European Commission of Human Rights

Application No. 10929/84

Jon NIELSEN

against

DENMARK

REPORT OF THE COMMISSION

(adopted on 12 March 1987)

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant, Jon Nielsen, is a Danish citizen. He was born out of wedlock in 1971 and resides in Copenhagen. Before the Commission he is represented by his father, Mr. Henning Nielsen, and by Mr. Jørgen Jacobsen, a lawyer practising in Copenhagen.

The Government of Denmark are represented by their Agent, Mr. Tyge Lehmann, Ministry of Foreign Affairs.

3. The case concerns the applicant who in 1983, after being the subject of a custody dispute between his parents, was placed in a child psychiatric ward of a State hospital against his wish but in accordance with the wishes of the holder of the parental custody. The applicant considers that he was deprived of his liberty contrary to Article 5 para. 1 of the Convention and alleges that he did not have the possibility of taking proceedings by which the lawfulness of the detention could be decided by a court as provided by Article 5 para. 4 of the Convention.

B. The proceedings

4. The application was introduced on 15 February 1984 and registered on 3 May 1984. The Commission considered the case on 2 October 1984 and on 7 May 1985 and decided on the latter

date to give notice of the application to the respondent Government in accordance with Rule 42 para. 2 (b) of its Rules of Procedure and to invite them to present before 19 July 1985 their observations in writing on the admissibility and merits of the application.

The Government's observations were dated 19 July 1985 and the applicant's observations in reply were dated 7 October 1985.

5. Legal aid under the Addendum to the Commission's Rules of Procedure was granted to the applicant on 11 September 1985.

6. On 5 December 1985 the Commission decided to invite the parties to appear before it at a hearing on the admissibility and merits of the case.

7. The hearing took place on 10 March 1986. The applicant, who was present himself, was represented by his father, Mr. Henning Nielsen, by Mr. Jørgen Jacobsen, and by Mr. Anders Boelskifte as Adviser. The Government were represented by Mr. Tyge Lehmann as Agent, Mr. Gunnar Blæhr of the Ministry of Foreign Affairs as Adviser, Mr. Torben Melchior of the Ministry of Justice as Counsel and Mr. Bo Vesterdorf of the Ministry of Justice as Adviser.

8. Following the hearing, the Commission declared the application admissible.

9. The parties were then invited to submit any additional observations on the merits of the case which they wished to make. The Government submitted additional observations on 13 June 1986, a copy of which was transmitted to the applicant. No further observations were received from the applicant.

10. After declaring the case admissible the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Consultations with the parties took place between 2 May and 15 July 1986. In the light of the parties' reaction, the Commission now finds that there is no basis upon which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following Members being present:

MM. J. A. FROWEIN, Acting President
C. A. NØRGAARD
G. JÖRUNDSSON
B. KIERNAN
A. S. GÖZÜBÜYÜK
A. WEITZEL
J. C. SOYER
H. G. SCHERMERS
H. DANELIUS
G. BATLINER
Mrs. G. H. THUNE
Sir Basil HALL

The text of this Report was adopted on 12 March 1987 and is now transmitted to the Committee of Ministers of the Council of Europe in accordance with Article 31 para. 2 of the Convention.

12. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

13. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on admissibility of the application as Appendix II.

14. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

15. The parents of the applicant, who was born on 7 April 1971, lived together from 1968 until 1973. They were not married and accordingly only the mother had parental rights over the child. After the relationship between the parents broke down in 1973, the applicant remained with the mother and the father's access to him was initially effected on a "gentlemen's agreement" basis. However, this system did not function well and in 1974 the father obtained a specific access right through the competent authorities.

16. It appears that a closer relationship developed between the applicant and his father over the next years. According to Danish legislation at that time, however, it was not possible to petition the courts to have the custody rights transferred from the mother to the father. Therefore, the applicant's father introduced an application with the European Commission of Human Rights complaining inter alia that he had no effective possibility of obtaining from a court a determination on the merits covering the custody of his child and that he thus was treated differently from fathers of children born in wedlock. During the proceedings before the Commission the Custody and Guardianship of Children Act was changed. The Act thereafter provided that a court decision might vest parental custody in the father of a child born out of wedlock, when certain specified conditions were fulfilled (Section 28 para. 2 of the Act). This change of the law came into force on 1 October 1978. The Commission, therefore, on 5 December 1978 rejected the application since the applicant's father could no longer claim to be a victim of an alleged violation of the Convention (No. 7658/76, Dec. 5.12.78, D.R. 15, p. 128).

17. In the meantime, and until the summer of 1979, the father's right of access to the applicant had been implemented on a regular basis. However, in 1979 the applicant apparently refused to return to the mother after a two-week holiday with the father. The social authorities were contacted and, with the consent of all parties, it was decided to place the applicant in a children's home. However, he disappeared from there and returned to the father who, on 6 August 1979, instituted proceedings before the City Court of Ballerup (Ballerup ret) in order to have the custody rights transferred to him according to the new law. Father and child furthermore went "underground" until 8 October 1979, when the father was arrested by the police. He was released on 12 October 1979. With the consent of the mother, the social authorities, on 9 October 1979, placed the applicant in the Copenhagen county hospital, Nordvang, Department for Child Psychiatry.

18. On 23 October 1979 the father's right of access to the applicant was suspended. The father appealed against the decision to the Ministry of Justice, which, however, upheld the decision on 12

November 1979.

19. In a letter of 23 November 1979 to the hospital authorities, the chief physician at the county hospital Nordvang wrote:

> "(the applicant) was admitted to the hospital on 9.10.1979. The admittance was in accordance with the wishes of the holder of the custody rights and fully supported by the child. (The applicant) has all the time been happy about his stay here and has never expressed a wish to leave. On the contrary, we have felt obliged to protect the child from more kidnapping attempts and have rejected visits from suspicious persons trying to contact the boy who hardly knew these persons. To talk about detention in a psychiatric ward among mental patients or administrative deprivation of liberty is thus complete nonsense ...
>
> When admitted the boy was strongly affected by the events in question and thus in need of child psychiatric treatment. He has improved somewhat during his stay here but is still considerably affected by the situation and will still need psychiatric treatment. This could very well be carried out as out-patient treatment but the mother is at present worried that this would lead to kidnapping attempts by the father ...
>
> An impartial child psychiatric examination does not only involve an examination of the child in question but also thorough talks with both parents. Since this is not possible, I have adjourned the case and cannot therefore reach any conclusions."

20. The applicant disappeared from Nordvang on 11 December 1979 and hereafter lived in hiding with his father.

21. The above-mentioned court proceedings before the City Court of Ballerup concerning parental rights ended on 11 July 1980. The Court did not find a transfer of custody to the father to be in the interest of the child.

22. The applicant's father appealed against this judgment to the Court of Appeal for Eastern Denmark (Østre Landsret). On 25 November 1980 the parties agreed that the applicant should undergo a child psychiatric examination by Professor A. This examination resulted in a statement by Professor A of 16 February 1981 in which he concluded inter alia:

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

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

24. In November 1982, after having lived "underground" for approximately 3 years, the applicant's father again instituted proceedings before the City Court of Ballerup in order to have the custody rights transferred to him. Since he was wanted by the police, suspected of having kidnapped the applicant, the father did not attend the hearing but the father's lawyer pointed out that the applicant, now 12 years old, had lived with his father for 3 ½ years, obviously according to his own wish. To normalise the applicant's life it would be necessary to transfer the custody rights to the father.

25. The applicant's mother maintained that the applicant had been harmed due to the abnormal circumstances under which he had lived with his father. She was therefore determined to accept Professor A's offer concerning support from the State hospital child psychiatric ward (Rigshospitalets børnepsykiatriske afdeling) for a transitional period and to accept the professor's advice concerning the father's access to the applicant.

26. The City Court decided on 11 April 1983 that the circumstances of the case did not reveal a need for a transfer of the custody rights.

27. The applicant's father appealed against this judgment to the Court of Appeal. The applicant and his father were present on 22 September 1983 when the Court of Appeal pronounced judgment in which the City Court judgment was upheld. Leave was subsequently granted by the Ministry of Justice to bring the case before the Supreme Court (Højesteret). After the hearing in the Court of Appeal on 22 September 1983 the father was arrested by the police and charged with acting contrary to Section 215 read in conjunction with Section 261 paras. 1 and 2 of the Danish Penal Code (depriving the mother of the exercise of her parental rights). On 27 March 1984, the father, who had been detained on remand since his arrest, was sentenced to 9 months' imprisonment by the Court of Appeal sitting with a jury.

28. In the meantime the mother requested, advised by the social authorities of Herlev County and Professor A, that the applicant be admitted to the State hospital child psychiatric ward since it was clear that the applicant did not want to stay with her. After his father's arrest the applicant was then placed in a children's home until he was admitted to the ward on 26 September 1983.

29. According to Professor A, who was responsible for the applicant's treatment at the State hospital, the procedure followed in connection with the admission was the usual one for the ward in that the holder of the parental rights requested the admission, the family doctor provided the entry card and the ward accepted the admission.

30. With regard to the factual circumstances of the applicant's stay at the State hospital there is a certain discrepancy between the observations of the Government and those submitted by the applicant's representative.

31. The Government in particular refer to the following statements submitted by Professor A to the Medical Health Officer of Copenhagen (Københavns Stadslæge) and the Department of Health and Social Security (Social- og Sundhedsforvaltningen) on 6 January and 7 March 1984 respectively:

> "(The applicant) has expressed his dislike of staying here, but at no time has he attempted to run away. We have not been able to and have not wanted to prevent him from running away, which he could have done, inter alia, when he together with the other children left the ward e.g. to visit museums, to go for a hair cut. Also in this respect he has been in hospital on the same terms as the other patients of the ward. ...
>
> The treatment involves environmental therapy at the ward and regular talks with (the applicant). ...
>
> At no time has he been given medicamental treatment. ...
>
> Since 23 October 1983 his mother has visited the ward regularly during the usual visiting hours on Sundays and Wednesdays. Since 11 November 1983 (the applicant) has visited his mother at home. The visits were at first short,

but since 10 December 1983 he has been able to spend the weekends there. Christmas Eve and Christmas Day were spent with his mother and so was New Year's Day. ...

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

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

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

32. Due to the special circumstances of the case and due to a request from the applicant's representative, the National Board of Health (Sundhedsstyrelsen) carried out an investigation of the case. The Medical Health Officer of Copenhagen was requested to visit the ward in which the applicant was placed. In her report of 8 February 1984 she stated:

"The child psychiatric ward currently keeps 18 children in continuous treatment, the average period of therapy being about five or six months. The children are divided by age into three groups of six, each with its own delimited area. (The applicant) is placed in the section for adolescents, he has a room of his

own furnished with a plank bed, small table, bulletin board, chair and desk. The room clearly reflects his interest in building models; on the floor there is a pair of track shoes. (The applicant) is not at home while I am there but in school. During the past weeks he has been attending the same elementary school he used to go to and where he apparently feels at ease. Every day he goes to and from the school by cab, alone. The ward has recreational rooms where (the applicant) can spend time on carpentry work. There is also a lounge, a dining room and a kitchen. The children take turns in helping with the cooking, setting of tables, etc. Much is done to make the children feel at home. (The applicant) takes swimming lessons together with other children in the ward accompanied by one of the staff members. He has also gone sledge riding and may visit school friends. The entrance door to all children's wards is locked, partly to prevent the young children from running all over the hospital grounds where they might hurt themselves in lifts or lose their way. The entrance door is locked also in order to minimise the substantial risk of theft. (The applicant) is allowed to leave the ward if he asks for permission to go, for instance to the library. He moves around unaccompanied on these occasions.

My conclusion is that (the applicant) is staying in an environment as similar as possible to a real home and that he is by no means kept there against his will. On the contrary, he is allowed to move about outside the ward all by himself or in the company of staff members and/or other children. He has established rather good contacts with a boy of his own age (hospitalised on account of anorexia nervosa)."

33. In its report of 15 February 1984 the National Board of Health concluded:

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

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

To sum up: The National Board of Health sees no reason for criticising Professor (A) or the child psychiatric ward of the State hospital for their medical treatment of (the applicant)."

34. Whilst not repudiating the above statements, the applicant's representative has submitted the following:

"The child psychiatric ward is definitely a closed ward.

> The door to the ward was locked and (the applicant) was totally unable to receive visitors except in agreement with and under the surveillance of the staff at the ward ... In other words: the applicant was unable to leave the hospital if he so wished. ...
>
> (He) was not permitted to phone (his father's counsel) or his father, who was in prison charged with the kidnapping of the applicant, who had actually been the active party in the kidnapping. (The applicant) was under almost constant surveillance: he was unable to make social contacts; persons from outside the hospital were unable to get in contact with him without special permission ..."

35. The applicant stayed at the child psychiatric ward until 22 February 1984, the day on which he should have been discharged to his mother's home. However, he disappeared from the hospital and lived with various families in Jutland until 8 March 1984 when he was found by the Police and brought back to the State hospital in Copenhagen and re-admitted to the ward at the request of his mother. The applicant was discharged from the hospital on 30 March 1984 and placed in the care of a family not officially known to the father.

* * *

36. By letter of 23 October 1983 to the Ministry of Justice, the applicant's representatives questioned the lawfulness of the applicant's detention at the State hospital for child psychiatry contrary to his own wish. They maintained inter alia that the admission of the applicant to the hospital was unlawful since the provisions of the Mental Health Act on compulsory admission had not been observed. The Ministry of Justice submitted the matter to the chief psychiatrist at the psychiatric ward of the hospital who inter alia stated that the applicant had not been admitted to the ward pursuant to the provisions of the Mental Health Act, but pursuant to a decision made by the holder of the parental rights. At no time had the applicant been considered mentally ill.

37. On 28 December 1983 the Ministry accordingly replied that the applicant was not placed there in accordance with the Mental Health Act, but according to a decision by the mother as holder of the custody rights and therefore the Ministry refused to decide in the matter.

38. On 1 January 1984 the applicant's representatives nevertheless petitioned the courts, according to chapter 43 a of the Administration of Justice Act (retsplejeloven). They wanted a decision on the lawfulness of the applicant's placing in the State hospital. The defendant in this case was the Ministry of Justice which pleaded dismissal, maintaining that the applicant had not been subjected to administrative deprivation of liberty pursuant to the Mental Health Act.

39. By a court order of 6 January 1984 the Copenhagen City Court (Københavns byret) upheld the plea for dismissal of the case made by the Ministry of Justice on the following grounds:

"considering that (the applicant) (...) has been admitted to the child psychiatric ward of the State hospital, Copenhagen, on the basis of a decision made by (the mother), who is the holder of parental rights, (the applicant's) detention at the State hospital is not covered by Act, No. 118 of 13 April 1938 on the stay in hospital of mentally ill persons and therefore not subject to judicial review according to chapter 43 a of the Administration of Justice Act. For this very reason the petition shall have to be

dismissed."

40. The applicant's representatives appealed against this decision to the Court of Appeal maintaining, in particular, that if the applicant had not been a minor he could have challenged the lawfulness of his detention in the State hospital before the courts. Although the holder of the custody rights according to Section 19 of the Custody and Guardianship of Children Act had an extensive right to decide over the child such a right should be subject to certain restrictions. A totally involuntary detention ought to be an interference which could only be carried out administratively and thus under the conditions mentioned in Art. 71 para. 6 of the Danish Constitution despite the fact that the decision was carried out with the mother's consent.

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

42. Rejecting the State Attorney's latter argument, the Court of Appeal wrote in its decision of 15 February 1984:

> "The question whether a minor should be subjected to treatment in a hospital is normally decided by the holder of the parental right and such measures cannot be challenged by means of chapter 43 a of the Administration of Justice Act.
>
> Concerning the treatment of mentally deranged persons inter alia in public hospitals special rules apply according to Act No. 118 of 13 April 1938, cf. chapter 43 a of the Administration of Justice Act. From what has been established in this case it appears that (the applicant) does not suffer from any mental illness and according to the above there has been no question of admittance for treatment of a mental illness. The decision to admit (the applicant) to the State Hospital Department of Child Psychiatry after the disturbances he has been through and the decision on his temporary stay there is taken by his mother, who has the parental rights over him. The appellant's claim concerning judicial review according to chapter 43 a of the Administration of Justice Act cannot therefore be complied with and the judgment of the Copenhagen City Court to dismiss the case is upheld."

43. According to Section 371 of the Administration of Justice Act the applicant's representatives asked the Ministry of Justice, who was the defendant in the case, for leave to appeal to the Supreme Court. However, on 14 March 1984 the Ministry refused leave to appeal since the Ministry was of the opinion that the judgment would not be overruled by the Supreme Court.

* * *

44. The question whether to transfer the custody rights from the mother to the father had, as mentioned above, been brought before the Supreme Court following the decision of the Court of Appeal on 22 September 1983. Before the Supreme Court Professor A maintained, in a statement of 19 June 1984, that it would be in the best interest of the applicant that the parental rights remained with the mother. This opinion was supported by the Medico-Legal Council (Retslægerådet) in its statement of 9 August 1984. On 21 August 1984 the Supreme

Court overruled the lower courts' decisions and awarded custody over the applicant to his father. The applicant now lives with his father.

B. Relevant domestic law

a) Protection of personal liberty according to the Danish Constitution (Danmarks Riges Grundlov)

45. The right of personal liberty is protected according to Section 71 of the Danish Constitution, which reads:

> "§71 Stk. 1. Den personlige frihed er ukrænkelig. Ingen dansk borger kan på grund af sin politiske eller religiøse overbevisning eller sin afstamning underkastes nogen form for frihedsberøvelse.
>
> Stk. 2. Frihedsberøvelse kan kun finde sted med hjemmel i loven.
>
> Stk. 3. Enhver, der anholdes, skal inden 24 timer stilles for en dommer. Hvis den anholdte ikke straks kan sættes på fri fod, skal dommeren ved en af grunde ledsaget kendelse, der afsiges snarest muligt og senest inden 3 dage, afgøre, om han skal fængsles, og, hvis han kan løslades mod sikkerhed, bestemme dennes art og størrelse. .....
>
> Stk. 4. Den kendelse, som dommeren afsiger, kan af vedkommende straks særskilt indbringes for højere ret.
>
> Stk. 5. Ingen kan underkastes varetægtsfængsel for en forseelse, som kun kan medføre straf af bøde eller hæfte.
>
> Stk. 6. Uden for strafferetsplejen skal lovligheden af en frihedsberøvelse, der ikke er besluttet af en dømmende myndighed og som ikke har hjemmel i lovgivningen om udlændinge, på begæring af den, der er berøvet sin frihed, eller den, der handler på hans vegne, forelægges de almindelige domstole eller anden dømmende myndighed til prøvelse. Nærmere regler herom fastsættes ved lov.
>
> Stk. 7. Behandlingen af de i stk. 6 nævnte personer undergives et af folketinget valgt tilsyn, hvortil de pågældende skal have adgang til at rette henvendelse."

Translation

> "Section 71. (1) Personal liberty shall be inviolable. No Danish subject shall, in any manner whatsoever, be deprived of his liberty because of his political or religious convictions or because of his descent.
>
> (2) A person shall be deprived of his liberty only where this is warranted by law.
>
> (3) Any person who is taken into custody shall be brought before a judge within twenty-four hours. Where the person taken into custody cannot be immediately released, the judge shall decide, in an order to be given as soon as possible and at the latest within three days, stating the grounds, whether the person taken into custody shall be committed to prison; and in cases where he can be released on bail, shall also determine the nature and the amount of such bail ...
>
> (4) The pronouncement of the judge may be at once separately appealed against to a higher court of justice by the person concerned.

(5) No person shall be remanded in custody for an offence which can involve only punishment by fine or light detention.

(6) Outside criminal procedure, the legality of deprivation of liberty not executed by order of a judicial authority, and not warranted by legislation relating to aliens, shall at the request of the person so deprived of his liberty, or at the request of any person acting on his behalf, be brought before the ordinary courts of justice or other judicial authority for decision. Rules governing this procedure shall be provided by statute.

(7) The persons referred to in sub-section (6) shall be under supervision by a board set up by Parliament, to which board the persons concerned shall be permitted to apply."

46. The provision forms part of the protection of the citizen from the State and extends to interventions decided on and effected by public authorities.

b) The Custody and Guardianship of Children Act (Myndighedsloven)

47. The Danish rules on parental custody which were in force in 1983 are laid down in the Custody and Guardianship of Children Act. Children and young persons under 18 years of age are under parental custody unless they have contracted marriage.

48. According to Section 19 of the Custody and Guardianship of Children Act it is the duty and responsibility of the holder of the parental custody of a child born out of wedlock to provide for the care and welfare of the child and the holder of the custody has powers to decide on the personal conditions of the child. Section 19 reads as follows:

"§ 19. Forældremyndigheden medfører pligt til at sørge for barnets person og beføjelse til at træffe bestemmelse om dets personlige forhold."

Translation

"Section 19. The holder of the parental custody of the child has a duty to provide for the care and welfare of the child and has powers to decide on the personal conditions of the child."

49. The provisions on parental custody of children born out of wedlock are laid down in Section 28 of the Custody and Guardianship of Children Act, reading:

"§ 28. Forældremyndigheden over børn uden for ægteskab tilkommer moderen.

Stk. 2. Forældremyndigheden over barnet kan ved dom tillægges faderen, såfremt det findes påkrævet under særligt hensyn til barnets tarv. Ved afgørelsen skal navnlig lægges vægt på faderens hidtidige forbindelse med barnet ..."

Translation

"Section 28. The parental custody of children born out of wedlock is vested in the mother.

(2) The parental custody of the child can by a decision of the court be vested in the father where required out of special regard for the welfare of the child. In making the

decision, special importance shall be attached to the father's previous relationship with the child ..."

50. On 6 June 1985 the Custody and Guardianship of Children Act was amended by Act No. 230 of 6 June 1985. According to Section 26 and Section 33 sub-section 3 of the Act any minor who has attained the age of 12 is normally heard before a decision on parental custody, access rights or appointment of guardian is made. These provisions now read:

"§ 26. Er et barn fyldt 12 år, skal der, før der træffes afgørelse i en sag om forældremyndighed eller samværsret, finde en samtale sted med barnet herom. Samtalen kan dog undlades, hvis den må antages at være til skade for barnet eller uden nogen betydning for afgørelsen."

"§ 33 stk. 3. Skal værge beskikkes for en umyndiggjort eller for en mindreårig, der er fyldt 12 år, skal der finde en samtale sted herom med den pågældende, før afgørelsen træffes. Samtalen kan dog undlades, hvis den må antages at være unødvendig eller til skade for den pågældende."

Translation

"Section 26. Where a child has attained the age of 12, a conversation with the child shall take place before a decision on parental custody or access rights is taken. The conversation may be omitted if it may be assumed that it will harm the child or be without importance for the decision."

"Section 33 (3). Where a guardian is to be appointed for a person who has been declared incapable of managing his own affairs or a minor who has attained the age of 12, a conversation shall take place with the person in question before the decision is taken. The conversation may be omitted if it may be assumed to be unnecessary or harmful to the person in question."

c) The Social Aid Act (Lov om social bistand)

51. According to Section 20 of the Social Aid Act, any person is under an obligation to inform the social welfare authorities in case the health of a child is imperilled. Section 20 of the Social Aid Act, Consolidated Act No. 413 of 5 July 1984, reads as follows:

"§ 20. Den, der får kendskab til, at et barn under 18 år fra forældres eller andre opdrageres side udsættes for vanrøgt eller nedværdigende behandling eller lever under forhold, der bringer dets sundhed eller udvikling i fare, har pligt til at underrette det sociale udvalg."

Translation

"Section 20. Any person who becomes aware that a child or a young person under 18 years of age is exposed to neglect or degrading treatment on the part of the parents or other educators or lives under conditions liable to imperil his health or development shall be under a duty to notify the local social welfare committee."

52. According to Section 32 of the Social Aid Act it shall be the duty of the local social welfare committee to supervise the conditions under which the children within its area live and to support their parents in their upbringing and care.

53. According to Section 32 sub-section 4 it shall be the duty of

the local social welfare committee to give the holder of the parental rights or the person who in actual fact takes care of the child special guidance and support if the child has difficulties in relation to his environment, his school or the community, or if the child is otherwise living under unsatisfactory conditions.

54. According to Section 123 of the Social Aid Act the social welfare authorities may, without the consent of the holder of the parental rights, decide to place the child away from home. The provision reads as follows:

> "§ 123. Når det er absolut påkrævet af hensyn til et barns velfærd kan det sociale udvalg indtil barnets fyldte 18. år uden samtykke fra forældremyndighedens indehaver træffe beslutning om
>
> 1) at anbringe barnet uden for hjemmet,
>
> 2) at anbringe barnet i en psykiatrisk hospitalsafdeling eller et hospital for sindslidende med tilslutning af hospitalets overlæge, selv om de almindelige betingelser i henhold til lovgivningen om sindslidende personers hospitalsophold ikke er opfyldt,
>
> 3) at nægte hjemgivelse eller ændre anbringelsesstedet, uanset at anbringelsen oprindelig er sket med samtykke fra forældremyndighedens indehaver.
>
> Stk. 2. Opretholdelse af hjælpeforanstaltninger efter stk. 1 udover 1 år forudsætter fornyet behandling af sagen i det sociale udvalg. Er den unge fyldt 18 år, kan hjælpeforanstaltningerne kun opretholdes såfremt den pågældende giver samtykke hertil."

Translation

> "Section 123. Where absolutely necessary in the interests of the welfare of the child, the local social welfare committee may, until the child attains the age of 18, without the consent of the person having the parental rights over the child, decide -
>
> (i) to place the child away from home;
>
> (ii) to commit the child to the psychiatric department of a hospital or to a mental hospital with the acceptance of the medical superintendent of the hospital, even though the general conditions prescribed in the legislation on hospitalisation of the mentally ill are not satisfied;
>
> (iii) to refuse to let the child return home or place the child elsewhere, notwithstanding the fact that the initial care was established with the consent of the person having the parental rights over the child.
>
> (2) Where the supportive measures according to sub-section 1 may exceed one year, the local social welfare committee shall reconsider the case. Where the young person is 18 years of age, the supportive measures can only be maintained with his or her consent."

55. According to Section 125 of the Social Aid Act the holder of the parental rights shall in a case concerning the supportive measures referred to in Section 123 be offered legal assistance. Before a decision is taken, the holder of the parental rights, the guardian, the child, the attorney and any other legal assistant shall have the

opportunity to make a statement to the local social welfare committee.

56. The right to complain of a decision on removal of children from their home is dealt with in Sections 128 and 129 of the Social Aid Act. These sections read as follows:

> "§ 128. Beslutninger, der er truffet efter § 123, stk. 1 og § 124 kan indbringes for den sociale ankestyrelse inden 4 uger efter, at klageren har fået meddelelse om afgørelsen.
>
> Stk. 2. Berettiget til at indbringe en sag for ankestyrelsen er forældremyndighedens indehaver, den der faktisk udøver forældremyndigheden, samt, såfremt sagen vedrører en person, der ikke står under forældremyndighed, den unge eller værgen. ..."
>
> "§ 129. Ankestyrelsens beslutninger efter § 128 kan ved henvendelse til ankestyrelsen inden 4 uger efter, at klageren har fået meddelelse om afgørelsen, kræves forelagt for landsretten. ..."

Translation

> "Section 128. There shall lie an appeal from any decision made in pursuance of sub-section (1) of Section 123 and of Section 124 of this Act to the Social Appeals Board within a period of four weeks from the date on which the appellant received notification of the decision.
>
> (2) Entitled to lodge an appeal with the Social Appeals Board shall be the person having the parental rights over the child, the person who in actual fact exercises those rights and, if the matter relates to a person who is not subject to parental authority, the young person himself or his guardian. ..."
>
> "Section 129. Within a period of four weeks from the date on which he received notification of the decision, the appellant may request a decision made by the Social Appeals Board according to Section 128 to be brought before a High Court. ..."

d) The Mental Health Act (Lov nr. 118 af 13.4.1938 om sindssyge personers hospitalsophold)

57. According to Section 3 of the Danish Mental Health Act, Act No. 118 of 13 April 1938 on Mentally Deranged Persons' Hospitalisation, as amended by Act No. 225 of 7 June 1972, a patient can only be committed to a mental hospital on a written medical recommendation based on a medical examination made within the last four weeks before the commitment. Apart from patients who are admitted at their own request, the medical recommendation shall be made by a medical practitioner who is not an employee at the mental hospital.

58. The responsible chief physician shall decide, according to Section 4 of the Act, whether the conditions for commitment are fulfilled and whether the patient shall be treated for his illness.

59. The rules on discharge of a patient are laid down in Sections 8 and 9:

> "§ 8. Når den behandlende læge skønner, at udskrivning er uforsvarlig, enten fordi patienten er farlig for sig selv eller for andre, eller fordi udskrivning væsentlig vil forringe udsigterne for patientens helbredelse, skal udskrivning nægtes.

Stk. 2. Uden for de i stk. 1 nævnte tilfælde må den behandlende læge ikke nægte at efterkomme en anmodning om udskrivning, medmindre den må antages at ville medføre væsentlige ulemper for patienten selv, og justitsministeren tiltræder nægtelsen."

"§ 9. Udskrivning kan begæres af patienten selv eller af følgende personer: Indehaver af forældremyndighed, værge, lavværge, tilsynsværge, ægtefælle, myndige børn, forældre eller andre nære slægtninge.

Stk. 2. For så vidt en sådan begæring afslås, skal den behandlende læge på forlangende af den, der har fremsat begæring om udskrivning, forelægge sagen for justitsministeren, der inden 1 måned afgør, om udskrivning skal finde sted.

Stk. 3. Når justitsministeren har bestemt, at udskrivning skal nægtes, skal der gives den, der har begæret udskrivning, meddelelse derom. Samtidig skal vedkommende gøres bekendt med, at spørgsmålet om lovligheden af tilbageholdelsen kan forelægges retten i overensstemmelse med retsplejelovens kapitel 43 a.

Stk. 4. Er en fremsat begæring afslået af justitsministeren, kan spørgsmål om udskrivning ikke med virkning efter denne paragraf rejses, forinden der er forløbet 4 måneder efter justitsministerens afgørelse. Forelægges spørgsmålet om tilbageholdelsens lovlighed retten, regnes den nævnte frist fra rettens afgørelse."

Translation

"Section 8. When the responsible medical officer finds that a discharge is unjustifiable either because the patient is dangerous to himself or others, or because the discharge would reduce the prospects for the patient's recovery considerably, discharge shall be refused.

(2) Outside the situations mentioned in sub-section (1) the responsible medical officer shall not refuse to comply with a request for discharge, unless it must be presumed to cause considerable disadvantages for the patient himself and the Ministry of Justice endorses the refusal."

"Section 9. An order for discharge may be made by the patient himself or the following persons: the holder of the parental rights, the guardian, the trustee, the husband or wife, a son or daughter if of age, the father or mother, or another close relative.

(2) Where an order for discharge is refused, the responsible medical officer shall, at the request of the person making the order for discharge, bring the case before the Minister of Justice who within a period of one month shall decide whether the discharge shall come into effect.

(3) Where the Minister of Justice has decided that discharge shall be refused, the person who has made the order for discharge shall be notified. On notification the person shall be advised that the issue of the lawfulness of the detention may be brought before a court according to chapter 43 a of the Administration of Justice Act.

(4) Where an order for discharge has been refused by the Minister of Justice, the issue of discharge may not be

raised according to this section within a period of four months of the resolution of the Minister of Justice. Where the issue of the lawfulness of the detention is brought before a court, the time-limit shall be reckoned from the date of the decision of the court."

e) Extract of the Report on the Principles on Involuntary Treatment in the Field of Psychiatry, no. 1068/1986 (Principbetænkning om tvang i psykiatrien, no. 1068/1986).

60. In 1985 the Ministry of Justice appointed a committee to consider possible amendments to the Danish Mental Health Act of 1938, in particular with regard to involuntary treatment of patients. The committee was composed of legal and medical experts as well as a representation of patient organisations. In April 1986 the committee published the "Report on the Principles on Involuntary Treatment in the Field of Psychiatry".

61. As regards the admission to a hospital of minors the report states inter alia:

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

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

The problem arises, however, where the child is hospitalised to be treated for a psychic disorder of a non-psychotic nature. Since only mentally ill persons are comprehended by the Mental Health Act, the Mental Health Act cannot be expected to restrict the exercise of the parental rights in these cases. It is therefore natural to legally compare psychic disorders other than psychoses with somatic disorders with the consequence that the

decision of the holder of the parental rights shall prevail, provided that the chief psychiatrist can justify the hospitalisation of the child for treatment. The child or other close relatives, e.g. the parent who may not have any parental rights, cannot in these instances invoke the protection of the Mental Health Act. The latter issue was discussed a great deal in the media in connection with the much debated Jon case, see Ugeskrift for Retsvæsen, 1984, p. 665/The Danish weekly Law Reports" (pp. 390-392 of the report).

"... , it would also be difficult to understand if the same conditions should not apply to psychic disorders which are not comprehended by the Mental Health Act as in the case of somatic disorders where the holder of the parental rights with the consent of the medical officer can decide to admit the child to a hospital contrary to its wishes. Here the protection of the child - as is the case with somatic disorders - is to be sought in the fact that the medical officer under professional responsibility shall assess whether the request made by the holder of the parental rights for admission to a hospital can be considered justified" (p. 395 of the report).

III. SUBMISSIONS OF THE PARTIES

62. The following is a summary of the parties' main arguments submitted on the merits at the admissibility stage and during the examination of the merits.

A. The applicant

63. A child has an independent right to protection according to the Convention. Article 5 is in its wording particularly clear and does not allow for an interpretation which excludes minors. This is furthermore proven by the fact that Article 5 para. 1 (d) refers to "a minor". Reference to minors here would have been superfluous if they were not included in the protection against attacks on the liberty of the individual by the provisions of Article 5. Accordingly, it can be established that a minor should not be subjected to a deprivation of liberty save in the cases mentioned in Article 5 para. 1 (a)-(f), a list of possibilities which, according to the case-law of the Commission and the Court of Human Rights, is exhaustive. Of these, only sub-paragraphs (d) and (e) are of any interest and these sub-paragraphs do not apply in the present case.

64. It is not in accordance with the actual facts that no action has been taken by the public authorities considering that the applicant's mother acted in close co-operation with, and at the instigation of, these authorities.

65. The facts of the case show that the applicant was deprived of his liberty within the meaning of Article 5 of the Convention. The child psychiatric ward is definitely a closed ward and the applicant was unable to receive visitors except in agreement with and under the surveillance of the staff of the ward. Neither was the applicant permitted to make telephone calls without special permission. He was under almost constant surveillance and was unable to make social contacts. Persons from outside the hospital were furthermore unable to get in contact with him without special permission.

66. It is recognised that children may be so young that they themselves cannot bring a case before the Commission and that parents to a certain extent can decide on the personal matters of their children. However, children are not subjected completely to the authority of their parents and under Danish law there are examples which indicate that. The Mental Health Act is an example where there

is a certain control by the courts of justice regardless of the age of the child and of the consent of the parent. In a case where the child is of an age where he must be supposed to know and understand what is meant by deprivation of liberty, he should not be deprived of the right to bring a case before the Commission.

67. The conclusion is therefore that the applicant, against his wish, was deprived of his liberty in a way contrary to Article 5 para. 1 when placed in the child psychiatric ward at the State hospital in question.

68. The other important point is whether the applicant or his representatives were entitled to take proceedings by which the lawfulness of the detention could be decided by a court in accordance with Article 5 para. 4 of the Convention.

69. The applicant brought his case before the Copenhagen City Court and, on appeal, before the Court of Appeal. Both courts, however, dismissed the plea to have the lawfulness of the deprivation of liberty decided in a court procedure. The requirements of Article 5 para. 4 have accordingly not been fulfilled.

B. The Government

70. There are two main issues to be considered in this case. The first issue is of a factual nature, namely whether the applicant's stay at the hospital in fact restricted his freedom of movement in such a way that it amounted to a detention within the meaning of Article 5 of the Convention. If this question is answered in the affirmative, the second - and central - legal issue arises, namely whether the applicant's stay at the hospital against his wish can be regarded as a deprivation of liberty considering that it was not a public authority, but the applicant's mother who decided that he should be admitted to the hospital.

71. When considering the first question, whether the applicant in fact was deprived of his liberty, it should be taken into consideration that the applicant is a child and that children often in their daily life have restrictions imposed on them which cannot be imposed on adults. Naturally, this difference is due to the parent/child relationship.

72. The applicant stayed in the hospital for a total period of approximately five and a half months. To get a picture of his stay there the Government would refer to the statements of the responsible doctor at the hospital, the Copenhagen Medical Officer of Health and the National Board of Health (paras. 31 - 33 above). From these statements it follows that the applicant had an extensive freedom of movement during his stay at the hospital and that he had ample opportunity to leave the hospital because he quite regularly went to school in town alone, went visiting friends and family etc. He stayed at the hospital under the same conditions as the 17 other children in the ward and the length of his stay did not go beyond the average length for children in the child psychiatric ward.

73. In the opinion of the Government this is far from the deprivation of liberty - arrest and detention - in Article 5 of the Convention.

74. Regarding the second central issue the Government submit that the holder of the parental rights has a duty to provide the necessary care and welfare for the child. In a number of cases this will involve decisions to which the child does not agree, and which are therefore to be carried out against the will of the child. The holder of the parental rights decides inter alia where the child shall stay. If the child leaves the place where the parents have decided he shall stay, the parents can, with the support of the authorities,

bring back the child. Thus the decisions and measures taken by the parents will often restrict the child's freedom of movement without being considered as deprivation of liberty within the meaning of Article 5.

75. Where the child needs medical assistance, it may be necessary to admit the child to a hospital. Normally this decision is taken by the holder of the parental rights and the hospital. Generally a child cannot be expected on his own to judge whether for example hospitalisation is needed, and he will not be able to recognise the consequences of not having the required medical treatment. If, as an exception, there is a risk that the child will avoid any necessary medical treatment, it can be imperative to take precautions, e.g. by seeing to it that the child does not leave the hospital.

76. The legal context of the right of a parent to decide over the child is that a placement in a hospital with the parent's consent is a voluntary placement according to Danish law, even if the child disagrees.

77. It is evident, however, that the right of parents to decide on the personal conditions of their children must terminate at a certain age. At what age a child shall be given the right to decide for itself on personal matters against the wish of the parents must be decided according to national law. In the absence of special national provisions, the national legislation on attaining majority must be decisive. In Denmark, the age of majority is 18 years, an age-limit which is, by the way, in accordance with a Council of Europe recommendation.

78. If the national age-limit should not be decisive for the interpretation of Article 5 of the Convention, the question would arise what age-limit should then prevail.

79. The Convention gives no reply to this question, and it seems difficult to provide a common criterion for the choice of an age-limit if one were to depart from the age of majority. Therefore, the solution should be left to national law because the national legislator is in the best position to weigh the different interests involved and draw the borderline between, on the one hand, parents' authority and, on the other hand, children's right to decide for themselves.

80. Thus, it is the Government's opinion that the admittance to a hospital of a sick child in general and in the present case falls within the authority of the parent who has the custody. Consequently, the parent/child relationship brings the present case outside the scope of Article 5.

81. This does not mean that the parents' rights are unrestricted. Protests - for instance a complaint from the child or from a third party - may lead to action from the social and medical authorities and they may decide that the child should be discharged from the hospital when it is absolutely necessary in the interests of the welfare of the child. Complaints may also be lodged with the medical authorities who will control whether hospital treatment is justified.

82. Thus, there are various ways in which the authorities can check the decisions of the parents and resolve a possible conflict between the child and the parents.

83. It should be pointed out in this respect that the admission to the hospital at the request of the holder of the parental rights was requested on the basis of a clear medical indication. The family doctor recommended admission, and the need for medical treatment was later approved by the National Board of Health, who in a letter of 15 February 1984 inter alia wrote that under the given

circumstances it would be against the welfare of the applicant to deprive him of proper treatment.

84. Article 5 of the Convention covers deprivation of a child's liberty decided by a public authority without, or against, the parents' consent. Such deprivation can take place only when the conditions in Article 5 are fulfilled. The Danish legislation on the rights of minors vis-à-vis the public authorities, that is the Constitution and the Social Aid Act, fulfil these conditions. Thus, in cases where the authorities decide to deprive a person of his liberty, for instance by placing a child away from home without the consent of the guardian, the person deprived of his liberty is entitled to a court hearing. In this way, Denmark secures to minors the rights under Article 5, cf. Article 1 of the Convention.

85. If, on the other hand, the parents themselves request that the child be placed away from home, this falls outside Article 5. There is no liberty of which the child can be deprived because the child is subject to parental authority. When outside parental authority, however, the rights of children are identical with the rights of adults. The Government have never considered the admittance to the psychiatric ward at the State hospital in a situation like the applicant's as a deprivation of liberty and therefore have never had any reason for considering what rules, if any, should govern such a situation.

86. This opinion is confirmed in the provision on judicial control according to Article 5 para. 4 of the Convention. Such form of control is natural in cases where the law provides that deprivation of liberty may occur when certain specified conditions are fulfilled. The courts may then control whether the conditions have been fulfilled.

87. However, restrictions on a minor's freedom of movement, which are determined by the holder of the parental rights, cannot depend on certain conditions prescribed by law and are therefore not suitable for judicial control. Thus it is difficult to see how a court might hold that placing a child in a boarding school against its will, but according to the wishes of his parents, is "unlawful" or that hospitalisation, found necessary both by the holder of the parental rights and the hospital, is "unlawful". In addition, the result of such a hypothetical court decision, which overruled the judgment of the parents and the hospital, would be that the child returned to the parents, who on the contrary, in understanding with the hospital, had wanted the child to receive medical treatment.

88. It is thus the opinion of the Danish Government that the applicant has not been deprived of his liberty and that his stay in the State hospital does not fall within the scope of Article 5 of the Convention.

89. The Government have furthermore referred to the "Report on the Principles on Involuntary Treatment in the Field of Psychiatry" prepared in 1986 by the committee appointed by the Ministry of Justice (see paras. 60 - 61 above). In this report the committee also examined the scope of the Mental Health Act in relation to minors and the position of minors, who are not suffering from a psychosis - thereby falling outside the scope of the Act - but from other mental diseases and admitted to a hospital at the request of the holder of the custody of the child. With regard to the latter question the committee unanimously found the present Danish legislation satisfactory and did not recommend a limitation of the parental authority.

90. Having regard inter alia to the European Convention on Human Rights, the Committee of Ministers of the Council of Europe adopted in 1983 the "Recommendation Concerning the Legal Protection of Persons

Suffering from Mental Disorder Placed as Involuntary Patients" (No. R (83)2).

91. According to Article 1 the Recommendation concerns the involuntary placement of persons suffering from mental disorder. Involuntary placement means the admission and detention in e.g. a hospital, the placement not being effected at the person's own request. The Recommendation provides inter alia that the patient should be informed of his rights and should have the right of access to a court. The Recommendation does not regulate the question whether placement of a minor against his wish, but in accordance with the request of the holder of custody, shall be considered to be an involuntary placement in the meaning of the Recommendation.

92. Article 9 provides that the placement, by itself, cannot constitute, by operation of law, a reason for the restriction of the legal capacity of the patient. In the explanatory memorandum to that Article it is mentioned that any such restriction must comply with the principles of ordinary law which generally provides that legal capacity may be restricted only where the person concerned is unable to understand or defend his interests. Thus, it is assumed in the Recommendation that a certain category of patients under ordinary law may have a restricted legal capacity.

93. Under ordinary law minors are subject to parental authority. If a limitation of the parental authority had been intended it would have been necessary to lay down express provisions on e.g. a - fixed or flexible - minimum age-limit and on whether the child's consent or opinion should be asked for in cases where the parents request the child's placement. Since the Recommendation is silent on these essential issues, it is the Government's opinion that Recommendation No. R (83)2 must be interpreted in such a way that the question of legal significance of the minor's own wish is left to the appreciation of national law.

94. Having regard inter alia to the European Convention on Human Rights the European Committee on Legal Co-operation (CDCJ) in November 1984 adopted and submitted to the Committee of Ministers a draft Recommendation on legal duties of doctors vis-à-vis their patients (addendum to CDCJ (84)55). According to Article 5 of the draft Recommendation no medical intervention may be administered without the free and informed consent of the patient. Article 6 deals with the problems of consent of legally incapacitated persons and provides that the consent of the patient's legal representative shall be required where the patient is a minor. Where a minor is capable of understanding, his opinion shall be asked for and taken into account as far as possible. States may fix an age, under the age of full legal capacity, as from which the patient may express a valid consent (Article 6 para. 2).

95. The draft Recommendation also covers persons suffering from mental disorder, but does not, according to Article 12, affect the special provisions contained in Recommendation No. R (83)2 mentioned above. It follows from the draft Recommendation that consent of the minor is not required. The question of whether an age-limit, lower than the age of majority, should be fixed is left to the appreciation of the Member States.

96. The Ministers' Deputies, at their 382nd meeting in March 1985, adopted the Recommendation under reference No. R (85)3. However, at their 383rd meeting in April 1985, the Deputies decided to reopen their discussion on a specific point, that is Article 3 para. 2 (1) which, however, has no connection with the questions in the present case.

97. The draft Recommendation clearly supports the Government's view that placement in a hospital of a child falls within the parental

authority, even if the child disagrees.

98. Finally, the Government wish ex tuto to state that they intend to pursue the question of the admissibility of the present case ratione personae should the proceedings be carried forward to the Court of Human Rights.

IV. OPINION OF THE COMMISSION

A. Points at issue

99. The following are the principal points at issue:

- whether the committal of the applicant to the child psychiatric ward at the State hospital was a deprivation of liberty within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention, and if so whether the deprivation of liberty was in accordance with the requirements of this provision, and

- whether the applicant was entitled to take proceedings by which the lawfulness of this committal could be decided speedily by a court as guaranteed by Article 5 para. 4 (Art. 5-4) of the Convention.

B. Article 5 para. 1 (Art. 5-1) of the Convention

100. Article 5 para. 1 (Art. 5-1) of the Convention reads as follows:

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

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

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

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

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

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

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

101. The parties appear to agree on the principle that Article 5 (Art. 5)

applies to minors. The Government have submitted that Article 5 (Art. 5) covers deprivation of a child's liberty decided by a public authority without, or against, the parents' consent and that such deprivation of liberty can take place only when the conditions in Article 5 (Art. 5) are fulfilled. It also follows from the case-law of the Commission that Article 5 (Art. 5) in principle applies to minors (cf. for example No. 8819/79, Dec. 19.3.81, D.R. 24 p. 158).

102. The Commission considers that the second sentence of Article 5 para. 1 (Art. 5-1), including the enumeration in sub-paras. (a)-(f), only concerns deprivation of liberty which is ordered by the public authorities or for which these authorities can otherwise be held responsible. Where deprivation of liberty is exclusively the result of acts by private persons, it falls outside the scope of the second sentence of Article 5 para. 1 (Art. 5-1), but it remains in such cases to consider whether the State has failed in its general duty under the first sentence of Article 5 para. 1 (Art. 5-1) to protect the right of a person to freedom and security of person.

103. In the present case, the first question which arises is therefore whether the applicant's stay against his will at the State hospital was the result of a decision or an act of a public authority, or whether the applicant's mother has the full responsibility for the measures taken in regard to the applicant.

104. In this respect, the Commission notes that, although the applicant was admitted into the State hospital at the request of his mother, it was the duty of the chief physician at that hospital to ensure that his admission was reasonable and justified in the circumstances. The Commission refers, in this regard, to the Report on the Principles of Involuntary Treatment in the Field of Psychiatry, prepared in 1986 by the committee appointed by the Danish Ministry of Justice to examine the legal position of mentally disordered persons (paras. 60 - 61 above). In this report the committee states as follows:

> "It is therefore natural to legally compare psychic disorders other than psychoses with somatic disorders with the consequence that the decision of the holder of the parental rights shall prevail, provided that the chief psychiatrist can justify the hospitalisation of the child for treatment. ..."
>
> "..., it would also be difficult to understand if the same conditions should not apply to psychic disorders which are not comprehended by the Mental Health Act as in the case of somatic disorders where the holder of the parental rights with the consent of the medical officer can decide to admit the child to a hospital contrary to its wishes. Here the protection of the child - as in the case with somatic disorders - is to be sought in the fact that the medical officer under professional responsibility shall assess whether the request made by the holder of the parental rights for admission to a hospital can be considered justified."

105. The Commission is therefore of the opinion that the consent of the applicant's mother in the present case did not relieve the chief physician at the State hospital of his responsibility in taking the final decision regarding the applicant's admission into the hospital and regarding the conditions in which he was to be kept at the hospital.

106. It follows that the application of Article 5 para. 1 (Art. 5-1), second sentence, is not excluded on the ground that the applicant's stay at the hospital could be considered to be exclusively based on the acts of a private person, namely the applicant's mother.

107. It remains to be examined whether the applicant's stay at the hospital, in view of the restrictions on his movements while he was

kept there and despite the fact that consent had been given by his mother as his legal guardian, constituted deprivation of liberty within the meaning of Article 5 para. 1 (Art. 5-1).

108. As regards the first question, i.e. whether the restrictions on the applicant's movements were such that this amounted to a deprivation of liberty within the meaning of Article 5 (Art. 5) of the Convention, the Commission refers to the case-law of the European Court of Human Rights where it is stated that, in order to determine whether someone has been deprived of his liberty within the meaning of Article 5 (Art. 5-1), the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (cf. Eur. Court H.R., Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, paras. 58-59 and Guzzardi judgment of 6 November 1980, Series A no. 39, p. 33, para. 92).

109. In the present case, the Commission accepts that the applicant was placed against his will in a psychiatric ward at a State hospital. Next the Commission has considered the specific conditions under which the applicant was placed in the hospital. In this respect it is recalled that the applicant stayed in the hospital from 26 September 1983 to 22 February 1984 and then again from 8 March to 30 March 1984, that is a total period of approximately six months. The child psychiatric ward at which the applicant stayed was locked and he was not allowed to leave the ward or to receive visitors without permission.

110. In the ward, which at that time housed 18 children, the applicant was placed in a section for adolescents where he had a room of his own. As from 23 October 1983 his mother visited the ward during the usual visiting hours and as from 11 November 1983 the applicant was allowed to make short visits to his mother's home, extended to weekend and holiday visits after 10 December 1983. On 2 February 1984 the applicant started to go to school and went back and forth by taxi. Once during his stay, the applicant disappeared from the hospital. He was found by the police and brought back to the hospital.

111. When examining the specific circumstances under which a person is kept in a hospital it becomes clear that the process of classification into either deprivation of or restriction upon liberty is no easy task. Obviously special difficulties arise in this connection with regard to the conditions under which a child is placed in a hospital because precautions may be necessary for protecting the child and other patients from the risks it could involve if the child could move freely within and outside hospital premises. In the present case, however, the Commission places considerable weight on the fact that the case concerns detention in a psychiatric ward of a 12-year-old boy who was not mentally ill and that the applicant, when he disappeared from the hospital, was found and brought back to the hospital by the police. Therefore, despite the possibilities to leave the premises of the ward, with the permission of the staff, the involuntary placement of the applicant under the conditions in which he stayed in the hospital must in principle be considered as being a deprivation of liberty within the meaning of Article 5 (Art. 5) of the Convention.

112. The second question now remains, namely whether the fact that the holder of the parental rights consented to the placement of the 12-year-old applicant in the hospital implies that the stay at the hospital should not be regarded as a deprivation of liberty within the meaning of Article 5 (Art. 5) of the Convention. The Government have pointed out that the Danish legislation on the rights of minors vis-à-vis the public authorities fulfils the conditions of Article 5 (Art. 5) of the Convention and that the legal position of the right of a parent to decide over the child is that a placement in a hospital with such parental consent is a voluntary placement, even if the child

disagrees.

113. Accordingly the Government maintain that, when the holder of the parental rights requests that the child be placed away from home, this falls outside Article 5 (Art. 5). There is no deprivation of liberty because the child is subject to parental authority. When outside parental authority, however, the rights of children are identical with the rights of adults. The Government have never considered the admittance to the psychiaric ward at the hospital in question in a situation like the applicant's as a deprivation of liberty and therefore have never had any reason for considering what rules, if any, should govern such a situation.

114. The applicant has argued that the holder of the parental right does not have unlimited power with regard to his or her offspring. Children have an independent right to protection according to the Convention and are not completely subject to the authority of their parents. It is recognised that children may be so young that they have by themselves no possibility of challenging any decision, but such argument is not valid when they are of an age at which they must be supposed to know and understand what is meant by a deprivation of liberty.

115. The Commission acknowledges that the holders of parental rights are entitled to decide in matters concerning their children. The rights secured under the Convention and its Protocols also presuppose this. In particular Article 2 of Protocol No. 1 (P1-2) to the Convention confirms that parents have enforceable rights vis-à-vis their children.

116. The relevance of parental consent also follows from the Commission's case-law. In Nos. 3435/67, 3436/67, 3437/67 and 3438/67, Dec. 19.7.68, Collection 28 p. 109 concerning the possibility for minors to leave military service entered into by contract, the Commission stated:

"whereas, however, the Commission finds that the young age at which the applicants entered into the service cannot in itself attribute the character of 'servitude' to the normal condition of a soldier; whereas the applicants refer to the particular protection of minors provided for in all legal systems in regard to their own possibly unconsidered engagements; whereas in this respect the Commission has noted that parental consent is required in the United Kingdom at least for boys entering the armed forces under the age of 17½ years and that in the present cases such consent was in fact given; whereas the protection of minors in other fields of law consists exactly in the requirement of parental consent and also in the existence of the principle that an engagement entered into by the minor will be void without such consent but valid and binding if the consent has been duly given; whereas thus the provisions of the United Kingdom concerning the recruitment of boys under 17½ take into account the special situation of a minor; whereas consequently the terms of service if not amounting to a state of servitude for adult servicemen, can neither have that character for boys who enter the services with their parents' consent;"

117. Nevertheless, the Commission finds that the rights of the holder of the parental rights vis-à-vis his or her children are not unlimited and do not involve any unrestricted power of decision over the child and its personal conditions. In European countries the parental rights are to a large extent restricted by legislation and this view is also expressed in Danish law. From the Social Aid Act it follows that a complaint from the child or from a third party may lead to action from the social and health authorities and they may decide

to intervene on behalf of the child in cases where disagreements arise between parent and child (paras. 51-56 above). It also follows from the new provisions of the Custody and Guardianship of Children Act according to which any minor who has attained the age of 12 is normally heard before a decision on parental custody, access rights or appointment of guardian is made (paras. 47-50 above).

118. Furthermore, it follows from the provisions of the Mental Health Act that there is a restriction of the powers of the parental custody where a child, who is justly considered mentally ill, is admitted to or detained at a psychiatric ward of a hospital contrary to his wishes. The power, which the holder of the parental rights has, to decide where the child shall stay, in the home or outside the home, does not comprise the power to effect compulsory admission of the child to a psychiatric ward, but only the power to make a request in this respect.

119. The Danish Penal Code is another example of restrictions on the exercise of parental rights (see for example Section 244).

120. Accordingly, the Commission recognises that the holder of the parental rights has certain rights to decide over the personal matters of his or her child as long as the child is a minor under national law. However, as stated above, this right is not unlimited. In the present case the question arises whether the decision to place the applicant in the psychiatric ward fell within the ambit of the parental rights leading to the conclusion that the placement cannot be considered as a deprivation of liberty, or whether a limitation must be implied in the parental rights of the applicant's mother with the consequence that the placement in the hospital of the 12-year-old applicant against his will must be considered as a deprivation of liberty within the meaning of Article 5 (Art. 5) of the Convention.

121. The Commission recalls that the background for the applicant's admission to the child psychiatric ward was a year-long controversy concerning custody rights over him. The applicant had lived "underground" together with his father for approximately 3 years and, apparently, did not want to live with his mother who at that time had custody over him. When the applicant's father was arrested on 22 September 1983, charged with depriving the mother of the exercise of her parental rights, the applicant was admitted to the ward on 26 September 1983 on a recommendation of the family doctor and with the approval of the chief physician of the ward.

122. In its report on 15 February 1984 the National Board of Health stated inter alia:

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

123. The treatment the applicant received at the ward consisted of "environmental therapy and regular talks". From this the Commission must conclude that the applicant did not suffer from any somatic disease but rather allegedly suffered from an "abnormality" in the psychiatric field or, in other words, a "psychic disorder of a non-psychotic nature" which in the opinion of the chief physician in charge necessitated the placement in a psychiatric ward.

124. The Commission is not called upon to examine the regrettable year-long controversy concerning the custody of the applicant and does not intend to dispute the medical evaluation made concerning him but will merely recall that the Supreme Court on 21 August 1984 gave the custody of the applicant to his father. Subsequent to this decision there has been no treatment of the applicant and he has not spent subsequent periods in a psychiatric ward.

125. The Commission is, however, called upon to answer the question set out in para. 120 above and in doing so the Commission finds that the result will have to depend on a concrete assessment of the maturity of the applicant and his ability to understand his situation and to come to a decision as to the intervention in his personal liberty, which the admission to a hospital and detention in a psychiatric ward involve.

126. The Commission does not find it necessary in this case to set out any fixed age-limit below which the opinion of a minor is of no importance. However, it is evident that the wishes of very young children regarding the question of hospitalisation and treatment in psychiatric wards cannot be decisive. On the other hand a system under which for example a 17-year-old minor could be placed in a closed ward with the consent of the holder of the parental rights and against his own wishes could hardly as such be considered a voluntary placement which would not raise any question of deprivation of liberty.

127. Applying the above general considerations to the circumstances of the present case the Commission recalls that the applicant at the time in question was 12 years old. As already pointed out above any specific age should not as such determine a minor's ability to understand the situation but the Commission nevertheless recalls the rules referred to above (para. 50) according to which, in other relations, the will and wishes of a 12-year-old child are important factors in regard to far less drastic steps than placement in a psychiatric ward. Furthermore it has not been alleged in the present case that the applicant was not normally developed according to his age or in any way unable to understand his situation. Nor has it been established that he suffered from any mental illness. Regarding the latter point the Commission also recalls the apparent discrepancy which follows from the system applicable in Denmark where a child who is detained in a hospital under the Mental Health Act, allegedly suffering from a mental disease of a psychotic nature, can challenge the question of this detention in the ordinary courts of justice notwithstanding the possible consent of the holder of the parental rights, whereas a child in the applicant's situation who is not mentally ill but "only" suffering from so-called "psychic disorders", which apparently are of a less serious nature, has no such possibility.

128. The Commission has no doubt that the applicant's mother gave her consent only having the best interests of the applicant in mind. However, considering all the relevant facts of this case the Commission finds that an individual assessment of the applicant leads to the conclusion that the case concerned a normally developed 12-year-old child who was capable of understanding his situation and to express his opinion clearly. As the protection under Article 5 (Art. 5) of the Convention also applies to minors the consent from the holder of the parental rights is not decisive in these circumstances.

129. It follows that the applicant was detained in a psychiatric ward against his will and that this placement amounted to a deprivation of liberty within the meaning of Article 5 (Art. 5) of the Convention.

C. Article 5 para. 1 (a) - (f) (Art. 5-1-a, 5-1-f) of the Convention

130. The Government have submitted that, should the applicant's stay at the hospital be considered as a deprivation of liberty, they would "not necessarily accept that Article 5 para. 1 (e) (Art. 5-1-e) would not be applicable". The Government have not, however, developed this argument further.

131. The Convention does not state what is to be understood by the words "persons of unsound mind". However, it is clear that Article 5 para. 1 (e) (Art. 5-1-e) cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society. The individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". The very nature of what has to be established is a true mental disorder and this calls for objective medical expertise (cf. Eur. Court H.R., Winterwerp judgment of 24 October 1979, Series A No. 33, p. 18, para. 39).

132. The Commission finds no basis in the facts established for the assumption that the applicant was suffering from a true mental disorder which could characterise him as a person of unsound mind within the meaning of Article 5 (Art. 5) of the Convention. On the contrary, the Danish courts concluded, when dismissing the applicant's requests for judicial review, that "after what has been established in this case (the applicant) does not suffer from any mental illness". Accordingly, and since the applicant's placement in the hospital, being a deprivation of liberty, did not serve any of the purposes enumerated in the remaining sub-paras. (a) - (d) and (f), the Commission finds that Article 5 para. 1 (Art. 5-1) has been breached.

Conclusion

133. The Commission concludes, by eleven votes to one, that there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention.

D. Article 5 para. 4 (Art. 5-4) of the Convention

134. The applicant has also complained that he was not entitled to take proceedings by which the lawfulness of his placement in the hospital could be decided by a court.

Article 5 para. 4 (Art. 5-4) of the Convention reads a follows:

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

135. This provision secures that everyone who is deprived of his liberty, lawfully or not, is entitled to supervision by a court.

136. In the present case, the applicant, through his representatives, challenged the lawfulness of his detention, first in the Copenhagen City Court and subsequently on appeal in the Court of Appeal for Eastern Denmark. Both courts, however, concluded that the placement of the applicant in the child psychiatric ward at the State hospital was not covered by the right to judicial review and for this reason dismissed the case. It follows that the applicant did not have any possibility to bring the question of the lawfulness of his detention before a Danish Court.

137. The Commission notes that, although the applicant was only 12 years old, it would not be impossible to have a system under which he could have been legally represented in proceedings of this kind. Many legal systems provide for the appointment of a guardian ad litem in cases where there is a conflict of interests between a minor and his ordinary guardian. Moreover, the Danish Mental Health Act itself, although it was not applicable in the present case, contains rules

regarding a number of persons who are entitled to act on behalf of a patient, including a minor, who is detained in a hospital in accordance with the provisions of this Act. Under the Mental Health Act, it would even be possible for the minor himself to bring the matter before a court. Other solutions to the problem would also be possible.

138. Accordingly, the Commission finds that the applicant was not granted the right under Danish law to take proceedings by which the lawfulness of his commitment to the State hospital could be decided by a court in accordance with Article 5 para. 4 (Art. 5-4) of the Convention.

Conclusion

139. The Commission concludes, by ten votes to two, that there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention.

E. Recapitulation

140. The Commission concludes, by eleven votes to one, that there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention (para. 133).

The Commission concludes, by ten votes to two, that there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention (para. 139).

Secretary to the Commission Acting President of the Commission

(H. C. KRÜGER) (J.A. FROWEIN)

PARTLY CONCURRING PARTLY DISSENTING OPINION OF

MR. J. A. FROWEIN

I have voted for a violation of Article 5 para. 1 but not of Article 5 para. 4. My reasons are as follows.

1. The detention of Jon Nielsen in the psychiatric ward amounted to a deprivation of liberty in the normal sense of the word. The restrictions existing, described in the Report of the Commission, show that beyond doubt. The question arising under the Convention is, however, whether detention based on the lawful decision of the parent having the right of care and custody over the child can be called a deprivation in the sense of Article 5 para. 1 for which the State is responsible.

Article 5 is constructed in a very clear way. While the first sentence of para. 1 lays down the positive obligation for the State to protect the liberty of its citizens by legislation and other action, the second sentence of para. 1 together with the alternatives (a) to (f) protect individuals against specific deprivations of liberty by State action. It follows from the wording of the different alternatives that only decisions by public authorities are at issue in (a) to (f). The paragraph concerning minors, i.e. Article 5 para. 1 (d), would certainly have dealt with the decision by parents, and not only with the order for educational supervision granted by the competent authority, if this provision should also apply to parents.

The Commission finds the State to be responsible because the chief physician at the State hospital has accepted Jon Nielsen. However, the Danish courts have held that under Danish law the

decision by the mother as the parent who had care and custody was decisive for the legal situation. I feel bound by that finding which seems to me quite convincing.

Family law in all European countries gives the parents the right to decide on the residence of their children. They may place them in hospital if necessary. Their decision is not a decision which falls under Article 5 para. 1 second sentence (a) to (f). Of course, their right to decide on the detention of their children is not at all unlimited. But that does not mean that a wrong decision becomes a decision for which the State has responsibility under the Convention. The situation is rather comparable to the case where people are deprived of their liberty by a criminal act. Nobody would come to the conclusion that that could raise an issue under Article 5 para. 1.

This shows that Article 5 para. 1 second sentence is not applicable to the case.

2. The question arises nevertheless whether there is State responsibility under Article 5 para. 1 first sentence according to which everyone has the right to liberty and security of person. This applies to minors as well as to adults. It must be decided whether the legal possibility for a parent, who has the right to care and custody, to place a child into a psychiatric ward without specific judicial or other formal control may amount to a violation of the guarantee laid down in the first sentence of Article 5 para. 1. Indeed, some States have introduced specific controls. For instance, under the German law parents need the consent of the "Vormundschaftsgericht" (parental court) for such a decision.

In the present case the mother who had care and custody of the applicant decided to place him in the psychiatric ward of the hospital. Apparently this happened in the context of her dispute with the father of the child who earlier had gone underground with the boy. The applicant was admitted by a Professor A. after the family doctor and the social authorities had co-operated with the mother over the placement. It is impossible to say, therefore, that the placement was just an arbitrary decision by the mother. Rather, experts and psychiatrists took part in its implementation.

However, it is not alleged that the applicant suffers from any mental illness. It follows that his detention together with children who are mentally ill must have caused considerable hardship to the applicant. This shows the great danger existing where there is no procedure with sufficient formal safeguards for the placement of minors in psychiatric hospitals by their parents. A lack of such a procedure is not in line with the positive obligation flowing from Article 5 para. 1 first sentence for the State to protect the liberty of all citizens including children. It is for this reason that I find a violation of Article 5 para. 1 first sentence.

3. As to Article 5 para. 4 no violation can be established since the deprivation of liberty which has taken place does not fall under Article 5 para. 1 second sentence. Paragraph 4 applies only to deprivations of liberty by a public authority. This is shown by the wording "arrest or detention" referring to the formulation used in Article 5 para. 1 (a) to (f). Where the holder of the right to care and custody gives his consent to the placement Article 5 para. 4 cannot be the appropriate safeguard. The right to care and custody gives the custodial parent the right to represent the minor in court proceedings including proceedings under Article 5 para. 4.

The problem to be settled by the legislation for cases of this sort is how to solve possible conflicts between parent and child. The requirement of consent by a court or a special authority for the placement into a closed institution seems to be the appropriate

procedure in that respect.

The solution favoured by the majority must lead to a legal procedure which is difficult to reconcile with family law in general. It would mean that a child of a certain age, without a clear limit being established, must be able to bring proceedings even against the will of the holder of the right to care and custody. It would seem difficult to make that dependent on the individual development of the child. To find a violation of Article 5 para. 4 implies that the right of the mother, who of course could have brought Article 5 para. 4 proceedings had her child been detained against her will, is not taken into account.

Especially disputes between parents, which form the difficult background of this case, are better avoided by appropriate safeguards for decisions of great importance, such as placement in a mental hospital, than by creating rights which are supposed to be exercised individually by very young children.

DISSENTING OPINION OF MR. G. JÖRUNDSSON

My basic approach to the interpretation of Article 5 is very much the same as that of Mr. Frowein in his individual opinion, although I have come to a different conclusion.

I accept that the detention of the applicant in the psychiatric ward amounted to a deprivation of liberty and it goes without saying that minors enjoy in principle the rights guaranteed by the Convention, including Article 5. I find, however, the status of the applicant as a minor to be of a decisive importance for the question whether he was subjected to deprivation of liberty covered by Article 5.

It is a common feature of family law in the Contracting States, that the holders of parental rights have the power and the duty to decide where the child is to live or stay, often in connection with measures necessary for the protection of its health and for its education. Such traditional and inevitable restrictions on the liberty of a minor must be taken into consideration in the interpretation of Article 5. It is also obvious from the construction and the wording of Article 5 para. 1 second sentence, that it does not deal with restrictions, which are the result of the decisions of parents or those who exercise parental rights.

I think it is clear, having regard to Danish law in this field, that the consent of the applicant's mother must be seen as the basic and conclusive decision in the light of the principles which must be applied in the interpretation of Article 5. The control of the need for treatment and the advice given by the relevant authorities are in this respect only of secondary importance and cannot as such be considered a deprivation of liberty, engaging State responsibility under Article 5.

In my opinion, therefore, Article 5 para. 1 second sentence does not apply in the present case. This does not mean, however, that the State has no responsibility regarding the exercise of parental power in respect of minors. Such responsibility follows from Article 5 para. 1 first sentence which provides that everyone has the right to liberty and security of person. The requirements of this provision are, however, in my opinion satisfied by the supervision provided for by the Danish Social Aid Act and by the fact that the applicant's need for treatment and his admission to the psychiatric ward had been recommended by the family doctor and approved by the chief physician of the ward in the exercise of his professional responsibilities. The applicant's need for treatment could also be, and was in fact referred to the National Board of Health.

For these reasons I have come to the conclusion that there has been no violation of Article 5 para. 1 in the applicant's case and it follows from that finding that there has been no breach of Article 5 para. 4.

&_APPENDIX I&S

HISTORY OF PROCEEDINGS

Date	Item
15 February 1984	Introduction of the application
3 May 1984	Registration of the application
Examination of admissibility	
2 October 1984	Commission's deliberations and decision to adjourn the examination of the case in the light of the Danish Supreme Court judgment of 21 August 1984.
7 May 1985	Commission's deliberations and decision to invite the Government to submit observations on the admissibility and merits of the application
19 July 1985	Submission of Government's observations
7 October 1985	Submission of appliant's observations
5 December 1985	Commission's deliberations and decision to hold a hearing on the admissibility and merits of the application
10 March 1986	Hearing on the admissibility and merits of the application, the Commission's deliberations and decision to declare the application admissible. The applicant MM. Jacobsen Boelskifte Nielsen The Government MM. Lehmann Blæhr Melchior Vesterdorf

Date	Item
Examination on the merits	

13 June 1986	Submission of Government's additional observations on the merits
12 July 1986	Consideration of the state of proceedings
10 December 1986	Consideration of the state of proceedings
5 March 1987	Commission's deliberations on the merits and final votes
12 March 1987	Adoption of the Report