EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No 8427/78

Wim HENDRIKS

against

the Netherlands

Report of the Commission

(Adopted on 8 March 1982)

Strasbourg

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

A. The substance of the application

2. The applicant, Mr Wim Hendriks, was born in 1936 in the Netherlands and is presently residing in Odenthal, Hoeffe Im Backesfeld, Federal Republic of Germany.

3. The applicant's marriage, concluded in 1959 and out of which a son was born in 1971, was dissolved in September 1974 by decision of the Regional Court in Amsterdam.

4. In December 1974 the applicant requested the Court to make a visiting arrangement as regards his son. This request was repeated in March 1975. In May 1975 the Regional Court awarded the custody of the child to the mother on the basis of a report by the Council for the Protection of Children (Raad voor de Kinderbescherming) and appointed the mother's father as co-guardian (toeziend voogd). No provisional visiting arrangement between the applicant and the child was ordered.

5. In early 1978 the applicant requested the Council for the Protection of Children for their good offices in establishing contact between his son and himself. The Council suggested that he should apply to the Juvenile Judge in Amsterdam for such arrangement as the mother refused to co-operate.

6. On 16 June 1978 the applicant requested the Juvenile Judge to establish a first contact between his son and himself and subsequently to make a visiting arrangement in such a manner that it would not have a detrimental effect on the child. The judge adjourned further examination of the case awaiting the advice of the Council for the Protection of Children.

7. On 20 December 1978 the Juvenile Judge dismissed the applicant's request on the ground that, as the latter's ex-wife refused any co-operation for a visiting arrangement, even for a single contact between father and son, the boy's interests would be harmed if such arrangement were to be made.

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8. On 9 May 1979 the applicant lodged an appeal against this decision with the Court of Appeal in Amsterdam, inter alia stating that the mother's refusal to co-operate was an invalid ground for rejection of his request. By decision of 7 June 1979 the Court of Appeal rejected the appeal on the ground that in a situation where a conflict appeared to exist between the parents, the ordering of a visiting arrangement would lead to tension in the family of the parent to whom the guardianship was awarded; as the interest of the child to grow up without unnecessary tension should prevail, it refused to make such an arrangement in the applicant's case.

9. On 19 July 1979 the applicant submitted an appeal on points of law to the Supreme Court, inter alia invoking Art. 8 of the Convention. He stated that the only basis for dismissal could be exceptional circumstances relating solely and exclusively to the person of the applicant and constituting a danger to the child's health and morals or seriously disturbing its mental balance.

10. By decision of 15 February 1980 the Supreme Court upheld the Court of Appeal's decision on the ground that although the interest of the parent should not be left aside, the interest of the child weighs most heavily. It concluded that the applicant's submission was not supported by any legal provision and that the appeal should therefore be rejected.

11. The applicant claims that, contrary to his right under Art. 8 of the Convention, he can never effectively enjoy the right to access to his child when, as in his case, despite all his attempts to establish such a contact in the most reasonable way without doing harm to the child, it can be wholly frustrated by the mother's refusal to co-operate. In his opinion, it was wrong that only the interests of the child should count, while his rights are wholly ignored.

12. In this respect he refers to the conclusions of the Parliamentary Commission appointed to comment on certain newly drafted rules of family law inter alia stating that, after divorce, children have an indefeasible right to have contact with both parents.

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Proceedings before the Commission

13. The application was introduced on 14 September 1978 and registered on 24 November 1978.

14. On 13 March 1980 after having received the parties' observations on the admissibility of the application, the Commission considered that the applicant's complaints raised substantial issues under the Convention. It, therefore, decided to declare the application admissible (1).

15. The observations on the merits were submitted by the applicant on 23 June and 7 July 1980, and by the respondent Government on 3 October 1980.

16. On 13 December 1980 the Commission resumed its examination of the application and decided its future procedure. It further deliberated on 12 October and 17 December 1981 and 8 March 1982.

17. Following the decision on admissibility the Commission, acting in accordance with Art. 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the matter. In the light of the parties' reactions, the Commission now finds that there is no basis on which such a settlement can be effected.

The present Report

18. The present Report was drawn up by the Commission in accordance with Art. 31 of the Convention, after deliberations and votes, the following members being present:

MM. Nørgaard, President
Frowein
Ermacora
Fawcett
Busuttil
Kellberg
Jörundsson
Tenekides
Trechsel
Kiernan
Melchior
Sampaio
Carrillo
Gözübüyük
Weitzel
Schermers

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(1) See Decision on Admissibility, Appendix II.

19. The text of the Report was adopted by the Commission on 8 March 1982 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2).

20. A friendly settlement of the case not having been reached, the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

(1) to establish the facts, and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of their obligations under the Convention.

21. A schedule setting out the history of proceedings before the Commission and the Commission's decision on admissibility of the case are attached hereto as Appendices I and II.

22. The full text of the observations of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

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II. ESTABLISHMENT OF THE FACTS

23. The facts of the case are generally not in dispute between the parties.

A. The Netherlands law on access to children after divorce

24. Under Netherlands law, in the case of divorce, the parental power which both parents were exercising jointly during the marriage terminates by the dissolution of the marriage. The court must award the custody of the minor to one of the parents. Continuation of contact between the other parent and the child can be subject to an agreement between that parent and the one to whom the custody has been awarded. If such an agreement cannot be reached, the parent without custody can request the court to make a visiting arrangement for the child and himself.

25. The relevant provision of the Netherlands law under which the applicant made his application for a visiting arrangement to the Juvenile Judge is Section 161 (5) of the Civil Code reading as follows:

> "The court may on the application or request of both parents or of one of them make an arrangement for contact between the child and the parent to whom the custody has not or will not be awarded. If no such arrangement has been made in the decision pronouncing the divorce or in a subsequent decision as provided for in paragraph 1 of this Section the Juvenile Judge may make such arrangement as yet."

/Paragraph 1 of Section 161 provides that:

> "By the decision pronouncing the divorce or by a subsequent decision the court awards the custody of each minor of the spouses to one of the parents and appoints at the same time a co-guardian."/

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B. Particulars of the case

26. The applicant's marriage, concluded in May 1959 and out of which a son was born in 1971, when he and his wife were residing in Cologne, Federal Republic of Germany, gradually broke down and in September 1973 led to his wife's returning to the Netherlands, taking the child with her. The wife instituted divorce proceedings and on 26 September 1974 the Regional Court in Amsterdam pronounced the divorce.

27. On 24 November 1974 the proceedings concerning the guardianship of the child were adjourned awaiting the advice of the Council for the Protection of Children. In December 1974 the applicant asked the court to make a provisional visiting arrangement as regards his son. This request was repeated in March 1975.

28. By letter of 21 May 1975 the Council for the Protection of Children submitted its advice to the Regional Court and stated that, according to the applicant's ex-wife, he was a psychiatric patient, a sadist and had had to serve a prison sentence of two months for smashing in her windows. The Court was further informed that no contact had been established with the applicant as he refused to come to the Netherlands for a discussion and that his correspondence was almost incomprehensible. It was also stated that the applicant's ex-wife agreed to his seeing the child from time to time. The Report concluded that the custody of the child should be awarded to the mother.

29. The applicant apparently did not see this report until 28 October 1977 and contests the contents thereof.

30. On 26 May 1975 the Regional Court rules according to the Council's advice. It further appointed the father of the applicant's ex-wife as co-guardian on the ground that the applicant was living abroad. The mother's claim for subsistence was rejected. No provisional visiting arrangement was ordered.

31. Both parents remarried in 1975.

32. The applicant then endeavoured with the help and on the advice of private persons and authorities, to come to an agreement with his ex-wife about having regular contact with the child. On one occasion, on the advice of the Council, he asked the police in the locality of his ex-wife's residence to use their good offices to secure his access to his son, however without success.

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33. In early 1978 the applicant wrote to the Council for the Protection of Children requesting its intercession in establishing contact between his son and himself, as he had to undergo a serious operation.

34. On 25 May 1978 the Council replied that it had contacted the mother who refused to co-operate as, in her opinion, the applicant's request for contact with his son should not be considered as showing interest in the child, but as an attempt to frustrate her newly established family life. The Council suggested that he should apply to the Juvenile Judge in Amsterdam for a visiting arrangement.

35. By letter of 7 June 1978 the applicant informed the Council that he would follow this suggestion and asked it to submit its advise as to an immediate visiting arrangement to the Juvenile Judge in order to save time.

36. On 16 June 1978 the applicant requested the Juvenile Judge to make a visiting arrangement in such a manner that it would not have a detrimental effect on the child; in his view the child had a right to know his father. He further pointed out that he had to undergo a serious operation and would like to see the child beforehand.

37. By letter of 27 July 1978 the Council for the Protection of Children informed the applicant that it had not been asked by the Juvenile Judge for its advice on the case and would therefore wait until the judge would do so.

38. On 2 August 1978 the Juvenile Judge decided to adjourn further examination of the case until December, awaiting the advice of the Council for the Protection of Children.

39. As soon as he was informed of this decision, the applicant asked his lawyer to request the Juvenile Judge to arrange for an immediate encounter with his son as a provisional measure in view of the fact that further delay would be unreasonable and that the operation did not admit a delay until December. Subsequently the lawyer submitted a request to that effect to the Juvenile Judge asking him to speed up the proceedings for the reasons given by the applicant.

40. The lawyer was, however, informed that the judge did not intend to grant this request.

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41. The advice of the Council for the Protection of Children was submitted on 22 November 1978. It stated inter alia that the applicant had not seen his son since 1974, meaning that they had not seen each other for four years.

42. In the Council's opinion, the problems in answering the question why it was really impossible for this father to see his child were ascribable to the parents themselves, as they had not assimilated the divorce. A medical educational bureau (medisch opvoedkundig bureau) which had been asked to examine the situation with a view to coming to a visiting arrangement had refused its assistance. The Council drew the conclusion that resistance to the father on the part of the mother and the stepfather was so great that they were unable either emotionally or intellectually to contemplate any form of contact between father and son. Their resistance might possibly mean, should contact nevertheless take place between father and son without the intervention of, for example, a paediatric counselling service, undesirable repercussions for the child. Nothing could be done for the child without an effort on both sides and a little good will. However, since the mother and stepfather could not be expected to make that effort and, furthermore, since the child did not appear to have any great need for his father although this could have been established more precisely by therapeutic contact, the advice was to dismiss the father's application.

43. A copy of the advice was sent to the applicant's lawyer; the applicant was only allowed to take note of its contents at the Youth Office in Bergisch Gladback, Federal Republic of Germany.

44. The applicant challenged the advice in a letter addressed to the Juvenile Judge stating, inter alia, that the unwillingness of his ex-wife and her husband to co-operate could not be used as a valid reason for refusing the request, all the more so as he had proposed that great care be taken in making any visiting arrangement; furthermore, it was wholly unsatisfactory that the medical educational bureau had refused its assistance. The applicant further stated that he had postponed the necessary operation hoping that in the meantime he could have established contact with his son.

45. On 20 December 1978 the Juvenile Judge in Amsterdam ruled that the applicant's request, although reasonable, should be dismissed. The judge stated that, although contact between the parent to whom the guardianship had not been awarded and his children under age should generally be possible and the Council

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for the Protection of Children was prepared to assist, the applicant's ex-wife refused any co-operation for a visiting arrangement, even for a single contact. Therefore, it was to be expected that, if a visiting arrangement were to be made, the boy's interests would be harmed.

46. On 9 January 1979 the applicant lodged an appeal against this decision with the Court of Appeal in Amsterdam stating that in the circumstances of the case a first contact with the child could have been established at the beginning of the proceedings whereafter the Council for the Protection of Children would have had ample time to deliver its opinion. Moreover, in view of his state of health, valuable time had been lost because of the procedure followed. He further submitted that the Juvenile Judge's decision lacked reasons as the mother's refusal to co-operate was an invalid ground for rejection.

47. By decision of 7 June 1979 the Court of Appeal in Amsterdam dismissed the applicant's appeal. It stated that in principle, for a harmonious development, a child must have contact with both parents, to enable identification with the parent to whom guardianship has not been awarded. However, there were exceptions to the rule in cases where, as in the present case, a conflict appeared to exist between the parents. In such cases, to order a visiting arrangement would lead to tension in the family of the parent to whom the guardianship was awarded and to a loyalty conflict on the part of the child. Such a situation would not be in the interests of the child and it was not necessary to determine which parent was responsible for this tension, since the interest of the child to grow up without unnecessary tension should prevail. The Court finally pointed out that the child had not seen his father since 1974, that he had a harmonious family life and considered the present husband of the mother as his father.

48. On 19 July 1979 the applicant submitted an appeal on points of law to the Supreme Court which dismissed it on 15 February 1980. It held that the applicant was wrong in thinking that the judge, when considering the request of a parent not having the custody of the child to make a visiting arrangement on the basis of Section 161 (5) of the Civil Code, may only dismiss such request on the grounds of extraordinary circumstances to be found exclusively in the person of that parent and constituting a danger to the health and morals of the child or seriously disturbing its mental balance; such a stand was not supported by any legal provision. The Court further held that the interest of that parent clearly should not be overlooked, but, as the Court of Appeal had rightly considered, the interests of the child ultimately weighss most heavily. It concluded that the appeal could therefore not lead to the setting aside of the decision.

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III. SUBMISSIONS OF THE PARTIES

A. As to Article 8 of the Convention

1. Submissions of the applicant

(a) The relevant legislation

49. As to the question whether the relevant Netherlands legislation in itself restricted access to, or contact with, his child beyond the limits set out in Art. 8 of the Convention the applicant submitted that, on the one hand, the relevant legal provisions on access to children after divorce should be so interpreted that a right of access was recognised in the sense that the court had to make a ruling to that effect, and that, on the other hand, the Netherlands legal system enabled the mother to frustrate this right by refusing access, as the courts apparently applied the principle that the mother's attitude was decisive.

(b) The dismissal by the Netherlands courts of the applicant's request for access

50. The applicant pointed out that his application before the Commission had two different aspects:

1) his claim for an immediate contact with his child, under reasonable circumstances, at the beginning of the proceedings concerning access;

2) his claim for regular contact with his child.

51. As to his claim for an immediate contact with his child, the applicant was of the opinion that it should be an absolute human right of every parent to meet and communicate with his child personally under reasonable conditions without interference by a public authority so as to avoid situations where a denial of access to the child in the very beginning would inevitably create a disadvantage for that parent and would be the cause of considerable hardship and disturbance - to the detriment of the child - of beginning a true relationship.

52. He further pointed out that despite his submissions on this point the Netherlands courts had completely ignored this aspect of his case before them. In his opinion, prevention from access to the child in the very beginning had created an inevitable disadvantage to him, as during the proceedings he had to remain in the background as a bogeyman causing feelings of fear for the child.

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53. As to his claim for regular contact with his son the applicant stated that the courts, whilst admitting that his request for a visit arrangement was reasonable and that in principle a child should have contact with both parents, had still dismissed the request on the ground that the mother, who originally agreed to his seeing his son from time to time, had refused to co-operate. The applicant referred, in particular, to the decision of the Court of Appeal of 7 June 1979 which stated that, although, in principle, for a harmonious development a child must have contact with both parents in order to enable identification with the parent to whom custody has not been awarded, there should be exception to this rule in cases where, as in the applicant's case, there appeared to exist a conflict between the parents. In this respect, the applicant pointed out that, in the opinion of professionally qualified persons, the court's statement could not be used as a valid reason for dismissing his request. The purpose of the law was to authorise the judge to impose rules in case the parties could not arrive at a friendly settlement, a situation which clearly was one of conflict.

54. The applicant further submitted that, in his case, the mother prevented him from any access to his child by illegitimate means while investigation by the courts had revealed no valid reasons in his person for denying him any contact with the child. The reasons submitted by the mother should be subject to investigation in order to determine which parent was responsible for the fact that the mother, who had the custody of the child, obstructed the contact. In the applicant's opinion illegitimate obstruction of the contact should be considered as a coarse dereliction of the primary duty of the parent to whom the custody has been awarded to protect the feasible right of the child to have contact with the other parent. It should, in fact, be a valid ground for having the former deprived of the custody and for having it awarded to the latter.

55. The applicant further observed that the only grounds on which the courts might dismiss his claim to fix and ensure the modalities of the exercise of his right to have regular intimate family life with his child were to be found in the strict conditions set out in paragraph 2 of Art. 8 of the Convention.

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56. In support of that allegation he referred to the notion of "measures taken in accordance with the law and necessary in a democratic society for the protection of health and morals". In that respect he submitted that, in the opinion of the Commission, the terms "the protection of health or morals" covered not only the protection of the community as a whole but also the protection of individual members of the community; moreover, the terms "health or morals" necessarily included the psychological as well as the physical well-being of individuals, and, in the present case, as regards the right to family life of the father to have contact with his child, in the first place the child's mental stability and freedom from serious psychic disturbance as well as those of both parents.

57. As to the health of the child the applicant observed that the courts had found that his ex-wife had deliberately obstructed his access to the child and had refused any co-operation for an arrangement, even for a single contact. Without having determined which parent was responsible for the fact that the mother obstructed the contact, the courts considered that, if the child would have to stay with the applicant, on the evidence it was clear that the mother's attitude to a contact between the applicant and the child would create tension in her new family and lead to a loyalty conflict on the part of the child.

58. In this connection the applicant observed that these apprehensions of the domestic courts did not reflect the actual opinion of the mother. In support thereof he referred to the mother's statements before the Juvenile Judge on 19 December 1978 contained in the verbatim record of the hearing where she said: "We have no objection to a visit arrangement as such, but we are of the opinion that this will not be in the interest of the child." He further referred to previous statements by the mother at the hearing before the Juvenile Judge on 2 August 1978 where she said, "If I knew for certain that he (the applicant) does it all for the child's sake and this would be to the advantage of the child, then I would indeed like to have a visit arrangement."

59. The applicant stressed that the judge, when considering the claim of a parent not having the custody of the child to impose rules on the basis of Section 161 (5) of the Civil Code, might only dismiss such a claim on the ground of extraordinary circumstances to be found exclusively in the person of that parent. In this respect he referred to the Commission's decision on the admissibility of Application NO 911/60 Collection of Decisions No 7, p. 7, where the Commission expressly referred to the Swedish court's findings about

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the father's extremist views which would create heavy and serious mental conflicts. In the applicant's view, such a factual situation was clearly covered by the strict conditions of paragraph 2 of Art. 8. Therefore, the Supreme Court, when rejecting his appeal on points of law on the ground that such a view was not supported by any legal provision (the Supreme Court's judgment of 15 February 1980) should be considered as being ill-founded.

60. According to the applicant it apparently was an assumed rule in the Netherlands that the attitude of the parent having custody was decisive in that the latter could actually decide whether the other parent might have access to his child and whether, as in his case, it was not in the interest of the child to have regular contact. In his opinion, this attitude and mentality could not therefore be ascribed to the mother as she had just acted according to this assumed rule. This situation, however, involved the responsibility of the Government, since the courts apparently supported such an attitude of the parent having custody. As an example, the applicant referred to a decision of the Supreme Court where it had stated that "the right of the protection of family life, as laid down in Art. 8 of the Convention, does not imply that the parent to whom the custody had not been awarded could claim contact with his children if these contacts, due to the considerable disturbance and tensions thereby created, were obviously contrary to their interests. To grant such a claim nevertheless is contrary to the rights of the children under Art. 8 of the Convention. As the mother's fears and attitude to a contact between the father and the child would create disturbance and tensions, theses circumstances should be avoided in the interests of the child."

61. In the applicant's view it was plain that this decision had only regard to disturbance created by the fear of the mother and did not at all go into the question whether the contact between father and child in itself would create any disturbance violated Art. 8 of the Convention. It would therefore encourage parents who have custody to provoke conflict situations preventing thereby the other parent from access.

62. The applicant concluded that having regard to the Commission's established case-law the parent who was deprived of the custody might not be prevented by the parent having custody from access to his children unless, because of exceptional circumstances exclusively found in the person of that parent not having custody, such contact would certainly constitute a serious danger to the health and morals of the children.

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63. As a final remark, the applicant observed that it was wholly unfair that when being forced to start court proceedings in order to seek his right under Art. 8 he had to bear the very high costs involved. In this connection he referred to the acts of desperate fathers recently committed in the Netherlands which received a lot of publicity in the press.

2. Submissions of the Government

(a) The relevant legislation

64. The respondent Government submitted that the present Netherlands legislation (Sections 161, paragraph 5, and 162 of Book I of the Civil Code) was based upon the assumption that in principle, the child should, after a divorce, be able to retain contact with both parents, in order to grow up harmoniously. In this connection they referred to the Memorandum of Reply (Memorie van Antwoord) to the Amendment Bill to the previous law on divorce which had lead to the present Sections 161 and 162 of the Civil Code. It was evident that the intention of the legislator was that both parents should maintain contact with their child unless this conflicted with the child's interests.

65. The Government further pointed out that current case-law in the Netherlands showed that in practice, when asked to do so, the Netherlands courts made arrangements for such contacts. Any such arrangement would not manifestly harm the child's welfare. In their opinion, the right of contact of the parent without custody could not be upheld if contact would lead to substantial disturbance and tension in the child's family life and would thus be manifestly contrary to the child's interests.

66. On this point the Government referred to a recent judgment of the Netherlands Supreme Court of 2 May 1980 where it was decided that if it were to be recognised that the parent without custody did have a right of access in spite of the harm to the child's interests, this would conflict with the child's rights under Art. 8 of the Convention. The Court further stated that a right of access might be derived from the Article, but not such an absolute right as not to be subject to restriction if access were manifestly contrary to the child's welfare.

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67. In this connection the Government submitted that no absolute right in the above sense existed in the legislation of the other member States of the Council of Europe: for example, Section 1634 of the German Civil Code as amended on 1 January 1980.

68. In addition the Government pointed out that the above Sections of the Civil Code were in accordance with Art. 8 of the Convention and in no way restricted the applicant's right to contact with his son; on the contrary, they gave him recourse to the courts in order to give effect to that right, so that Art. 13 of the Convention was also complied with.

69. They further stated that the Netherlands case-law to which they had referred was in accordance with the Commission's case-law (Applications Nos 172/56, Yearbook I, p. 211 and 911/60, Yearbook IV, p. 198).

70. The Government then submitted that they considered it appropriate to draw the Commission's attention to the Bill for revision of the procedural laws governing divorce and for revision of the right of access in connection with divorce, which was submitted to the Second Chamber of the States General on 30 June 1979. The Bill reinforced the principle that the child and the parent not awarded custody were entitled by law to have access to each other after divorce. An arrangement must be made with regard to the exercise of that entitlement, stating the form that the contact should take. In the first instance the law assumes that this arrangement is made in consultation between the parents and the child. If they do not succeed in coming to an arrangement, the Bill provides for the exercise of the entitlement to access at the request of both parents or of one of them. Under the Bill, the Court may only refuse permission for a parent to exercise his entitlement to access if it would be manifestly against the child's interests for the parent to do so or if the child, being twelve years of age or older, when questioned, raises serious objections to his parent being permitted access to him. In the Government's opinion, it was thus clear that this Bill constituted a codification of current case-law in the Netherlands.

(b) The dismissal by the Netherlands courts of the applicant's request for access

71. The Government observed that three judicial authorities in succession refused to make access arrangements on account of the serious tensions to which this would give rise within the family. The child's interests in no access arrangements being made were held to be paramount. In view of these judicial decisions it was therefore not the mother's refusal which prevented access arrangements being made.

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72. In its consideration of the applicant's appeal on points of law, the Supreme Court noted that the interests of the parent not granted custody must be taken into account when establishing access arrangements, thus recognising the applicant's own right of access per se.

73. At the same time however, the Supreme Court noted that ultimately the greater weight must be attached to the child's interests, which in the view of the Court would not be served by access in view of the tension expected to result. The Government further pointed out that they recognised that there should be very strong arguments for the applicant's right to access to his son pursuant to Art. 8 para. 1 of the Convention being entirely denied. They took the view that such arguments apply in the present case, having regard to the special circumstances thereof, as described, inter alia, in the Report by the Council for the Protection of Children in Amsterdam of 22 November 1978.

74. As to the question whether it was not in the interests of the child always to know its father and mother, the Government was of the opinion that in principle every child had the right to know both its parents after the parents' marriage had been dissolved by divorce. It was precisely for this reason that legislation provided for the possibility of parents having access to their children after divorce. However, in connection with the divorce, circumstances could arise in which it would be manifestly contrary to the child's welfare for it to have continued contact with both parents after the divorce.

75. In the Government's opinion, there might be weighty reasons, based upon the child's interests, for denying a parent the right of access to a child after divorce. The Commission's case-law relating to Art. 8 of the Convention confirmed that cases arose in which the child's interests conflicted with him having contact with a parent.

76. The Government concluded that for the reasons given above Arts. 8 and 13 of the Convention had not been violated.

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B. As to Article 6 of the Convention

1. The submissions of the applicant

77. In his initial observations the applicant stated that since the present legal system enabled the mother to refuse any access to the child he had been forced to request the Juvenile Judge to make a visit arrangement. He submitted this request on 21 June 1978 and the Judge ruled on 20 December 1978, while the appeal proceedings ended on 15 February 1980. In the applicant's opinion the length of these proceedings could not be considered to be reasonable in the circumstances of his case, and like the divorce procedure itself, enabled the child to become estranged from his father. He further pointed out that the refusal of the Council for the Protection of Children to supply him with a copy of their report which had been at the basis of the Juvenile Judge's decision of 20 December 1978 had hampered the proceedings before the Commission as he had been prevented from submitting it in support of his allegations.

2. The submissions of the Government

78. The Government observed that with reference to Art. 6 of the Convention the applicant claimed

a) that his request for access was not dealt with within a reasonable time;

b) that the procedural rights of the applicant and of the authorities which took the decisions were not equal within the meaning of Art. 6 ("equality of arms").

79. As to the claim under a) the Government submitted that, in deciding whether a case had been dealt with within a reasonable time, the most important point was to know how long the court needed in order to arrive at a well-founded decision. In the present case the request for access arrangements was submitted to the Juvenile Judge on 21 June 1978.

80. The Juvenile Judge considered it necessary to obtain a report on the case, and therefore requested one from the Council for the Protection of Children on 2 August 1978. The Council acted quickly by submitting a lengthy report on 22 November 1978. The Juvenile Judge gave his decision on 20 December 1978.

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81. On 9 January 1979 the applicant lodged an appeal with the Court of Appeal in Amsterdam. On 9 May 1979 the parties were heard by the Court of Appeal, after the registry of the court had received a defence to the appeal from the child's mother, on 3 May 1979. On 7 June 1979 the Court of Appeal confirmed the decision of the Juvenile Judge of 20 December 1978. In view of the importance of the decision applied for and the time taken for each step of the procedure, the Government took the view that the applicant's case was dealt with within a reasonable time.

82. As regards b), the Government referred to the last paragraph of p. 4 of the Commission's decision of 13 March 1980 concerning the admissibility of the applicant's application which revealed that a copy of the report of 22 November 1978 by the Council for the Protection of Children in Amsterdam was sent to the applicant's counsel. When the Council forwarded the report to the Chief director (Oberkreisdirektor) of the District Youth Welfare Office (Kreisjugendamt) in Bergisch Gladbach (Federal Republic of Germany), on 28 November 1978, it expressly granted permission for the applicant to see the whole report at the Office.

83. The Government's letter of 8 October 1979 to the Commission once again made it clear that the Netherlands authorities had no objection to the applicant's examining the report.

84. The Government therefore considered that no information was withheld from the applicant which had played a part in the decisions of the Netherlands judicial authorities relating to the case.

85. Bearing in mind, moreover, that a copy of the report was sent to the applicant's counsel, the Government did not consider that the principle of equality of arms as laid down in Art. 6,para. 1 of the Convention had been violated in the present case.

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C. As to Article 3 of the Convention

1. The submissions of the applicant

86. The applicant alleged that in his respect the Netherlands courts fully ignored the most fundamental and elementary natural links between a father and his child, by preventing him from having any access to it. In his opinion he had at least the right to see his child, in a respectful manner, on the latter's birthday.

87. He further pointed out that the court's refusal to make visiting arrangements had to be considered as a punishment of an innocent person.

88. In his view, such a treatment by the courts impaired his right to human dignity and was degrading within the meaning of Art. 3 of the Convention.

2. The submissions of the Government

89. The Government submitted that it had been stated above that at the request of the parent, the Netherlands courts may make arrangements for contact between the child and the parent not awarded custody upon divorce. In this respect they referred to their comments on the admissibility of the application that in principle a child should have regular contact with both parents in order to grow up harmoniously, so that it also had the possibility of identification with the parent not awarded custody. However, in the present case the courts had established that if they were to make access arrangements and these were to be put into effect, a situation would arise which was contrary to the interest of the child.

90. According to the Government it certainly had not been established that the applicant's interests were not taken into account in the decisions of the courts. However, the child's interests, which in the view of the courts lay in no access arrangements being made, were held to be paramount, and this was the deciding factor. The Government was of the opinion that no reasonable grounds could be invoked in support of the claim that the rejection of the applicant's request for access arrangements constituted inhuman or degrading treatment.

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IV. OPINION OF THE COMMISSION

A. Points at issue

91. The issues in this case, which have been declared admissible, can be stated as follows:

1. Whether or not Art. 8 of the Convention has been violated by reason of the fact that the applicant did not have access to his child?

2. Whether or not Art. 3 of the Convention has been violated by reason of the above fact?

3. Whether or not Art. 6 of the Convention has been violated by reason of

   - the length of the proceedings before the Netherlands courts with which the applicant tried to obtain a judicial decision concerning access to his child, and/or

   - the fact that the applicant was not provided with a copy of the advice given to the Netherlands courts by the Council for the Protection of Children.

B. On Article 8 of the Convention

92. Having regard to the submissions of the Parties the Commission considers that the main issue which falls to be examined under Art. 8 of the Convention is whether the failure of the Netherlands authorities and courts to secure to the applicant access to or contact with his child after his divorce constituted, in the circumstances of the present case, an unjustified interference with his right to respect for family life.

93. Art. 8 of the Convention provides as follows:

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

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

1. General considerations

94. On a preliminary point the Commission recalls that, in accordance with its established case-law, the right to respect for family life within the meaning of Art. 8 of the Convention includes the right of a divorced parent, who is deprived of custody following the break up of the marriage, to have access to or contact with his child, and that the State may not interfere with the exercise of that right otherwise than in accordance with the conditions set out in para. 2 of that Article (Applications Nos. 911/60, Yearbook IV, p. 198; No. 7911/77, Decisions and Reports 12, p. 192).

95. The Commission considers that the natural link between a parent and a child is of fundamental importance and that, where the actual "family life" in the sense of "living together" has come to an end, continued contact between them is desirable and should in principle remain possible. Respect for family life within the meaning of Art. 8 thus implies that this contact should not be denied unless there are strong reasons, set out in para. 2 of that provision, which justify such an interference.

2. The right to respect for family life under Article 8 (1) of the Convention

96. In the present case the applicant, since his former wife's return to the Netherlands in 1973 and the subsequent dissolution of their marriage, has not had access to his son and his efforts to obtain such access from the competent courts have failed. The courts, in their examination of the applicant's request for a visiting arrangement, had to consider not only the position and the interests of the applicant but also those of his son. Their decision to refuse the father's request for a visiting arrangement in order to safeguard the well-being of the child (cf. paras. 45 to 48 above) by giving preference to the interests of the child over those of the father interfered with the exercise of the applicant's right to respect for his family life under Art. 8 of the Convention.

97. It has been suggested, in the submission of the applicant, that the applicable legal provision, which is Section 161, para. (5) of the Netherlands Civil Code, constituted as such a breach of Art. 8 of the Convention. Section 161, para. (5) of the Civil Code provides as follows:

> "The judge may on the application or request of both parents or of one of them make an arrangement for contact between the child and the parent to whom the custody has not or will not be awarded. If no such arrangement has been made in the decision pronouncing the divorce or in a subsequent decision as provided for in paragrapgh 1 of this Section the Juvenile Judge may still make such arrangement."

98. In his submissions the applicant pointed out that under that provision the mother could frustrate his right under Art. 8 by refusing access, since the courts apparently applied the principle that the mother's view was decisive.

99. The Government submitted that the present Netherlands legislation was based upon the assumption that in principle, after divorce, the child should be able to retain contact with both parents in order to "grow up harmoniously". The parent's right of access could not be upheld, however, if contact would lead to substantial disturbance and tension in the child's family life and thus be manifestly contrary to the child's interests. They submitted that this principle was applied by the courts and that a Bill was now before Parliament which constituted a codification of the courts' case-law.

100. The Commission has considered, in the light of the judgment of the European Court of Human Rights in the Marckx Case (judgment of 13 June 1979, Series A, No 31, para. 31 at page 5), whether the applicant can claim, in the circumstances of his case, that the legislation was as such in breach of Art. 8 of the Convention.

101. The Commission had regard to both the Explanatory Report (Memorie van Toelichting) of the Amendment Act 1969 by which the above Section 161 (5) of the Civil Code was introduced, and the Explanatory Report of the Amendment Act 1979, now before Parliament, in which the present legal situation is described.

102. According to the Explanatory Report of the Amendment Act 1969, the present text of Section 161 (5) was intended as a provisional one laying down in general terms the "right to visit" (bezoekrecht) pending the proposals on the matter by the Wiarda-Commission (1) in its final report.

103. In the Explanatory Report to the Amendment Act 1979, now before Parliament, the Minister of Justice described the present legal situation in the following terms:

> "... Access to his child after divorce is a privilege which may be granted to a parent by his former spouse, or possibly by the judge. A privilege which the judge will not grant him in a number of cases because access, in short, is not 'possible', which often means that the custodial parent would cause great difficulty."

104. The Minister therefore proposed that "the entitlement to contact between the child and the parent to whom custody has not been granted be provided for as a legal right".

105. The Commission also notes that the proposed 1979 Amendment Act contains provisions guaranteeing a right of access of the parent not having custody to his child which the courts shall enforce unless they are satisfied that the exercise of that right is not in the child's interest.

106. In the light of these explanations and developments, it might appear that the present state of the legislation in the Netherlands does not as such provide for the legal safeguards required by Art. 8 of the Convention to ensure that contact between a divorced parent not having custody and his or her child exists as a matter of right.

107. However, in the context of the present case, the Commission finds that the problem does not arise insofar as the courts in the Netherlands have clearly treated the applicant's claim for access to his child in a way that recognised his entitlement to such access but have refused it in the interest of the child.

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(1) Commission set up in april 1973 by the Ministry of Justice in order to advise on technical improvements of the procedural rules on divorce and judicial separation.

108. The Commission must therefore examine whether in the circumstances of the present case the interference complained of under Art. 8(1) of the Convention was justified under the terms of para. (2) of that provision.

3. Justification for the interference under Article 8 (2)

109. In its examination of the justification issue the Commission must ascertain whether the interference in the present case (a) was "in accordance with the law", (b) had an aim or aims that were legitimate under Art. 8 (2) and (c) was "necessary in a democratic society".

110. The Commission first notes that the parties' submissions in this respect are of a more general character.

111. The applicant argues, inter alia, that not only have the Netherlands courts completely ignored his claim for immediate contact with his child, under reasonable circumstances at the beginning of the proceedings concerning access, but they have also dismissed his claim for regular contact with his son on the ground that the mother has refused to co-operate. In his opinion, the obstruction of the contact by the mother should be considered as a dereliction of the primary duty of the custodial parent to protect the right of the child to have contact with the other parent. He further submits that the judge, when considering the claim of a non-custodial parent under Section 161 (5) of the Civil Code, might only dismiss such a claim on the ground of extraordinary circumstances to be found exclusively in the person of that parent and constituting a serious damage to the health and morals of the children. In his case, the courts had revealed no valid reasons in his person for denying him all contact with his child.

112. The Government observe that the courts refused to make access arrangements, not on account of the mothers' refusal, but on account of the serious tension to which this would give rise within the family of the child. They recognise that there should be very strong arguments for the applicant's right of access to his son being entirely denied. In their opinion, such arguments apply in the present case, having regard to the special circumstances as described inter alia in the Report by the Council for the Protection of Children in Amsterdam, dated 22 November 1978.

(a) Was the interference in accordance with the law?

113. The Commission observes that the restraint imposed on the applicant by the Netherlands courts was based on Section 161 (5) of the Netherlands Civil Code. Under this provision the court may make a visiting arrangement at the request of the parent or both or it may, as in the present case, refuse it.

114. This interference was thus "in accordance with the law" within the meaning of Article 8(2).

(b) Did the interference have aims that are legitimate?

115. The Commission has constantly held that, in assessing the question of whether or not the refusal of the right of access to the non-custodial parent was in conformity with Art. 8 of the Convention, the interests of the child predominate. The interference is therefore justified where it has been made for the protection of health of the child. (Application No. 7911/77, DR 12, p.192).

116. In the view of the Commission, there can be no doubt that the interference with the applicant's right under Article 8(1) had this purpose. In this respect, the Commission refers to the decision of the Court of Appeal in Amsterdam dated 7 June 1979, where it was held that, in principle, for a harmonious development, a child must have contact with both parents, to enable identification with the non-custodial parent. In the Court's opinion, there were exceptions to this rule in cases where, as in the present one, a conflict appeared to exist between the parents and the making of an access arrangement would lead to tension in the family of the custodial parent and to a loyalty conflict on the part of the child, which situation would not be in the interests of the latter.

117. In its judgment of 15 February 1980 the Supreme Court confirmed that the interests of the non-custodial parent should not be overlooked, but, as the Court of Appeal had rightly considered, the interests of the child ultimately weigh most heavily.

118. Accordingly, the interference with the applicant's right under Art. 8 (1) had an aim that is legitimate under Art. 8(2)

(c) Was the interference 'necessary in a democratic society' for the protection of the health of the child?

119. The Commission first points out that in examining whether the interference was necessary it does not intend to substitute its own judgment for that of the competent domestic courts. Its function is to assess, from the point of view of Art. 8, the decision which those courts took in the exercise of their discretionary power.

120. Bearing these considerations in mind, the Commission is of the opinion that it is an important function of the law in a democratic society to provide safeguards in order to protect children, particularly those who are specially vulnerable because of their low age, as much as possible from harm and mental suffering resulting, for instance, from a divorce of their parents.

121. In such cases, this purpose is achieved by keeping the child away from a situation which could be detrimental to his mental development owing to the existence of a loyalty conflict vis-à-vis one or both of the parents and the inevitable parental pressure put on him causing feelings of insecurity and distress.

122. In the present case, three courts, namely the Juvenile Court, then the Court of Appeal and finally the Supreme Court have carefully considered the applicant's request for access to his child. Each court came to the conclusion that, given the difficulties between the ex-spouses, it was important for the child's well-being to be kept out of these difficulties. The Supreme Court further stated that the interest of the parent not having custody should, of course, not be overlooked, but that, as the Court of Appeal had already rightly considered, the interests of the child must ultimately weigh more heavily.

123. In these circumstances the Commission is satisfied that the interference complained of, namely the courts' refusal of the applicant's request for a visiting arrangement, was required by the interests of the child.

124. The Commission has also considered the position of the applicant. It notes that feelings of distress and frustration because of the absence of one's child may cause considerable suffering to the non-custodial parent. However, where, as in the present case, there is a serious conflict between the interests of the child and one of its parents which can only be resolved to the disadvantage of one of them, the interests of the child must, under Art. 8 (2), prevail. The Commission finds that there is no indication that the refusal of the applicant's request for a visiting arrangement was not necessary in the overriding interest of the child.

125. It follows that the interference with the applicant's right to respect for his family life, being proportionate to the legitimate aim pursued, was justified under para. (2) of Art. 8 as being necessary in a democratic society for the protection of the rights and freedoms of another person, namely the child concerned.

Conclusion

126. The Commission is of the opinion, by 10 votes against 6 that the facts of the present case do not disclose a violation of Art. 8 of the Convention.

C. On Article 3 of the Convention

127. Art. 3 of the Convention is in the following terms:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

128. The applicant maintains that the Netherlands courts fully ignored the most fundamental and elementary natural link between a father and his child by preventing him from having access to the latter. In his view, the courts' refusal to make access arrangements should be considered as a punishment of an innocent person, impairing his right to human dignity and subjecting him to degrading treatment contrary to Art. 3.

129. The Government submit that the courts had held that in the interests of the child, being the decisive factor, no access arrangements should be made. In their opinion no reasonable grounds could be invoked in support of the claim that the rejection of the applicant's request for access arrangements constituted inhuman or degrading treatment.

130. The Commission, having found that the court decisions complained of were justified, under Art. 8(2), by the overriding interests of the child, considers that the same decisions cannot be regarded as constituting inhuman or degrading treatment under Art. 3 of the Convention.

Conclusion

131. The Commission is of the opinion, by 12 votes against 2 and with 2 abstentions that the facts of the present case do not disclose a violation of Art. 3 of the Convention.

D. On Art. 6 of the Convention

132. Art. 6(1) of the Convention provides inter alia:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

133. The applicant alleges violations of this provision:

1. in that the proceedings before the courts were not concluded within a reasonable time; and

2. in that he was not, as required by the principle of "equality of arms", provided with a copy of the advice given to the courts by the Council for the Protection of Children.

134. The Government contest that Art. 6(1) has been breached.

1. On the first point

135. The Commission notes that by letter of 21 June 1978 the applicant requested the Juvenile Judge in Amsterdam to make an access arrangement, since his former wife refused any cooperation in this respect. On 2 August 1978 the Judge adjourned further examination until December awaiting the report of the Council for the Protection of Children. The applicant's further request to speed up the proceedings in view of the serious operation which he would have to undergo was apparently not granted. After having received the Council's advice dated 20 November 1978 the Judge ruled on 21 December 1978. The Court of Appeal dismissed the applicant's appeal of 9 January 1979 on 7 June 1979, while the Supreme Court rejected his appeal on points of law of 19 July 1979 by decision of 15 February 1980.

136. Given these facts it appears that the length of proceedings before the Juvenile Judge and the Court of Appeal was of respectively six and one and a half months, while the proceedings before the Supreme Court took about seven months.

137. The Commission considers that, in order to keep the parents and children concerned no longer than necessary in uncertainty, proceedings relating to a parent's access to his child should not be unduly prolonged. It recognises on the other hand that the decision to be taken requires careful examination of the family situation and that, in the present case, the preparation of the report of the Council for the Protection of Children involved time- consuming contacts with the persons concerned. Moreover, the chances of reaching an agreed arrangement had to be ascertained.

138. The Commission finds that, in view of these considerations, the time required by the courts for the determination of the applicant's request cannot in the circumstances of this case be regarded as unreasonably long.

Conclusion

139. The Commission is unanimously of the opinion that the court proceedings concerned do not, as regards their length, disclose a violation of Art. 6(1) of the Convention.

2. On the second point

140. It appears that the applicant did not receive a copy of the advice of the Council for the Protection of Children, but was only allowed to read this report at the Youth Office of Bergisch Gladbach near his residence in the Federal Republic of Germany.

141. The Commission first notes that, in their initial observations, the Government referred to a directive of the Secretary of State of Justice, contained in a circular of 18 March 1977 sent to all Councils for the Protection of Children, which states that reports should not be handed over to applicants because they generally contain information on persons other than the applicants and the privacy of such persons could be infringed if such reports were released. The Council could even object to the applicant seeing the report at all. The circular also contains the rule that, in principle, the applicant can have access to the report in the Council's office; if he is refused access to the report, he can complain to the judge dealing with the case. If the applicant is represented by a lawyer, the latter shall receive a copy of the report which he is only allowed to discuss with the former.

142. With regard to these rules the Commission does not exclude that, in certain circumstances, the fact that the applicant cannot keep a copy of the report may prejudice his position before the courts, the more so when he has no lawyer.

143. However, in the present case, no such issue arises. It appears that a copy of the Council's report was sent ot the applicant's lawyer in Amsterdam, while he himself was given the opportunity to read the advice at the Youth Office of Bergisch Gladbach. It further appears that the applicant had frequent contacts with his lawyer and the Council itself in writing and orally.

144. The Commission is therefore satisfied that the contents of the above report were sufficiently familiar to the applicant so as to enable him to prepare his case in detail with his lawyer and that the principle of "equality of arms", embodied in Art. 6(1) of the Convention, has therefore been respected.

Conclusion

145. The Commission is of the opinion, by 14 votes in favour and with 2 abstentions that the procedure followed by the courts with regard to the report of the Council for the Protection of Children does not disclose a violation of Art. 6(1) in the present case.

Secretary to the Commission — President of the Commission

H. C. Krüger — C. A. Nørgaard

Original French

Dissenting opinion of

MM. M. Melchior, J. Sampaio, A. Weitzel

and H.G. Schermers

1. We are unable to concur with the views of the majority of the Commission regarding compliance with Art 8 of the Convention in this case.

2. First and foremost, we consider that the present text of Section 161 (5) of the Netherlands Civil Code constitutes in itself a violation of the Convention, as it does not guarantee respect for that part of the right to family life which is constituted by the right of access to be established between a child born of a marriage dissolved by divorce and the parent who is not awarded custody (cf Marckx judgment of 13 June 1979, paragraph 31).

Legislation must recognise and guarantee this right, although the exercise of it may be suspended (inter alia) when the child's overriding interest so requires. Section 161 (5) as it stands, merely authorises the court to grant access, without specifying the conditions for its grant or refusal.

3. The respondent Government submit that Section 161 (5) of the Civil Code is based on the principle that, after a divorce, the child must be able to retain contact with both parents, in order to grow up harmoniously.

4. In our opinion, however, Section 161 (5) of the Civil Code does not provide sufficient guarantees of this principle to meet the requirements of Art 8 of the Convention. We consider that this is clearly indicated in the opinion of the Netherlands Government as stated by the Minister of Justice in his explanatory memorandum on the Bill amending that Section. According to him the present position is that under the existing Section 161 (5) access to the child after divorce is a privilege which may be granted to a parent by his former spouse, or possibly by the court. The court will not grant this privilege in many cases because access, in short, is not 'possible', which often means that the parent entitled to custody

would cause great difficulty. He therefore proposes that 'the entitlement to contact between the child and the parent to whom custody has not been granted be provided for as a legal right'. Furthermore, he emphasises that refusal to permit the exercise of this right can be based only on a limited number of grounds (cf the proposed new Section 161 (9)). He finally adds that, under the new legislation, the question of contact between the child and the parent who is not awarded custody would no longer depend primarily on the custodial parent.

We think most weight should be given to the Minister's statement to Parliament. The Minister's opinion does not bind the Commission, it is true, but we consider that it would be difficult to say that the law as it stands complies with the requirements of Art 8 (1), notwithstanding this unfavourable analysis.

The Explanatory Memorandum on the Bill likewise contradicts the observations on the merits of the application, which argue that the new text of Section 161 (5-10) merely codifies the current practice of the courts.

6. In our opinion, this analysis would indicate that the existing Netherlands law does not comply with the requirements of Art 8 (1) of the Convention and it is therefore unnecessary to examine the application with respect to paragraph 2 of that Article.

7. Nevertheless, as a subsidiary argument, the following comments may be made on the basis of one of these two initial considerations:

- Either one accepts that the existing legislation, despite the criticism that may be levelled at it, does not as such fail to comply with the requirements of Art 8 (1). In which case, the justification for interference must obviously be examined in the light of paragraph 2.

- Or, although it has been found that the present law is incompatible with the provisions of Art 8 (1) one nevertheless considers it necessary to examine whether the measures adopted by the Netherlands courts (although they rest on legislation which ex hypothesi does not in itself conform to the Convention) might be justified under Art 8 (2). The crucial factor in this respect is the very wide discretion which Section 161 (5) of the Civil Code confers on the courts. The Court could use this discretion in such a way that, exclusively on the basis of its judicial authority (à base purement prétorienne), the respect for the right conferred by Art 8 (1) and for the limitations imposed in paragraph 2 would be guaranteed.

8. From this point of view, we consider, like the Netherlands courts and the other members of the Commission, that in the instant case the child's interests must take precedence over the father's interests even to the extent that the latter may be refused access to his son.

In our opinion, however, such an extreme situation must be based on particularly serious considerations.

9. No doubt, the principle of giving precedence to the child's interests was accepted by the Netherlands courts, especially the Court of Appeal and the Supreme Court. But the reasons given for the Regional Court's decision, which was upheld by the Court of Appeal and the Supreme Court, constitute a strange interpretation of the substance of this principle.

The father's application was held to be reasonable. Nevertheless the court, bearing in mind the mother's hostile attitude, considered that granting access would give rise to tension in the child's new family, that this would be harmful to the child and that the father's right of access must, therefore, be refused. [It was, therefore, the mother's attitude which constituted the justification for refusing the right of access. This confirms the Minister of Justice's critical analysis of the present legislation and its application.]

10. It is true that, apparently, the child's interests have been given priority. Nevertheless, the process by which courts determine what is in the child's interests is open to very strong criticism. The creation of tension within the new family cannot in itself warrant the denial of access. There is therefore insufficient justification for interference with the father's right.

11. Any divorce inevitably causes psychological problems for the ex-spouses, the children born of the marriage and for the new husband or wife of the former couple.

A distinction between "difficult divorces" and "divorces without problems" is arbitrary. In the latter, the former spouses keep in touch and agree readily about custody and access. But even in such cases, the child is profoundly affected and has to find his psychological balance again. In the case of "difficult divorces" the child's situation is the same but of an indubitably greater intensity.

12. We think that it is generally useful and even necessary for the psychological balance and harmonious development of a child to know and maintain contact with the parent to whom custody has not been granted. This parent, from whom he will inherit, who often contributes to his upkeep, to whom he is entitled to turn in the event of financial need, whose name he bears, cannot remain a stranger to him. The situation might be different if (as is not true in this case) the parent in question was a danger to the child, had maltreated him before the marriage was dissolved, or was a criminal etc. But in this case the applicant does not have an imbalanced personality. Even the report of the Council for the Protection of Children does not suggest this. Letters enclosed with the file show that the applicant (an engineer) is a normal man who loves children. He is not a loner obsessed with the idea of "recovering" his child, and in fact he has married again.

13. In other words, the Netherlands courts have determined the child's interests in a purely static manner (his protection from psychological stress). The courts do not appear to have given any consideration to the dynamic concept that it is in the child's best interests to maintain contact with his father. This is a valid point, even though, at first, the establishment of this relationship may raise some difficulties for all the parties concerned. Once this problem has been overcome, the child's interests would be guaranteed and secured better than they would ever be in the solution adopted by the Netherlands Government.

14. The categorical refusal by the State authorities to allow contact between the child and the parent requesting access to his son constitutes an extreme interference in the family life of both child and parent. This cannot be justified under Art 8 (2) on the sole ground that to grant access might create tension in the new family (which was in fact the real motivation for refusing access in the instant case).

We therefore consider that the refusal to grant the applicant the right to access which he requested was not "necessary in a democratic society", although an aim was pursued referred to in Art 8 (2) and based on Netherlands law. The infringement of the rights of the applicant and the interference with his interests are out of all proportion to the aim pursued which, though in other respects legitimate in principle, was misapplied in practice in this case.

APPENDIX I

HISTORY OF PROCEEDINGS

Item	Date	Note
1. Examination of admissiblity		
Introduction of application	14 September 1978	
Registration	24 November 1978	
Commission's deliberations and decision to communicate the case to the Netherlands Government and invite them to submit written observations on its admissibility	4 July 1979	MM. Nørgaard Kellberg Daver Polak Frowein Dupuy Tenekides Trechsel Kiernan Klecker Melchior Sampaio
Government's observations on admissibility	8 October 1979	
Applicant's observations in reply	26 November 1979	
Commission's decision on admissibility and future procedure	13 March 1980	MM. Nørgaard Sperduti Busuttil Polak Frowein Jörundsson Tenekides Kiernan Klecker Melchior
2. Examination of merits		
Applicant's observations on the merits	23 June and 7 July 1980	
Government's observations on the merits	3 October 1980	

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Item	Date	Note	
Commission's deliberations	13 December 1980	MM.	Nørgaard Fawcett Sperduti Busuttil Kellberg Daver Opsahl Polak Frowein Jörundsson Dupuy Tenekides Trechsel Kiernan Klecker Melchior Sampaio Carrillo
Commission's deliberations and provisional votes	12 October 1981	MM.	Sperduti Frowein Ermacora Fawcett Busuttil Kellberg Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Soyer
Commission's deliberations	17 December 1981	MM.	Nørgaard Sperduti Kellberg Jörundsson Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers

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Item	Date	Note
Commission's deliberations, final votes on the merits of the case and adoption of the Report	8 March 1982	MM. Nørgaard Frowein Ermacora Fawcett Busuttil Kellberg Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Schermers