member of the Cabinet and a senior figure in one of the main political parties in the United Kingdom. Once the applicant became pregnant, her relationship with B became public knowledge leading to a significant public scandal, B's resignation from the Cabinet and a considerable amount of media attention including coverage

in tabloid newspapers. Subsequently, the matter has been the subject of a number of political commentaries and mentioned in various books.

The applicant's daughter ("C") was born on 31 December 1983. C has been brought up and at all times cared for by the first applicant, the only person with parental responsibility over C. In June 1984 C began to have epileptic fits caused by a brain tumour and the press became aware of C's condition in August 1986. C was subsequently operated upon in January 1988 amid, as the first applicant described during the proceedings outlined below, "lurid and sensational" press coverage.

1. The imposition of the injunctions

On 3 March 1993 the first applicant's applications for a lump sum and periodical payments for C were before the District court and, due to the attendant publicity, the judge made an order under section 12 of the Administration of Justice Act 1960 providing that:

> "nothing shall be published which will in any way identify or could lead to the identification of any of the parties to these proceedings or to the child ... or which could reveal or which could in any way lead to the revelation that these proceedings are taking place."

The matter was transferred to the High Court for a further injunctive order. The High Court heard counsel for the first applicant, for B and for the Official Solicitor, the latter having been invited by the court to attend as amicus curiae to ensure that C's interests in publication matters were suitably protected. On 9 March 1993 an order was made on consent and on the joint application of counsel for both the first applicant and B. (The first applicant submits that her consent to that order was "formal" only but, in its judgment of 10 March 1995 (see below), the High Court noted that she had jointly applied for that order with the express intention of protecting C's privacy).

The order included in its title "In the matter of the inherent jurisdiction" and "In the matter of the Children Act 1989" ("the 1989 Act"), discharged the order of 3 March 1993 and provided for an injunction in rem which would remain in force until the age of C's majority (31 December 2001) or until further order. The injunction restrained anyone from publishing by newspaper or from broadcasting (in any sound or television broadcast or by means of any cable or satellite programme service) the name or address of C, of any establishment in which C was residing or was being educated or treated or of C's parents, any picture of the child or the parents or any other matter in a manner calculated to lead to the identification of C as the subject of proceedings or of any establishment as being an establishment in which C was residing or being educated or treated. The solicitation of information as regards C (other than that already in the public domain) from C, from staff or pupils of any such establishment and from the parents was also prohibited.

On 12 September 1993 the first applicant took part in a live television broadcast during the course of which she made certain allegations as to what B had stated and done during a hearing before the District Court in March 1993. The following two days saw significant media reporting including the appearance of an old photograph of C in the newspapers. On 14 September 1993 B applied to the High Court for leave to make a statement by way of reply to what he regarded as serious misrepresentation.

On 15 September 1993 the Official Solicitor agreed to act as guardian ad litem for C which order was not opposed by either party. Further to a hearing during which the first applicant's solicitor and counsel for B and the Official Solicitor were heard, the High Court

granted an injunction in personam (namely, against the first applicant) the relevant order also including in its title a reference to the courts' inherent jurisdiction and to the 1989 Act. It was ordered that the first applicant be restrained until 31 December 2001 or until further order from discussing or otherwise communicating (otherwise than for ordinary social and domestic purposes) any matter relating to the education, maintenance or financial circumstances (including any proceedings before any court) of C with anyone other than the first applicant's solicitor and counsel, C's representative (the Official Solicitor), C's medical and educational advisers and any other person the Court may permit.

It was also ordered that nothing in the order should of itself prevent the first applicant from publishing any particulars or information relating to any part of the proceedings before any court other than a court sitting in private and publishing any information already in the public domain save for that arising in or from the instant proceedings. It was made clear that the first applicant and any person affected by the injunction were at liberty to apply to the court in that respect. Further media reporting (described in the High Court judgment of 10 March 1995 as sensational) accompanied the hearing of 15 September 1993 which reports included a recent photograph of C, the publication of which the first applicant had authorised. On 25 October 1993 the first applicant again appeared on television leading to a number of press comments about the first applicant, B and C.

2. The Institute, Dorothy Byrne and Carlton Television

Since about 1987 the first applicant considered from her researches that educational methods pioneered by a certain Professor would be of benefit to C. C was, however, refused a place in a school in Bath which used these educational techniques, the local authority not being prepared to support C's admission. By letter dated 9 November 1994 the first applicant requested a place for C in the Professor's Institute in Jerusalem ("the Institute") and by letter dated 16 January 1995 the Professor accepted C who was to begin on 19 February 1995. Soon thereafter, the second applicant contacted the first applicant with a view to making a documentary programme to be produced for Carlton Television ("Carlton TV") by the third applicant about C, on the educational and behavioural methods in the Institute and C's progress there. C was to play a leading role in the programme.

On 2 February 1995 the second applicant wrote to the Professor outlining the concerns of the first applicant to show how C was helped by the Institute's treatment and to spread the message about such treatment in the United Kingdom in view of the under-estimation (as the first applicant saw it) by the educational authorities in the United Kingdom of C's potential. The second applicant added that the programme would show C and the Institute in a very good light and she expected a "strong response from viewers". By letter dated 8 February 1995 the Professor agreed. On 24 February 1995 the applicant issued proceedings to have the injunctions dated 9 March and 15 September 1993 discharged or suitably varied to allow the making of the television programme. The respondents were B and C (the latter represented by the Official Solicitor).

3. The judgment of the High Court

The High Court delivered its judgment on 10 March 1995. It had before it, inter alia, numerous documents including relevant press cuttings, a report from two consultant neurologists instructed by B, a report from a consultant paediatrician instructed by the first applicant, letters from a chartered psychologist consulted by the first applicant about C, a transcript of the television programme of September 1993, affidavits from the first and second applicants and from the Official Solicitor and correspondence between the second applicant and the Institute about the programme.

As to the first applicant, the court pointed out that it was not in dispute that C had at all times been cared for and brought up by the first applicant whose commitment, dedication and devotion to C, in light of C's various educational, behavioural and emotional problems, was worthy of high commendation. In the past, her decisions about C could not be criticised and those as regards C's best interests had not been questioned. As to B, the court reiterated "in the clearest possible terms that this court is not concerned in any possible way to protect <B's> privacy or that of his family". As to the second applicant, the court noted that she had made a number of documentaries in co-operation with those who have a disability or problem and that she claimed that those about whom she had made programmes had found the experience beneficial. The second applicant's letter of 2 February 1995 to the Professor was also before the High Court. The first applicant was supported in the proceedings by the second applicant and by Carlton TV.

As to the legal basis for the court's intervention, the court considered that there were two possible bases for its jurisdiction - even assuming that the child's right to confidentiality extended no further than a duty on professionals of confidentiality, the programme would constitute a serious breach of that duty. Furthermore, and apart from that duty, since the programme directly concerned the care and up-bringing of C, the court had an inherent jurisdiction to consider the matters before it.

The court noted that both the first applicant and the court would have an absolute veto over the contents of the programme and accepted, on the evidence before it, that the actual filming was "unlikely necessarily to be disruptive or intrusive as alleged". However, the court was of a different view as regards the effect of the transmission of the programme on C. The court found that it had not been suggested that C would be wholly unidentified and that the likelihood was that it would be impossible to preserve such total anonymity. The court reviewed the press coverage of earlier incidents involving C and the first applicant from 1988 up to late 1993, found that on the evidence before it the press coverage arising from the television programme would be substantially extended as a result of C's parents' high profile, the circumstances surrounding C's birth and the subsequent differences between C's parents. The court had "no hesitation" in concluding that the "overwhelming probability" was that C would be adversely affected by the transmission of the programme as a result of the likely secondary tabloid publicity. Although many of these matters were already in the public domain, they would "almost inevitably be reiterated ... I use the mother's words about earlier publication ... in the lurid and sensational way that they have been in the past".

As regards the impact of that publicity on C, the court considered that while the only benefit to C of making the programme would be short-term encouragement, any such benefit would be short-lived compared to the "very serious consequences" of alerting her contemporaries to her unhappy background and history which could well cause her distress. In addition, the court noted that it was not speculative to consider that C may have to answer intrusive questions about the programme and even from members of the press. Moreover, C would be approaching her adolescence and would have sufficient problems to overcome without her contemporaries becoming aware of some of the more irrelevant but sensationalised facts about her background. This could become a label which could prove to be embarrassing for many years to come. Furthermore, the High Court, in the context of considering C's possible harassment should the programme be published, pointed out that there must be dangers of, for example, C being approached with questions such as what it was like to be a child of a single parent family and that C's answer would be "blazoned" across the press - the High Court considered that this would prove "highly stressful and disturbing" to C. The court considered that the first applicant had seriously underestimated these publicity considerations.

Accordingly, the High Court concluded that the transmission of the programme would not be in the overall welfare of C.

The High Court found that there was little in the first applicant's submission that she wanted to put the public record straight about C - she considered the press coverage in or around the time of C's operation in 1988 meant that the public perception of C was that C was hopelessly damaged and virtually a vegetable. The High Court, inter alia, did not accept that any such distorted view existed since C was shown in a published photograph in September 1993 as a perfectly normal child and the first applicant had the opportunity, in an interview with the Independent newspaper in December 1993, to speak well of C.

Insofar as the application was concerned with C's right to confidentiality, the High Court was of the opinion that its view as to the welfare of the child did not have to be balanced against any competing public interests involved, namely the child's welfare was considered to be paramount. Furthermore, the High Court considered that even if it had to carry out a balancing exercise (for the purposes of Article 10 of the Convention or otherwise) between the welfare of C and the public interest in the programme, it would "firmly see the scales as coming down in favour of there being an order against the programme being made". The High Court thereby considered that the exceptions contained in Article 10 para. 2 of the Convention had been established even accepting the importance to be accorded to freedom of publication and of the media.

Finally, and as regards the public interest in the programme being made, in particular, in view of the suggested encouragement it would give to others suffering problems like C's, the High Court commented that there was no reason why this aim could not be achieved if another child suffering the same problems as C and studying at the Institute was to be the subject of the programme. The difference between C and such other child was that C was a child of high profile parents. The High Court therefore found against the first applicant and costs were awarded, pursuant to a prior agreement, against Carlton TV who was not a party to the proceedings. The first applicant appealed.

4. The proceedings before and judgment of the Court of Appeal

By letter dated 13 June 1995 the "Controller, Compliance and Legal Affairs" of Carlton TV wrote, as requested, to the first applicant's solicitor outlining what that company intended should happen should the court allow the programme to be made. It was noted that Carlton TV had undertaken to the first applicant not to make the programme if there had not been a visible and dramatic change in C which apparently had taken place according to the Institute. Carlton TV was confident that a documentary programme of public interest and significance could be made. The proposed programme would include an interview with the first applicant about C's development, it would explain the Institute's methods which were educational and behavioural rather than medical and, in order to do so, the proposed programme would show one or more standard exercises as examples of how the Institute's methods had tackled C's particular problems. The programme would allow the Professor to explain how C's success gave hope to other parents who had been told that very little could be expected for their children because they had serious mental and/or behavioural deficiencies and to explain the importance of his work and approach. Carlton TV was of the view that the proposed programme would be of "enormous public interest and of real value". The programme would also benefit local authorities since the latter would be provided with new ideas on methods for encouraging and realising the potential of children like C.

Carlton TV understood that C was a child whose name was known but it believed that C's own recent success and the issues it raised for

other children with learning difficulties would mean that past issues as to her parentage would be discarded by viewers as irrelevant. Similarly, Carlton TV believed that the enormously strong thrust of the programme would dictate the nature and tone of any consequent publicity, which it believed was more likely to focus on C's success at the Institute rather than on the past. Carlton TV added that featuring an anonymous or unknown child was unlikely to engage as wide a range of audience or give the message as beneficial an impact. Further to the first applicant's request, C's stay in the Institute was video-taped and the video was of commercial quality suitable as a base for a television programme.

On 31 July 1995 Ward LJ delivered the main judgment of the Court of Appeal with the other two judges concurring with his reasoning and findings. In his initial comments, Ward LJ noted that the first applicant had been devoted and determined to do all she possibly could to bring out the best in C and that there had been "no challenge to the bona fides of either the mother or the production company".

In the main part of his judgment, Ward LJ reviewed in detail the relevant jurisprudence and legislation and noted three arguable bases for the jurisdiction of the courts in such cases - the first was the wardship jurisdiction and the court's inherent jurisdiction (which the court considered for all practical purposes as being the same) and the second was the duty of confidentiality to a child which parents can waive and which the first applicant had effectively waived. The third basis, and the basis upon which Ward LJ relied, was the 1989 Act. He considered that proceedings under the inherent jurisdiction of the court in relation to children are, pursuant to section 8(3) of the 1989 Act, family proceedings and, consequently, section 10 of the 1989 Act allowed the making of a 'prohibited steps order' by the court under section 8 even if an application for one has not been made.

As to the test to be applied, he considered that, in determining whether certain steps should or should not be taken by a parent in meeting his/her parental responsibility, the court is undoubtedly determining a question as to the "care and upbringing" of a child and that, consequently, section 1 of the 1989 Act applied meaning that the welfare of the child was to be considered paramount. In applying this test, Ward LJ "wholeheartedly" agreed with the conclusion of the High Court that the welfare of C "would be harmed and not advanced" by C being involved in the making and publication of the programme. He added, as regards the duty imposed by the courts by section 1 of the 1989 Act, that the courts would act cautiously, acting in opposition to the parent only when judicially satisfied that the welfare of the child required that the parental rights should be suspended or superseded. He concluded by noting that, even accepting the fundamental importance of the freedom of publication of information, the "paramountcy of the child's welfare ... dictates that this child should not participate in the television programme which the mother and the production company wish to make of her and with her".

Leave to appeal was refused by the Court of Appeal since it felt that the outcome of the case in hand was not controversial. However, it accepted that the case did raise questions of far-reaching importance relating to the rights of the citizen and the press and freedom of speech. The Court of Appeal accordingly wished the House of Lords to decide whether they needed to consider the matter. On 26 September 1995 the first applicant submitted a detailed application for leave to appeal to the House of Lords. The applicant's representatives were informed, by letter dated 14 December 1995, that that application had been refused.

B. Relevant domestic law and practice

Part I of the Children Act 1989 ("the 1989 Act") is entitled "Welfare of the Child" and section 1 provides, inter alia, that when

a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's "paramount consideration". Section 3(1) defines "parental responsibility" as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

Section 8(1) provides that a "prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court. Section 8(3) of the 1989 Act provides that, for the purposes of the Act, "family proceedings" means proceedings under the inherent jurisdiction of the High Court in relation to children.
Section 10(1)(b) provides that in any family proceedings in which a question arises with respect to the welfare of any child, the court may make a section 8 order with respect to the child if the court considers that the order should be made even though no such application has been made.

COMPLAINTS

The first applicant complains about the failure by the courts to vary or discharge injunctions to allow the making and transmission of a documentary programme based on her child's development in the Institute. She invokes Article 8 (respect for her private and family life) and Article 10 of the Convention. The second and third applicants complain about that failure since it prevented them from making and transmitting that programme and they invoke Article 10 of the Convention relying on the facts and submissions of the first applicant.

THE LAW

1. The first applicant complains that the failure by the courts to vary or discharge the injunctions to allow the making and transmission of a documentary programme about her child's stay in an educational and behavioural institute constitutes a violation of her right to respect for her private and family life guaranteed by Article 8 (Art. 8) of the Convention. She submits that the courts' overriding of her bona fide and reasonable decision as to the upbringing of her child, in the absence of any evidence as to bad faith or irrationality, constituted an interference not justifiable under Article 8 para. 2 (Art. 8-2) of the Convention.

(a) Article 8 (Art. 8), insofar as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and 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 ... for the protection of the rights and freedoms of others."

The Commission considers that the substitution by the courts of their own views (for those of the first applicant who was the sole responsible parent) as to the best interests of C and their consequent refusal to vary or discharge the restraining orders to allow the first applicant to pursue her decision to co-operate in the making of a programme about C's education and development constituted an interference with the applicant's right to respect for her family life. The Commission, while noting that the applicant also invokes her right to respect for her private life, considers that the matter is more appropriately considered under the family life aspect of Article 8 (Art. 8) of the Convention.

The Commission's task is to examine whether that interference with the first applicant's family life is justifiable under Article 8 para. 2 (Art. 8-2) of the Convention. Accordingly, it must consider whether the interference was "in accordance with the law", pursued one or more of the legitimate aims set out in Article 8 para. 2 (Art. 8-2) and whether it is "necessary in a democratic society" for one or more of those reasons.

As to the "in accordance with the law" element of Article 8 (Art. 8), the first applicant submits, inter alia, that the characterisation of the transmission of the programme as concerned with C's care and upbringing and the consequent right to make a 'prohibited steps order' under Article 8 (Art. 8) of the 1989 Act was a novel and unforeseeable development of the law which is demonstrated by the fact that neither B nor the Official Solicitor relied on this argument. It is also alleged that the Court of Appeal decision conflicted with its own jurisprudence on the matter. The Commission agrees with the first applicant that "in accordance with the law" means that not only must the interference in question be authorised by a rule of domestic or international law and be adequately accessible, but that a law cannot be regarded as such unless it is formulated with sufficient precision to enable the citizen to regulate his conduct (Eur. Court HR, Sunday Times v. the United Kingdom judgment of 26 April 1979, Series A no. 30, p. 31, para. 49). The Commission considers that the applicant is essentially submitting that the principles enunciated by domestic law were so imprecise that she had no way of foreseeing that the eventual test to be applied by the Court of Appeal would lead to the undermining of her "bona fide" view as to the welfare of C.

However, the Commission notes that the applicant was at all relevant times legally represented. It is also noted that the titles of the orders for the relevant injunctions referred to the inherent jurisdiction of the court and the 1989 Act. It also notes the clear provisions of sections 1, 3, 8 and 10 of the 1989 Act upon which Ward LJ (together with the Master of the Rolls) relied leading to that court considering C's welfare as the paramount consideration even if that were to be contrary to the relevant parent's decision. It is noted that Ward LJ accepted that the case focused on questions touched on but "not fully developed" in the growing body of authority regarding the courts' power to control publicity affecting children. However, and even if this means that it must be accepted that there can be some doubt as to the precision by which the basis for the courts' jurisdiction and the applicable principles was enunciated by statute and jurisprudence at the relevant time, the Commission considers that the first applicant was "able to foresee to a degree that was reasonable, in the circumstances, a risk" that the Court of Appeal would base its jurisdiction on the above-noted sections of the 1989 Act and apply the principle outlined in section 1 of that Act (see the above-cited Sunday times judgment, p. 31, para. 50 and pp. 32-33, para. 52).

The fact that neither B nor the Official Solicitor relied on such a possibility in opposing the first applicant's request, does not, in view of the statutory nature of the provisions upon which the Court of Appeal relied, change the objective foreseeability of that approach. Moreover, the first applicant has not made any attempt to show how the Court of Appeal's approach to existing jurisprudence was anything other than that court's interpretation of jurisprudential principles. Accordingly, the Commission considers that the interference was "in accordance with the law".

As to whether the interference pursued a legitimate aim, the first applicant disputes, in particular, that the interference "for the protection of the rights and freedoms of others" and submits that this is clear from the courts' comment that the programme could be made using another less well known child as a subject. According to the applicant, it "was, ..., only because <C> was the daughter of a well-known and public figure, a man who might receive adverse tabloid

coverage after the programme, that the courts found it necessary to intrude and overrule the family's decision". The Commission considers that the obvious implication from the applicant's submission, that the courts were concerned to protect B from adverse publicity, is not sustainable. The High Court expressly stated that this was not in any way a concern in the proceedings, there is no evidence whatsoever from the detailed judgments that this was an issue for the domestic courts and it is clear that the courts were concerned with the impact on C of the probable sensational tabloid publicity that transmission of the proposed programme would generate. It is consistent with this concern for C's welfare that the court would suggest that the same problem would not arise for a less well known child at the Institute. Accordingly, the Commission is satisfied that, since the domestic courts' interference pursued C's welfare, the interference pursued the legitimate aim of "the rights and freedoms of others".

As to necessity of the interference, the first applicant points out, inter alia, that there can be no closer bond than that which develops between a devoted single mother and an only child who is handicapped. She submits, in the first place, that since her decision to make the television programme was taken in good faith and with the proper advice, the courts should have followed her decision unless they found it irrational or in bad faith. Secondly, she submits that the courts are not well placed to make the assessment they did - none of the judges had ever met C, they were elderly males of an elite class unlikely to have had experience of raising children with handicaps like C, they had no personal interest in C or her future and they could not possibly know how the transmission of the programme would affect C. In contrast C's family were well placed to so decide on C's best interests. Thirdly, she argues that the judges were wrong in considering that the transmission of the programme would adversely affect C - she points out that the only concrete example given by the High Court of such adverse effect was that C would be asked at school what it was like being a member of a one parent family (whereas 22% of children in the United Kingdom belong to one-parent families) which indicates that that court was not apparently well disposed to single mothers.

The Commission recalls that the case-law of the Convention organs establishes that the notion of necessity implies that the interference corresponds to a pressing social need and that it is proportionate to the aim pursued. In addition, in determining whether an interference is necessary, the Convention organs will take into account that a margin of appreciation is left to the Contracting States as to the necessity of a given measure (Eur. Court HR, W v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 27, para. 59). Furthermore, when so determining, the Commission observes that it is not its task to take the place of the competent national courts and make a fresh examination of all the facts and evidence - rather the task of the Commission is to examine whether those courts adduced reasons to justify the relevant interference which are "relevant and sufficient" (Eur Court HR, Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, p. 32, para. 68).

Moreover, in cases where the fulfilment of the rights of parents might appear to threaten the rights, or interfere with the interests, of a child under Article 8 (Art. 8) of the Convention, it is for the national authorities to strike a fair balance between the relevant competing interests: what will be decisive is whether the national authorities have made such efforts "as can be reasonably demanded under the special circumstances of the case" to accommodate the parents rights. (Eur. Court HR, Olsson v. Sweden judgment (No. 2) of 27 November 1992, pp. 35-36, para. 90 and Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299, pp. 21-22, para. 57). The Commission considers that this accepted approach of the Convention organs to such cases answers the second submission of the applicant as to the "necessity" of the interference.

In the present case, the Commission notes the first applicant's first submission in this context and has had regard to the applicant's devoted care for C since C's birth, appreciates the bond that exists between the first applicant and C and does not find any evidence which would contradict the domestic courts' view that the first applicant's decisions as regards C were taken bona fide.

On the other hand, the Commission notes the following. The present applications are concerned not with the initial imposition of the injunctions but rather the need to continue or vary those injunctions in a particular context. In this respect, the Commission notes the finding of the High Court that the applicant had jointly applied (with B) for the first of those injunctions with the express intention of protecting the privacy of C. It is also noted that the applicant was legally represented as regards the High Court proceedings of 9 March 1993. The second injunction (15 September 1993) was not opposed by the applicant and was a direct result of her television appearance in breach of the first injunction.

In addition, the Commission considers that the High Court carefully considered in a balanced manner the impact on C's welfare of the proposed programme. The High Court had before it numerous documents and detailed relevant information. The court carried out a detailed analysis of the factual background of the applicant's birth, the ensuing press coverage to the date of the relevant court hearings (including press coverage of the applicant's appearances on television in September 1993 and October 1993), the impact of the making of the programme on C and the effect on C of the transmission of the programme. On the basis of this analysis, the High Court concluded that the "overwhelming probability" was that the transmission of the programme would attract extended secondary tabloid publicity because of C's parents' high profile, the circumstances surrounding her birth and the subsequent differences between C's parents.

Furthermore, the High Court detailed a number of ways in which it considered publicity could impact negatively on C (which are outlined in the above FACTS). While the High Court accepted the first applicant's bona fides, it considered that she had seriously underestimated the publicity considerations to which the court had made reference. The High Court also accepted that certain aspects of the proposed programme would not necessarily harm the applicant (namely, the filming itself) and was prepared to accept that there could be some benefit in terms of short-term encouragement to C. However, it was clear, in the view of the court, that any such short-term benefit was outweighed by the "serious consequences" which transmission of the programme would entail for C. Accordingly, the High Court concluded that the transmission of the programme would not be in the overall welfare of C. The Court of Appeal "wholeheartedly" agreed with the High Court's analysis in this respect, which latter court also noted that, when considering acting in opposition to a parent's wishes, the courts must "act cautiously".

As to the remaining submissions of the applicant as regards the necessity of the interference, the Commission does not accept that there is any evidence that the domestic judges were in any way prejudiced by the fact that the first applicant was a single mother - on the contrary, both the High Court and the Court of Appeal expressed their respect for the first applicant's care of and devotion to C. The first applicant submits that the High Court only focused on questions being asked of C about being a member of a one parent family to illustrate the impact on C of the probable publicity. However, the Commission considers this to be an incorrect description of the High Court's detailed analysis in that respect - the High Court used this question as an example of the nature of the possible harassment of C, harassment being only one of the ways identified in which the publicity could impact negatively on C.

Accordingly, the Commission considers that, in the circumstances of the present case and in view of the margin of appreciation accorded to States in this area, the imposition by the courts of their view as to the best interests of C despite the bona fide views to the contrary of the first applicant was supported by "relevant" as well as by "sufficient" reasons. In the view of the Commission, the domestic courts made such efforts as could be reasonably demanded to accommodate the first applicant's rights and the interference was accordingly proportionate to the legitimate aim pursued.

(b) As regards the procedural requirements implied in Article 8 (Art. 8) of the Convention to ensure effective respect for family life, the Commission notes that the applicant was at all relevant times legally represented, generally by a solicitor and a barrister, during the proceedings. The Commission is satisfied that the first applicant was given every opportunity to put forward the views which, in her opinion, would be decisive for the outcome of the proceedings. Insofar as it is argued that the timing of the Court of Appeal's judgment meant that the decision was a foregone conclusion because C had already left the Institute prior to the date of the judgment, the Commission notes that the video made of C in the Institute was of commercial quality and could have been used to make the programme had the Court of Appeal decided differently. Furthermore, the Commission considers that the proceedings were conducted within a reasonable period of time - the proceedings to challenge the injunctions commenced on 24 February 1995; having heard all parties the High Court delivered a detailed judgment on 10 March 1995; the Court of Appeal judgments had been delivered by 31 July 1995; and the House of Lords communicated its decision by letter dated 14 December 1995.

Accordingly, the Commission finds that the procedural requirements implicit in Article 8 (Art. 8) of the Convention were complied with and that the applicant was involved in the decision making process to a degree sufficient to provide her with the requisite protection of her interests (Eur. Court HR, H v. the United Kingdom judgment of 8 July 1987, Series A no. 120, pp. 27-28, paras. 87-90 and W v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 27, para. 59).

Consequently, the Commission considers the complaint by the first applicant under Article 8 (Art. 8) of the Convention inadmissible as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. All three applicants complain that the refusal to vary or discharge the injunctions constituted a violation of Article 10 (Art. 10) of the Convention. The second and third applicants rely on the first applicant's submissions in this regard. Article 10 (Art. 10) of the Convention, insofar as relevant reads as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, ..."

The Commission does not consider that it is necessary to decide whether the third applicant can be considered to be a "victim" within the meaning of Article 25 (Art. 25) of the Convention or whether the introduction of the application by the second and third applicants within six months of the decision of the House of Lords, in domestic

proceedings to which those applicant's were not parties, was within the time-limit set down by Article 26 (Art. 26) of the Convention since, for the reasons set out below this complaint is, in any event, inadmissible.

As to the issue of necessity, the applicant submits, in the first place, that, although the basis of the High Court's judgment was the duty of confidentiality owed to C, the information contained in the programme would not have been confidential since, inter alia, the information had already been made public. If a duty of confidentiality was the issue for the High Court, the applicants consider it inconsistent to suggest that the programme would not give rise to a similar breach of the relevant duty to another child.

Secondly, they consider that the focus by the High Court on the mother's unmarried status was insufficient substantiation of the alleged harm any publicity would cause to C; they consider that it was not appropriate for the courts to substitute their opinion for the bone fide, thoughtful and reasonable decision of the mother and they submit that, in view of the pre-publication nature of the injunctions and the means of communication of the programme (television), it was disproportionate for the courts not to vary or discharge the injunctions. Thirdly, the applicants consider that the domestic courts erred in that they failed to take account of the role of popular television in serving the values protected by Article 10 (Art. 10) of the Convention, considering that the domestic courts overlooked the judgment of experienced professionals that the interest of the general public would be engaged in a manner not achievable by an unknown child.

The Commission recalls that an interference with an individual's right of expression entails a violation of Article 10 (Art. 10) of the Convention if it does not fall within one of the exceptions provided for in para. 2 of that Article. The Convention organs must therefore examine in turn whether the interference was "prescribed by law", had an aim that is legitimate under Article 10 para. 2 (Art. 10-2) and was "necessary in a democratic society for the aforesaid aim (Eur. Court HR, Sunday Times v. the United Kingdom judgment, loc. cit., p. 29, para. 45).

The adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists but it goes hand in hand with European supervision, embracing both the law and the decision even those given by independent courts. The task of the Convention organs is to review under Article 10 (Art. 10) the decision delivered by the national authorities pursuant to their power of appreciation and the interference complained of must be looked at in light of the case as a whole in order to determine whether it was proportionate to the legitimate aim pursued and whether the reasons pursued by the national authorities to justify it are "relevant and sufficient". (Eur. Court HR, Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59)

While the tests applied to determine whether an interference with the rights guaranteed by Articles 8 and 10 (Art. 8, 10) are similar, the Commission must take into account, in the context of Article 10 (Art. 10) of the Convention, that the right to freedom of expression is one of the essential foundations of a democratic society and that prior restraints call for the "most careful scrutiny" (Eur. Court HR, Observer and Guardian v. the United Kingdom judgment, loc. cit., pp. 29-30, paras. 59-60). In addition, in considering the "duties and responsibilities" of the applicants as persons exercising their freedom of expression through the making and production of a television programme, the potential impact of the programme on the public and, consequently, on C must be considered to be an important factor (Eur.

Court HR, Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23 para. 31).

The Commission notes that by continuing the injunctions, the domestic courts prevented all the applicants from making a television programme featuring the education and development of C in an educational and behavioural institute. The domestic courts did not question the bona fides of those who wished to make the programme, the Court of Appeal noting this expressly as regards the applicants and the "production company". The applicants submit that the programme was of significant public interest in that it would inform the educational authorities in the United Kingdom, the families of those who suffer from similar problems as C and those sufferers themselves about other educational and behavioural methods which can significantly improve the latter's potential. The Commission has also had regard to the purpose of the programme, as outlined in the second applicant's letter to the Institute dated 2 February 1993 and Carlton TV's letter to the first applicant's solicitor dated 13 June 1995. Accordingly, the Commission considers that the continuance of the injunction by the domestic courts constituted an interference with all three applicant's right to freedom of expression within the meaning of Article 10 para. 1 (Art. 10-1) of the Convention.

As to whether the interference was "prescribed by law", the Commission considers in these cases that the terms "in accordance with the law" (Article 8 (Art. 8)) and "prescribed by law" (Article 10 (Art. 10)) are to be read in the same way (see, mutatis mutandis, Eur. Court HR, Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, p. 31, para. 66). Accordingly, the Commission relies on its analysis at 1. above, to conclude that it considers that the interferences were "prescribed by law" within the meaning of Article 10 (Art. 10) of the Convention. The Commission also considers, based on its analysis above, that the aim pursued by this interference was legitimate in that it pursued "the protection of the rights and freedoms of others" namely, C.

As to whether the interference can be considered "necessary", the Commission notes the purpose of the documentary programme and the acceptance of the applicants' bona fides in this respect outlined above. It is also noted that the first applicant's wish to set right what she considered to be a distorted public image of C was not accepted by the High Court as having any force mainly because it was not accepted that the public's view of C was so distorted.

The Commission notes the relative similarity of the tests to be applied in the context of the necessity of the interference under Articles 8 and 10 (Art. 8, 10), that the same legitimate aim is pursued in each case and that the practical result of the interferences with the rights of the applicants guaranteed by Articles 8 and 10 (Art. 8, 10) was their inability to produce the proposed programme. It considers therefore that the reasons outlined in the context of Article 8 (Art. 8) above for its conclusion that the interference with the first applicant's rights under Article 8 (Art. 8) was "necessary" are also relevant to its consideration of the necessity of an interference under Article 10 (Art. 10).

The Commission would add that the High Court considered that if it had to carry out a balancing exercise (for the purposes of Article 10 (Art. 10) of the Convention or otherwise) between the welfare of C and the public interest in the programme, it would "firmly see the scales as coming down in favour of there being an order against the programme being made". The High Court, accordingly, considered that the exceptions contained in Article 10 para. 2 (Art. 10-2) of the Convention had been established, although it emphasised that it was cognisant of the importance to be accorded to freedom of publication and of the media.

Moreover, and as regards the public interest in seeing the programme, the Commission notes, in particular, the comment of the High Court that, if the justification for making the programme was informing the public about the Institute and its methods, there was no reason why this aim could not be achieved by making another child, suffering the same problems as C and studying at the Institute, the subject of the programme. The Commission would refer to its response at 1. above to the applicant's challenge to this comment of the High Court. The High Court was, in the Commission's view, pointing out that if one eliminates the notoriety which attaches to C's background, one eliminates the main concern of the domestic courts (harmful secondary tabloid publicity) while still achieving the informative process pursued by the applicants. While the Commission accepts that the high profile nature of C's parents and, consequently, of C herself could increase public interest in, and the impact of, the programme, the Commission considers it justifiable to favour C's welfare over any greater public impact of the proposed programme consequent on the notoriety of C. As to the applicants' submission that the making of the programme with another less well-known child would be inconsistent with the court's reliance on the duty of confidentiality, it is noted that the Court of Appeal did not base its jurisdiction on that duty.

In such circumstances, the Commission is of the view that there were "relevant" and, in addition, "sufficient" reasons for the interference with the applicants' right to freedom of expression. Accordingly, the refusal to vary or discharge the injunctions to allow the proposed television programme to be made and transmitted constituted a justifiable interference with the applicants' rights within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. It follows that the complaint of the applicants under Article 10 (Art. 10) of the Convention must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission,

DECIDES TO JOIN APPLICATION NOS. 32712/96 AND 32818/96;

unanimously,
DECLARES THE APPLICATIONS INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber