

AS TO THE ADMISSIBILITY OF

Application No. 36931/97
by Patricia HERRON
against United Kingdom and Ireland

The European Commission of Human Rights (First Chamber) sitting in private on 3 December 1997, the following members being present:

MM M.P. PELLONPÄÄ, Acting President
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
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 1 February 1995 by Patricia HERRON against the United Kingdom and Ireland and registered on 18 July 1997 under file No. 36931/97;

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 applicant is an Irish citizen, born in 1951 and currently resident in Dublin. She is unrepresented.

The facts as submitted by the applicant may be summarised as follows.

The applicant and TM were married in 1982, separated under Irish law in 1987 and divorced under English law in 1992. They have one child, N, a boy, born in 1980. The applicant has lived in Ireland from 1982 onwards. N lived in Ireland from 1982 until he was taken to England by his father in October 1993. There has been protracted litigation concerning N with over 80 applications in Ireland alone.

In 1988 the applicant alleges that she discovered that her son had been sexually abused by TM and his brother between 1983 and 1987. She claims that TM was a practising homosexual and paedophile. The applicant alleges that she was informally told by the Irish police that no prosecution proceedings would be brought against TM, despite a full disclosure by N, because TM, who had been imprisoned for various

offences prior to their marriage, was a police informer.

The applicant was awarded custody of N on 11 December 1990 by an Irish High Court Judge who granted TM supervised access. In a note of judgment it was recorded that the judge found the allegations of sexual abuse to be "false". However, in a letter from the judge to the applicant dated 2 February 1994 he wrote:

"I did not think your husband's sexual abuse of your child has (sic) been proved as a matter of probability. It was unnecessary for my decision to make a finding on that particular aspect of the case".

In 1992 the applicant brought a private prosecution against TM in Ireland but claims that she was denied access to files because of the police decision not to prosecute TM. The applicant brought judicial review proceedings to compel the Director of Public Prosecutions in Ireland either to bring proceedings himself or to disclose documentation to the applicant for her private prosecution. These proceedings were heard by the Irish High Court and then the Irish Supreme Court which found, in delivering its judgment on 19 May 1994, that there needed to be evidence of mala fides or improper motives on the part of the Director of Public Prosecutions before his decision could be challenged by way of judicial review and there was no prima facie case in this instance for mala fides or improper motives.

The applicant experienced serious difficulties with N's behaviour which she attributed to his alleged abuse. In 1992 the applicant kept N from school to supervise an intensive period of therapy to teach him appropriate social skills. However, N ran away from home and was later found to have suffered non-accidental injuries. He stated that he had been beaten by his mother's cohabitee, DO'S. N refused to return home and a place of safety order was obtained by the Southern Health Board in June 1992 who contacted TM. The applicant then obtained an order prohibiting contact between TM and N. In August 1992 N returned to his mother. She obtained an order preventing TM from taking N out of the jurisdiction in February 1993. N continued to display behavioural difficulties. The applicant believed that he required psychological counselling as an in-patient and described him as having a psychopathic personality.

N ran away from home on at least 8 occasions between August and September 1993 and went missing in October 1993. The applicant became aware that TM was in Cork and informed the police. N appears to have approached his father for help and was taken to England by TM on 19 October 1993.

The applicant applied under the Hague Convention for N's return. Initially, the English High Court ordered that N be returned to Ireland. N then instructed his own solicitors to become a party and his father attempted to obtain a stay of the proceedings. Neither was successful. The applicant then instructed a private investigator to ensure that N remained in local authority care. Upon learning this, N absconded. The order to return to Ireland was then stayed in the hope of encouraging N to return to care. This was successful and N was granted leave to become a party on 29 November 1993.

In the English Court of Appeal N appealed the order for his return to Ireland and gave evidence, through reports from English and Irish social workers that he was genuinely frightened of his mother and her cohabitee, DO'S. He said that he had been physically and emotionally abused, had contemplated suicide and wished to stay in England with TM. On 21 December 1993 the court held that N's wishes were sufficiently strong for the order for return to be over-ruled pursuant to Article 13 of the Hague Convention. Interim residence was granted to the applicant's sister and N was made a ward of the English High Court.

On 7 June 1994 an order was made for TM to have interim care of his son. No transcript of that judgment has been provided. On 24 June 1994, upon an application by the Official Solicitor, the English High Court ordered that, in N's best interests, allegations of sexual abuse before 1988 would not be re-opened during the substantive hearing determining N's residence. Inter alia, this would protect N, who was then a party, from hearing all the allegations and would also reflect the fact that they had not been proved as a matter of probability in the Irish court. This decision was not appealed.

In the substantive hearing in the English High Court in October 1994 the applicant suggested that N should either be placed in a secure unit in Ireland or accommodated by the London Borough of Westminster, until they decided whether or not to take him into care. TM suggested that N should remain with him. Both parents gave evidence although the judge did not find either to be very impressive witnesses. The judge also heard from a consultant child psychiatrist and a social worker, both of whom recommended that N remain with his father, the psychiatrist emphasizing the importance of attendance at the Bloomfield clinic in Guy's hospital. Two reports had also been prepared by doctors at the Bloomfield clinic. The psychiatrist considered that forcibly detaining N in an Irish assessment centre would not be beneficial. While the judge saw the force of the applicant's argument that N should be returned to Ireland as he was an Irish child who was used to Irish culture, he also noted the psychiatrist's view that force would have to be used against N to ensure that he returned to Ireland.

In his judgment delivered on 11 October 1994, the judge identified N as being a disturbed boy. He considered that N needed considerable care, including the loving care of a parent, if he was to overcome his difficulties. The judge noted that the applicant did not propose to visit N if he were returned to Ireland and detained in a secure unit unless N asked her to do so. The judge decided that it would be in his best interests if he remained with TM, placing limited reliance upon N's wishes. He described the proposal as being the least disadvantageous for N. The judge also ordered that N should not be taken to Ireland without the leave of the court. The decision was not appealed.

N travelled to Ireland on his own in March 1996 leading the applicant to make a further application in November 1996 the purpose and contents of which are unexplained. The applicant is of the belief that there is a conspiracy between the United Kingdom and Ireland to protect TM from prosecution for sexual offences and that one effect of the conspiracy has been to allow TM to have care and control of N.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention that the United Kingdom authorities have been negligent in failing to bring TM to justice or to protect N from sexual abuse and have also violated her custody rights.
2. The applicant complains under Article 8 of the Convention that the Irish authorities have been negligent in failing to protect N from abduction, sexual abuse and removal from the applicant's custody, have failed to prosecute TM for alleged sexual abuse and have perverted the course of justice.
3. The applicant complains under Article 3 of Protocol No. 4 against the United Kingdom that N has been prevented from returning to Ireland by the High Court order dated 11 October 1994.
4. The applicant invokes Article 5 of Protocol No. 7 in relation to the United Kingdom and Ireland, arguing that the English and Irish authorities have been biased against her in comparison with their

treatment of TM.

THE LAW

1. The applicant invokes Article 8 (Art. 8) against the United Kingdom and complains that the English authorities have undermined her rights of custody, been negligent in their duty to bring TM to justice and protect N from sexual abuse and have perverted the course of justice in violation of her family rights.

Article 8 (Art. 8) provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

The Commission finds that the decisions of the English courts revoking the order to return N. to Ireland and awarding care and control of N to TM disclose an interference with the applicant's right respect for family life. While the Commission notes that the applicant's proposals in October 1994 were for N to be placed in secure accommodation in Ireland where she would visit him, rather than be returned to her home, the decision of the English High Court in granting custody to TM may be regarded as interfering with her parental rights in terms of being able to control the treatment given to her son.

Once the interference with the applicant's right to family life is established, the Commission is required to consider whether or not the interference was justified, by reference to the conditions set out in Article 8 para. 2 (Art. 8-2) of the Convention: the interference must be "in accordance with the law", it must be "necessary in a democratic society" and it must pursue the legitimate aims set out in Article 8 para. 2 (Art. 8-2) itself (eg. Eur. Court HR, W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, para. 60).

The applicant has suggested that there is an international conspiracy to prevent N from living with her, allegations which are wholly unfounded. There is no indication that the decision made by the English High Court 11 October 1994 was not "in accordance with the law". The judge applied the principles under the wardship jurisdiction, namely, to have regard to the welfare of the child, to come to the conclusion that it was in N's best interests to remain a ward of court with care and control to his father.

The Commission is also of the opinion that the interference had a legitimate aim under Article 8 para. 2 (Art. 8-2) namely promoting and protecting the best interests of the child, N and as such, may be regarded as having been effected for "the protection of health or morals" or for the "protection of the rights and freedoms of others".

As regards the question of the necessity of the interference the Commission recalls that the Court's case-law states that necessity implies that the interference corresponds to a pressing social need and is proportionate to the legitimate aim pursued (eg. Eur. Court HR, Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, para. 67).

In determining the question of whether the interference is necessary in a democratic society, the Commission acknowledges that the

Contracting State must be allowed a margin of appreciation since in general, having the benefit of first-hand experience of the case and the parties, it will be in a better position to evaluate the necessity of any interference. However, the review which can be carried out by the Commission is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith but extends to an examination of whether or not the reasons which are used to justify the interference are "relevant and sufficient" (see eg. Eur. Court HR, Olsson judgment, op. cit., para. 68).

The Commission observes that the court heard extensive evidence from the parents, a social worker who had worked with N, a consultant child psychiatrist and also had before it two other doctors' reports. Both independent witnesses who gave oral evidence, the social worker and the psychiatrist, were of the view that a return to Ireland would be detrimental to N, particularly given that the applicant intended that N should be detained in a secure unit upon his return to Ireland. The judge noted N's objections to returning to Ireland and identified N as being a disturbed boy who needed the loving care of a parent which he felt was more likely to come from his father. Consequently, the judge awarded care and control of N to TM. The fact that the judge described this choice as being the least disadvantageous for N reflects the difficulty of the decision. The Commission finds that his decision can be considered to be based on "relevant and sufficient reasons".

The Commission must also consider whether or not the manner in which the court came to its decision disclosed any evidence of either procedural or substantive unfairness (eg. Eur. Court HR, W. v. the United Kingdom judgment, op. cit., paras. 62-64). The applicant has complained in particular that, in its decision of 24 June 1994, the High Court excluded evidence regarding the alleged sexual abuse of N from being considered within the substantive hearing regarding N's residence. The Commission notes that matters concerning the admissibility of evidence fall primarily within the appreciation of the domestic courts (Eur. Court HR, Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, para. 46). The applicant was represented in the hearing on 24 June 1994 and was afforded the opportunity to put forward arguments as to the relevance of abuse allegations. The Commission recalls however that the court considered that, in N's best interests, the evidence regarding sexual abuse ought not to be included noting in particular that, as a party N would have been aware of all the allegations and moreover, that the Irish High Court judge had not found the allegations proven as a matter of probability. It does not find that this decision discloses any arbitrariness or unfairness.

As regards the complaint that there has been a failure to protect N from sexual abuse and to bring TM to justice, the Commission notes that the alleged sexual abuse occurred in Ireland between 1983 and 1987, six years before N went to England. There is no suggestion that any abuse has occurred since that date.

The Commission accordingly finds that the interference with the applicant's right to respect for her family life may be regarded as being necessary in a democratic society for the protection of the rights of others, namely the applicant's son, N, and therefore complies with the requirement of Article 8 para. 2 (Art. 8-2). It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also invokes Article 8 (Art. 8) of the Convention against Ireland complaining that the Irish authorities have been negligent in failing to protect N from removal from her custody, abduction and sexual abuse, have negligently failed to prosecute TM for alleged sexual abuse and have undermined her custody rights and perverted the course of justice in the English and Irish courts in violation of her family rights.

There is no suggestion that the Irish authorities should have known about the alleged abuse prior to the applicant reporting it in 1988. This complaint is unsubstantiated and, assuming that there were no domestic remedies to exhaust, would fail under the six month rule imposed by Article 26 (Art. 26) of the Convention, since the application was introduced on 1 February 1995. The alleged negligence in failing to protect N from abduction and removal from her custody has also not been the subject of any proceedings. Again assuming that there were no remedies to exhaust, the Commission notes that this complaint would also fail under the six month rule as N was taken to England in October 1993.

The allegations that the Irish authorities have perverted the course of justice appear to stem from the applicant's wholly unsubstantiated allegations that there is an international conspiracy to protect paedophiles including TM. The Commission notes that the English High Court alone has decided N's long term residence. As regards the applicant's unsuccessful attempt to bring judicial review proceedings against the Director of Public Prosecutions in Ireland to obtain an order for mandamus to force him to institute proceedings against TM, the Commission notes that its case law provides that the right of access to court does not include a right to have criminal proceedings instituted against a third party (eg. No. 9777/82, Dec. 14.7.83, D.R. 34, p. 158).

The Commission finds that this part of the application discloses no appearance of a violation of the provisions of the Convention and should be rejected as being manifestly ill-founded as a whole pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant complains under Article 3 of Protocol No. 4 (P4-3) against the United Kingdom that N has been prevented from returning to Ireland by the High Court order dated 11 October 1994.

Article 3 of Protocol No. 4 (P4-3) provides that:

"1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national."

Protocol No. 4 has not been ratified by the United Kingdom. It follows that the Commission is not competent to deal with this part of the application as it is incompatible pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant invokes Article 5 of Protocol No. 7 (P7-5) against both the United Kingdom and Ireland.

Article 5 of Protocol No. 7 (P7-5) provides that:

"Spouses shall enjoy equality of rights and responsibilities of a private law character between them and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."

Protocol No. 7 has not been ratified by the United Kingdom nor Ireland. These complaints must therefore also be rejected as incompatible pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
Acting President
of the First Chamber