AS TO THE ADMISSIBILITY OF

Application No. 12203/86
by A.R.
against Austria

The European Commission of Human Rights sitting in private on 4 March 1987, the following members being present:

MM C.A NØRGAARD, President
G. SPERDUTI
J.A. FROWEIN
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
B. KIERNAN
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
H. VANDENBERGHE
Mr F. MARTINEZ

Mr H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 24 February 1986 by A.R. against Austria and registered on 30 May 1986 under file No. 12203/86;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated on 2 and 4 March 1987;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1962, who resides at Türnitz. In the proceedings before the Commission she is represented by Mr. M. Urbanek, a lawyer practising in St. Pölten.

Due to an affection with German measles during her mother's pregnancy, the applicant suffers from defective hearing and retarded intelligence.

On 23 December 1980 the applicant married and moved to her husband's household.

On 7 June 1981 she gave birth to a son. Permanent quarrels with her mother-in-law concerning the child's education led to the separation of the couple on 18 September 1981.

The child remained with the father, but on 6 October 1981 the applicant applied to be granted the right of custody. Both the Youth Offices at Scheibbs and Lilienfeld, as well as the respective department at the Provincial Government of Lower Austria (Kinder- und Jugendpsychologischer Beratungsdienst) confirmed the applicant's ability to educate her child and moreover stressed that the child

should be handed over to the applicant as soon as possible.

On 21 October 1982 the District Court (Bezirksgericht) of Scheibbs adjudicated the right of custody for the child to the applicant. This decision became final on 12 January 1983, when an appeal of the child's father was dismissed by the Regional Court (Kreisgericht) of St. Pölten.

On 9 February 1983 the applicant and her parents accompanied by officers of the Youth Office of Scheibbs visited the father with a view to carrying out the above decision. However, the father refused to hand over the child to the applicant.

On 14 February 1983 the applicant applied to the District Court for compulsory surrender of the child, and the child's father applied to transfer the right of custody to himself.

On 14 April 1983 the applicant was divorced from the child's father.

On 1 July 1983 the District Court dismissed the father's application to transfer the custody and ordered the official surrender of the child to the applicant as provided by Section 19 of the Code of Non-Contentious Procedure (Ausserstreitgesetz). The court bailiff, assisted by the police (Gendarmerie) and Youth Office, was charged with the enforcement.

On 6 July 1983 a new attempt to surrender the child failed. The child who had not had contact with his mother for some time showed no confidence in her.

On 20 July 1983 the Regional Court dismissed the father's appeal from the decision of 1 July 1983, stating that it was the grandmother on the father's side who persistently obstructed any contact between her grandson and his mother.

On 7 October 1983 the District Court again ordered compulsory surrender, stressing that immediate enforcement was necessary in order to prevent increasing difficulties for the child to accustom to new surroundings.

On 10 November 1983 an attempt to surrender the boy failed once more, since the grandmother refused to hand him over, pretending he was ill.

On 22 November 1983 the applicant applied for a new date of compulsory surrender.

On 15 December 1983 the District Court again ordered surrender and imposed a fine on the child's father for non-observance of a judicial order.

The father's appeal to the Regional Court was dismissed on 29 December 1983.

On 16 February 1984 a further attempt to surrender the child by force failed, apparently because of medical advice that this would harm the child's well-being.

On 14 March 1984, as a result of a new attempt of the child's father to obtain a transfer of custodial rights, the District Court ordered the appointment of an expert for the purpose of delivering an opinion as to how both the applicant and the child's father were qualified for care and education. The applicant's appeal to the Regional Court was successful on 16 April 1984. The father appealed further to the Supreme Court, but this appeal was rejected on

28 June 1984.

On 3 May 1984 the District Court dismissed a further application of the father concerning the custodial rights. His appeal was also dismissed on 22 August 1984.

On 2 October 1984 the District Court ordered the appointment of an expert for the purpose of delivering an opinion as to how the custody decision of 21 October 1982 could be executed.

On 22 March 1985, as the child was still living with his father and grandmother, the applicant filed another application for effective measures to hand over the child to her.

From 1981 onward the applicant tried to visit her son as often as possible. This became more and more difficult, since she was destitute and had no earnings until 1985. The child and his father lived at a considerable distance from the applicant's home and it was almost impossible to get there by public transport. As the applicant had no driving licence, she had to get a driver for the visits to her child. When she could no longer afford the costs, she applied to the District Court to oblige the child's father to pay an advance for the visits.

On 6 September 1985 the application was dismissed. The Court stated that in non-contentious proceedings each party had to bear his or her own costs and that there was no provision on refunding expenses.

The applicant unsuccessfully appealed against this decision to the Regional Court and subsequently to the Supreme Court which finally rejected her appeal on 7 November 1985. Both Courts underlined that Section 19 of the Code of Non-Contentious Procedure did not provide any possibilities of imposing an advance on costs on the child's father and that it was irrelevant whether or not the father's behaviour had given rise to these costs.

It appears that the applicant's visits to her child were not continued after these decisions.

In the meantime both parties had filed new applications to the District Court concerning the custodial rights. The applicant had asked for an injunction ordering the immediate compulsory surrender of the child and the payment of alimonies by the father. The latter had made a new application to transfer the custodial rights to him, and in this context he had referred to his recent remarriage and the fact that the child had developed strong emotional ties to his second wife.

On 5 February 1986 the District Court decided on these applications, rejecting the applicant's claims and varying the earlier custody decision in favour of the child's father. It noted that according to a psychiatric report the boy was somewhat mentally retarded; he was extremely shy and anxious, lacked contact with the outside world and showed a symbiotic attachment to the persons educating him. In principle it should be avoided interfering with personal ties developed by children of his age because this could lead to serious psychological trouble. Despite possible doubts it now appeared to be in the boy's best interest to leave him in the social environment into which he seemed to be well integrated. A transfer to his mother could only be achieved by force and would expose him to a situation totally unkown to him in relation to which he had already developed anxiety and negative expectations. All existing ties would be severed abruptly. This could only lead to a deterioration of the adverse symptoms and grave repercussions on his future development, whereas these developments could be avoided if the boy remained with his father where it was ensured that his basic needs were met.

From the legal point of view, the Court observed that a variation of the previous custody decision, which had become final, was only possible if the conditions of Section 176 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch) were met. The predominant consideration in cases of this kind was the best interest of the child (Section 178a). At the time of the original custody decision the situation had been such that, due to the tender age of the boy, no special problems were expected to arise if he was transferred to other surroundings. This situation had fundamentally changed. A transfer of the already handicapped child to his mother could no longer be justified. It was true that the father thus achieved the aim of his permanent passive resistence, but it could not be said that by this attitude he had endangered the well-being of the child. He had only thwarted the realisation of the applicant's right to educate the child. The applicant herself was not wholly without responsibility. Her inability to establish the necessary relations with her child, which was partly due to her own handicaps, had contributed to the situation which could have been avoided if she had shown more flexibility and initiative.

The applicant appealed from this decision, claiming that the requirements under Section 176 of the Civil Code were not met because there was no mistake on her part which would harm the child's welfare. She further criticised the Court's assumption that custody decisions which, due to the Court's inactivity, are not enforced must be changed automatically after some time. In view of the resistence of the child's father and grandmother it had been clear from the outset that the applicant would not be able to keep the necessary contact with the child unless supported by the Court. She asked for an examination of the Court's responsibility for the belated and improper arrangements made for the child's surrender.

The Regional Court rejected the appeal on 16 April 1986. It confirmed that the predominant consideration must be the child's best interest. This was an independent notion and not part of parental rights. The child's interests took priority over those of the parents. The decisions invoked by the applicant as to the strict standard to be applied when custody decisions are being varied all related to cases where the factual situation corresponded to the legal one. The basic assumption was that a change of an established factual situation which interrupted the continuity of the education was justified only in very exceptional circumstances where a considerable improvement of the situation of the child could be expected by his transfer to different surroundings. These conditions were not met in the present case. The child was integrated in the family of his father and the latter's second wife, whereas the applicant could not take care of him herself due to her employment and his education would therefore again be entrusted to grandparents. The change of the factual situation would indeed lead to a serious interference with the child's welfare. It was irrelevant that this situation had been brought about in an illegal manner by the child's father. The latter's behaviour did not justify drawing any conclusions to the detriment of the child. The law was based on objective considerations and did not attach any importance to faulty behaviour. Likewise it was irrelevant in the present situation whether any responsibility of the courts could be established for the allegedly belated and inappropriate attempts to carry out the earlier custody decision. In this context reference was also made to the applicant's own failure to establish further contacts with the child.

The applicant's further appeal was rejected by the Supreme Court on 10 July 1986. Insofar as the applicant had complained of a violation of her right to be heard, the Court observed that the judge of first instance had in fact discussed the case with both parties. An oral hearing was not required in non-contentious proceedings. It was sufficient that the parties were given an opportunity to state

their views. Even if the judge of first instance had violated this rule, the opportunity was given and used in the appeal proceedings. As to the merits, the Supreme Court was only competent to examine whether there was a manifest violation of the law. This was not the case. The courts had sufficiently taken into account the predominant interest of the child's welfare. It was true that according to Section 144 of the Civil Code the withdrawal of parental rights required a danger for the child's welfare. However, this had been realised by the courts. The decision whether particular facts revealed such a danger was a matter of judicial appreciation which could not give rise to a manifest violation of the law.

COMPLAINTS

1. The applicant first complains of the length of the proceedings under Article 6 para. 1 of the Convention.

The custody decision became final in January 1983 when the child was one and a half years old.

The applicant emphasises the importance of the time element in this case in order to prevent alienation of the child who, at the time of lodging the application, was already four and a half years old and who, at the time when the custody decision was varied, had attained the age of six.

The applicant refers to the British child custody cases (Nos. 9580/81, 9840/82, 10496/83, Decs. 14.3.1984).

The applicant further complains under Article 6 para. 1 of the Convention that the proceedings which led to the variation of the custody decision were unfair. Her right to be heard was disregarded because she was never informed of the relevant application of the child's father nor given an opportunity to comment on it prior to the court's decision. She learnt of this application only when the decision varying the custodial rights was served upon her.

2. The applicant further complains under Article 8 of the Convention of an unjustified interference with the right to respect for her family life.

She submits that respect for family life does not only mean freedom from State interference but moreover involves an obligation for the authorities to act in a manner calculated to allow for a normal development of family ties. In this respect she relies on the Eur. Court H.R. Marckx judgment of 13 June 1979 (Series A no. 31). The non-implementation of the original custody decision in this case allegedly violates Article 8, because no effective measures to enforce this decision were taken before a situation arose where it appeared to be in the child's best interest to remain with the father and vary the custody decision accordingly.

3. The applicant finally complains under Article 13 of the Convention that she was not granted an effective remedy before the Austrian authorities to challenge the inactivity of the court while, at the same time, the court refused to alleviate her difficult financial situation in order to maintain at least the necessary contact with her child.

&_THE LAW&S

1. The applicant's principal complaint concerns the right to respect for her family life as guaranteed by Article 8 (Art. 8) of the Convention. This right was allegedly infringed by the failure of the Austrian authorities to enforce in time and by appropriate means the

decision of 21 October 1982 by which she was adjudicated custodial rights for her child. A further unjustified interference with the applicant's right to respect for her family life is seen in the decision of 5 February 1986 by which the above custody decision was varied in favour of the child's father who until that time had unlawfully failed to surrender the child to the applicant.

The Commission first observes that the latter decision was clearly based on the consideration of the best interest of the child who now was to stay with the father without an abrupt change of the surroundings which could only have provoked psychological trouble and detrimental effects for the child's already retarded development. This seems to be accepted by the applicant herself. In these circumstances the decision to vary the custody decision, and the resultant interference with the applicant's family rights, must be regarded as being justified under Article 8 para. 2 (Art. 8-2) of the Convention. The decision was in fact taken in accordance with the applicable Austrian law, it pursued a legitimate purpose covered by Article 8 para. 2 (Art. 8-2), namely the protection of the rights of others (i.e. the rights of the child), and it finally was not disproportionate to the aim pursued. It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The Commission has also examined the applicant's further complaint under Article 8 (Art. 8) concerning the authorities' alleged failure to take appropriate steps for the enforcement of the earlier decision which had conferred the custodial rights for the child on the applicant.

The Commission notes, however, that the competent Austrian Court indeed took repeated decisions to enforce the custody decision of 21 October 1982 after the applicant's first attempt to obtain its voluntary implementation with the assistance of the Youth Office had failed in February 1983. The Court not only rejected several requests of the child's father to vary the custody decision, it also repeatedly ordered the compulsory surrender of the child to the applicant and if necessary the use of force for this purpose. Thus already the decision of 1 July 1983 charged the court bailiff to apply force for taking away the child from the father with the assistance of the police and of the Youth Office. It was apparently the applicant herself who renounced the actual execution of this decision when it turned out that the child showed no confidence in her. On the applicant's request the Court then issued new orders for compulsory surrender of the child on 7 October and 15 December 1983 respectively. The attempts to execute these orders failed because the applicant again gave in on the basis of medical advice that the use of force would harm the child's well-being. The second order was accompanied by the imposition of a fine on the child's father who nevertheless did not give up his resistance. An application for a new order was not made by the applicant before March 1985, after the courts had rejected further requests of the child's father to vary the custody decision in his favour and after it had been decided to obtain expert advice on the question of how the custody decision in favour of the applicant could be executed. It is apparently this expert advice which subsequently laid the basis for the variation of the custody decision.

The Commission observes that the respondent State is not responsible for the behaviour of the private persons who obstructed the enforcement of the custody decision, i.e. the child's father and grandmother. Any complaint under the Convention, alleging failure to act, can only be levelled against the State authorities themselves, i.e. the competent courts and executive organs. However, it has not been shown that these authorities in fact neglected their duties. In the Commission's opinion they did everything which could be expected of them in the circumstances to back the applicant's claims.

Throughout the relevant period they consistently supported the applicant's legal position and rejected all remedies of the opposite party likely to interfere therewith. They also made available the necessary procedural instruments by which the applicant could have secured the effective realisation of her custodial rights. The fact that the obstruction by the opposite party prevented her from getting hold of the child when this was still possible without endangering the latter's predominant interests cannot be imputed to the State. Accordingly there is no appearance of the authorities having failed to show the necessary respect for the applicant's family life, nor of their having created the situation where a modification of the underlying custody decisions became unavoidable.

It follows that this part of the application must also be rejected as being manifestly ill-founded.

3. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention that a decision determining her civil rights was not taken within a reasonable time.

As regards this complaint, the Commission observes that Article 6 para. 1 (Art. 6-1) is applicable only insofar as the proceedings concerned the determination of the applicant's civil rights, i.e. her custodial rights vis-à-vis the child. In contrast, Article 6 para. 1 (Art. 6-1) is not applicable to those parts of the proceedings which concerned the enforcement of civil rights which had already been determined. The delay in the enforcement of the custody decision of 21 October 1982 is therefore outside the scope of Article 6 para. 1 (DArt. 6-1) of the Convention and cannot be challenged under this provision.

As regards the proceedings which concerned the determination of the applicant's custodial rights, they were not one set of continuing proceedings, but a series of separate proceedings. The Court was in fact entrusted with a permanent supervision of the custodial rights in the best interest of the child and in this context had a power to vary its original decision whenever this appeared appropriate in the circumstances having regard to the criteria laid down in the Civil Code.

It is not alleged that the proceedings on the applicant's own initial request to be adjudicated the child's custody were unreasonably delayed. The subsequent proceedings on the repeated requests by the child's father to vary the original custody decision were each time conducted without undue delay. The fact that no decision was taken immediately after the father's request of March 1985 can be explained by the fact that at that time the Court had appointed an expert to advise it on the question of how the original custody decision could be executed. The relevant decision was eventually taken in February 1986 and having regard to the circumstances this can still be regarded as a decision within a "reasonable time". There was no undue delay in the subsequent appeal proceedings.

It follows that this part of the application must again be rejected as being manifestly ill-founded.

4. The applicant also complains that the proceedings concerning the variation of the custody decision were unfair because she was not informed of the relevant request of the child's father nor given any opportunity prior to the decision of the Court of first instance to comment on this request. The Commission has not been provided with a detailed documentation on the conduct of the proceedings in question and is therefore unable to ascertain whether or not the applicant's above assertions are correct. In any event it appears from the relevant decision of the District Court of 5 February 1986 that the judge and a social worker visited the applicant at her home in

connection with these proceedings and that she was also examined by the competent advisory psychiatric service of the Provincial Government. The Commission further notes the finding in the appeal decision of the Supreme Court of 10 July 1986 that there had been no violation of the applicant's right to be heard. The Supreme Court observed that the judge of first instance had discussed the case with both parties and that in any event the applicant had been given an opportunity to state her views in the appeal proceedings before the Regional Court. The Commission finally notes that in the decisions on each level the applicant's legal position and the arguments submitted by her were in fact considered. It concludes that there is no appearance of a violation of the principles of a fair hearing in this case. The applicant's complaint in this respect is thus again manifestly ill-founded.

5. The applicant finally invokes Article 13 (Art. 13) of the Convention, claiming that she had no effective domestic remedy by which she could assert her right to respect for her family life in particular as regards the alleged failure of the authorities to enforce the original custody decision in an appropriate way.

However, the Commission notes that effective remedies were in fact available to the applicant to assert her claim of enforcement of the original custody decision under Section 19 of the Code of Non-Contentious Procedure read in conjunction with Sections 354 and 355 of the Enforcement Proceedings Act. These remedies were indeed used in the present case and the fact that they did not produce the desired result is not imputable to the respondent State as the Commission has already found (cf. para. 2 above). It follows that there is no appearance of a violation of Article 13 (Art. 13), and the applicant's complaint in this respect must again be rejected as being manifestly ill-founded.

For these reasons, the Commission

&_DECLARES THE APPLICATION INADMISSIBLE&S

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)