AS TO THE ADMISSIBILITY OF

Application No. 19762/92
by Ellen ASPLUND
against Sweden

The European Commission of Human Rights (Second Chamber) sitting in private on 2 September 1994, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

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

Having regard to the application introduced on 7 August 1991 by Ellen ASPLUND against Sweden and registered on 24 March 1992 under file No. 19762/92;

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

Having regard to :

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 16 March 1993 and the observations in reply submitted by the applicant on 2 June 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Swedish citizen born in 1942 and resident in Stockholm. She is a nurse by profession. Before the Commission she is represented by Mr. Lennart Möller, a lawyer practising in Stockholm.

This is the applicant's second application to the Commission. The first one (No. 13372/88) concerned inter alia the placement of the applicant's son Morgan in public care in 1987. It was declared inadmissible on 12 July 1989.

The facts of the present case, as submitted by the parties, may be summarised as follows.

Particular circumstances of the case

a. The applicant's custody of and access to Morgan

Together with D.J. the applicant has a son, Morgan, born out of wedlock on 21 November 1979. The applicant's relationship with D.J. ended in 1982. Morgan remained with the applicant, his then legal custodian. In 1984 D.J. was provisionally granted visiting rights to Morgan. In January 1988 the District Court (tingsrätten) of Stockholm transferred custody of Morgan to D.J. The applicant was granted certain visiting rights. The visits were initially to take place in the presence of a third person appointed by the social welfare authorities.

In December 1988 the applicant, when exercising her rights to visit to Morgan, left with him for Norway, where they stayed until January 1990, when Morgan was returned to D.J. through enforcement measures. According to the applicant, it had been Morgan's wish to leave D.J.

In February 1990 the applicant, when again exercising her rights to visit Morgan, took him to her home. According to the applicant, Morgan had subsequently refused to go back to D.J., stating that he had been beaten by him. Morgan was again returned to D.J. through enforcement measures.

In March 1990 the applicant requested that custody of Morgan be transferred to her. D.J., on the other hand, requested that the applicant's visiting rights be revoked. The parties agreed to request a fresh child psychiatric examination of Morgan.

On 25 April 1990 the District Court of Sollentuna held an oral preparatory hearing in the case. According to the applicant, Morgan had told a representative of the social authorities, who had met him on several occasions, that he wished to live with the applicant. The applicant referred to a written statement by that representative.

On 20 June 1990 the District Court provisionally ordered that D.J.'s custody of Morgan should be maintained. It further provisionally revoked the applicant's visiting rights pending the outcome of the case or an agreement between the parties. It also requested an opinion from the Social Welfare Board (socialnämnden) of Upplands-Väsby and a fresh child psychiatric examination of Morgan. The applicant's appeal was rejected by the Svea Court of Appeal (Svea hovrätt) on 6 August 1990 without any further appeal being open to her.

From 26 August 1990 to 4 September 1990 Morgan again stayed with the applicant. According to her, he had run away from D.J. He was again returned to D.J. through enforcement measures.

In an opinion of 4 September 1990 Mr. Lars Billing, a child and youth psychologist, found nothing to support the social authorities' view that Morgan had been incited by the applicant to run away from D.J. He further referred to an interview made with Morgan according to which he had run away because he had been beaten by D.J. on up to thirty different occasions, and that the reason for his second runaway was that he had unsuccessfully tried to contact the applicant by letter and telephone.

According to the Government, Mr. Billing's opinion has never been submitted to the social authorities.

On 20 December 1990 the applicant requested that the Social Welfare Board take measures so as to enable her to visit Morgan.

On 12 April 1991 the applicant requested that the District Court hold a new oral preparatory hearing in order to hear Morgan himself. She also requested access to Morgan.

The child psychiatric report submitted to the District Court on 29 May 1991 included an opinion by Dr. Bodil Guldberg, a specialist in

child psychiatry, who had met the applicant twice, D.J. twice and D.J. and Morgan together once. The opinion concluded in a recommendation that Morgan should undergo therapy.

The applicant objected to Dr. Guldberg's opinion, as she had not been interviewed together with Morgan. She further renewed her request that Morgan himself be heard by the Court.

In a further opinion of 12 September 1991 to the District Court Dr. Guldberg considered that it would be more advantageous to Morgan that he live with D.J. and have a regular contact with the applicant.

In its opinion of 7 January 1992 to the District Court the Social Welfare Board recommended that custody of Morgan be entrusted with D.J. alone and that the applicant be granted visiting rights.

As from February 1992 certain access between the applicant and Morgan took place in the presence of a third person appointed by the Social Welfare Board.

On 20 March 1992 the District Court postponed its examination of the case until 31 May 1992, awaiting further access arrangements to be proposed by the Social Welfare Board.

On 21 May 1992 the District Court of Stockholm convicted the applicant on three counts of aggravated child abduction (grov egenmäktighet med barn), once in 1988 and twice in 1990, and sentenced her to a conditional prison sentence and 3.000 SEK in fines.

On 23 June 1992 the District Court of Sollentuna postponed its examination of the case until 31 August 1992, awaiting the meetings between the applicant and Morgan fixed by the Social Welfare Board on 2 June 1992. The applicant and Morgan had met or were to meet on 17 June, 7, 8, 14, 15 and 17 July and 30 August 1992, each day for between three and ten hours and in the presence of a social welfare officer.

On 10 September 1992 the responsible social welfare officers informed the District Court that the access arrangements had been complied with on 17 June and 7 July 1992. On 8 July 1992, however, the applicant had again demanded that Morgan come and stay with her. On 13 July 1992 she had informed the social welfare officers of her dissatisfaction with the access arrangements and had cancelled the meetings with Morgan on 14, 15 and 17 July 1992. Morgan had subsequently declared that he no longer wished to meet the applicant.

According to the applicant, she was unable to meet Morgan on 14, 15 and 17 July 1992 due to illness. She also asserts that Morgan's objection to meeting her was the result of D.J.'s threat to have Morgan placed in public care if he met her. She finally asserts that Morgan has been assaulted by D.J. and refers to D.J.'s conviction of assault in 1983.

On 3 November 1992 the social welfare officers informed the District Court that Morgan was persisting in his wish not to meet the applicant.

On 25 November 1992 the District Court held a further oral preparatory hearing in the case. The applicant stated, inter alia, that she had spoken to Morgan over the telephone on several occasions.

b. Morgan's placement in public care

From June 1987 to February 1988 Morgan was placed in public care, the care order having acquired legal force following the refusal of the Supreme Administrative Court (Regeringsrätten) on 10 July 1987 to grant the applicant leave to appeal. The further facts underlying the care

order may be found in the Commission's decision as to the admissibility of the applicant's above-mentioned first application (No. 13772/88). During the care period and subsequently Morgan lived with D.J.

In August 1987 the applicant was prohibited pursuant to the public care legislation from having access to Morgan.

In an opinion of November 1987 Dr. Rudolf Schlaug, a psychiatrist, criticised the child psychiatric investigation forming the basis for Morgan's placement in public care, considering that the opinion showed serious deficiencies.

In an opinion of March 1988 Dr. Bo Edvardsson, a psychologist, also criticised the child psychiatric investigation, considering that the authorities had been prejudiced when concluding that Morgan had been in need of public care.

Relevant domestic law

a. Custody

From its birth a child is in the custody of the mother alone if its parents are not married to each other (Chapter 6, Section 3 of the Parental Code (föräldrabalken)). If a child is in the custody of only one of the parents and the other parent wishes custody to be transferred to him or her, the competent court shall, in accordance with the interests of the child, entrust the custody to the other parent or, if joint custody is requested, entrust the custody to both parents unless one of the parents disagrees to such an arrangement (Section 6).

b. Access

It is the responsibility of the child's custodian to ensure, as much as possible, the child's need of access to the parent who is not the child's custodian. If the child's custodian objects to the access requested by the parent who is not the child's custodian, the court shall, on an action being brought by that parent, determine the question of access in accordance with the child's interests.

c. Court procedure

The court shall ensure that questions of custody and access are adequately investigated and may not determine a case unless the competent social welfare board has been given the opportunity to impart information. The board has an obligation to submit any relevant information it may have to the court. The court may also request that the board or some other authority conduct an investigation of the matter. The court may issue guidelines for such an investigation and is obliged to make sure that the investigation is conducted speedily. The child may also be heard in court if there are special reasons for doing so and it is obvious that such a hearing may not prove harmful to the child (Chapter 6, Section 19).

The court may issue a provisional order concerning custody or access, in accordance with the interests of the child, pending a judgment or a decision with legal force. Such provisional orders may be issued without a prior main hearing (huvudförhandling). The other party, however, shall always be given the opportunity to state his opinion in the matter.

Appeals against provisional orders concerning custody or access are lodged separately with the competent court of appeal, whose decision is final (Chapter 20, Sections 11 and 12).

COMPLAINTS

1. The applicant complains under Article 8 of the Convention of unjustified interference with her right to respect for her family life. She submits

a) that subsequent expert reports have shown that Morgan's placement in public care was not justified;

b) that the prohibition of her access to Morgan during his public care was unjustified;

c) that the provisional revocation of her visiting rights in the course of the custody and access proceedings was unjustified and lasted for an excessive period of time; and

d) that as a result of the authorities' failure to actively work for a reunification of the applicant and Morgan she now has de facto no access to him.

2. The applicant further invokes Articles 3, 5, 6 and 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 7 August 1991 and registered on 24 March 1992.

On 12 January 1993 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits of the complaint under Article 8 of the Convention.

The Government's observations were submitted on 16 March 1993. Following an extension of her time-limit the applicant's observations in reply were submitted on 2 June 1993.

On 13 May 1993 the applicant was granted legal aid.

THE LAW

1. The applicant complains under Article 8 (Art. 8) of the Convention of unjustified interference with her right to respect for her family life. She submits

a) that subsequent expert reports have shown that Morgan's placement in public care was not justified;

b) that she was denied access to Morgan during his public care;

c) that the provisional revocation of her visiting rights in the course of the custody and access proceedings was unjustified and lasted for an excessive period of time; and

d) that as a result of the authorities' failure to actively work for a reunification of the applicant and Morgan she now has de facto no access to him.

Article 8 (Art. 8) of the Convention reads:

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

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

rights and freedoms of others."

The Government submit that all complaints under Article 8 (Art. 8) are inadmissible. As regards, in particular, the applicant's present situation, the Government submit that she is not formally prohibited from having access to Morgan. On the contrary, the authorities have attempted to re-establish the contact between the two. The social authorities are prepared to appoint a third person to assist him and the applicant during future meetings, should he again wish to meet her. The State cannot, however, be held responsible for Morgan's present wish not to see her. Moreover, her allegations that Morgan is being assaulted by his father have led to several thorough investigations also involving experts in child psychiatry. These investigations have not shown any support for the applicant's assertions.

The applicant submits that under Article 8 (Art. 8) of the Convention the authorities have an obligation to take positive measures for the re-uniting of the applicant and Morgan. However, as a result of the decision of 20 June 1990 to provisionally revoke the applicant's visiting rights, her and Morgan's situation have de facto remained unchanged despite the termination of his public care. The revocation of her visiting rights contravened the aim of re-uniting the applicant and Morgan and was in force for an excessive period of time. The fear of the applicant again repeating her criminal behaviour could have been prevented by ordering access to take place in the presence of a third person. Moreover, it has not been shown that Morgan suffered from any severe psychological conflicts as a result of the applicant's previous access.

The applicant finally maintains that Morgan continues to be prevented by D.J. from contacting her, D.J. threatening to have Morgan placed in public care. Practically all letters from the applicant to Morgan have allegedly been destroyed by D.J.'s wife before reaching him.

a) Morgan's placement in public care

The Commission observes that a complaint concerning the public care of Morgan made in the applicant's previous application No. 13772/88 was declared inadmissible on 12 July 1989 as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. It recalls that under Article 27 para. 1 (b) (Art. 27-1-b) of the Convention it shall not deal with any petition submitted under Article 25 (Art. 25) which is substantially the same as a matter which has already been examined by the Commission and if it contains no relevant new information.

The Commission notes that the expert opinions of 1 November 1987 and 14 March 1988, which the applicant appears to consider as relevant new information warranting a re-examination of Application No. 13772/88, are posterior to the placement of Morgan in public care and the subsequent appeal proceedings, but anterior to the Commission's decision on the admissibility of Application No. 13772/88 on 12 July 1989. The Commission cannot, however, accept, as a basis for reconsidering an application, submissions which could clearly have been presented by the applicant in her previous application (cf. No. 13365/87, Dec. 8.3.88, D.R. 55 p. 294). Accordingly, the expert opinions cannot be considered as such relevant new information as required by the Convention for the purpose of having a previous application re-examined.

It follows that this complaint must be rejected in accordance with Article 27 para. 1 (b) (Art. 27-1-b) of the Convention.

b) The prohibition of the applicant's access to Morgan during his public care

The Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 8 (Art. 8) of the Convention, as Article 26 of the Convention provides that the Commission "may only deal with the matter ... within a period of six months from the date on which the final decision was taken".

The Commission notes that the prohibition of access was imposed on the applicant in August 1987, but that it became obsolete when the public care of Morgan was terminated in February 1988. The present application was, however, lodged only on 7 August 1991, that is, more than six months after the termination of the care. Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have interrupted or suspended the running of that period.

It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

c) The provisional revocation of the applicant's visiting rights pending the outcome of the custody and access proceedings

Insofar as the complaint concerns the justification as such of the District Court's decision of 20 June 1990 to provisionally revoke the applicant's right to visit Morgan, the Commission is again not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 8 (Art. 8) of the Convention. The Commission refers to the above-mentioned six months' rule as stipulated in Article 26 (Art. 26) of the Convention and considers that the final decision in respect of the present complaint is the judgment of the Svea Court of Appeal rendered on 6 August 1990 on the applicant's appeal. The present application was, however, lodged only on 7 August 1991, that is, more than six months after that date. Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have interrupted or suspended the running of that period.

It follows that this aspect of the complaint has also been introduced out of time and must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

Insofar as the complaint concerns the duration of the provisional revocation of the applicant's visiting rights, the Commission observes that it lasted about one year and a half and de facto ended in February 1992, when some access took place. The Commission further notes that the applicant could at any time have challenged the provisional revocation by referring to new relevant circumstances. It appears, however, that she did not avail herself of this possibility.
In these circumstances the Commission cannot find any violation of Article 8 (Art. 8).

It follows that this aspect of the complaint must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

d) The complaint of continuing de facto lack of access to Morgan

The Commission considers that this complaint raises the question whether there has been a lack of respect for the applicant's right to respect for her family life. It recalls that the notion of 'respect' enshrined in Article 8 (Art. 8) is not clear-cut. Particularly difficult problems arise where the positive obligations implicit in that concept are concerned. Its requirements will vary considerably

from case to case according to the practices followed and the situations obtaining in the Contracting States. In determining whether or not such an obligation exists, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual as well as to the margin of appreciation afforded to the Contracting States (Eur. Court H.R., B. v. France judgment of 25 March 1992, Series A no. 232-C, pp. 47 et seq., paras. 44 et seq.).

The Commission considers that the applicant's allegations that Morgan is being prevented from contacting her are unsubstantiated. It further observes that, as stated by herself before the District Court on 25 November 1992, she herself is not prevented from having access to Morgan by telephone. Her further allegation that correspondence from her to Morgan has been stopped has also remained unsubstantiated.

The Commission further considers it established that, since July 1992, Morgan, now almost fifteen years old, has not wished to meet her. The Commission finds no indication that the Swedish authorities have failed to make the efforts which could reasonably be expected in order to arrange meetings between Morgan and the applicant. In such circumstances the applicant's interest in meeting Morgan must be considered to be outweighed by his own wishes, the interests of the child being of paramount importance under Article 8 (Art. 8) of the Convention as well as under the Parental Code and also having regard to the fact the custody and access proceedings are still pending.

Having regard to these various elements, the Commission finds that a fair balance has been, and is presently being, struck between the conflicting interests at stake in the present case (cf., contra, T.H. v. Finland, Comm. Report 22.10.93). Accordingly, there has been no lack of respect for the applicant's family life and the complaint therefore discloses no appearance of a violation of Article 8 (Art. 8) of the Convention.

It follows that this complaint must also be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The Commission has further examined the complaints under Articles 3, 5, 6 and 13 (Art. 3, 5, 6, 13) of the Convention. However, in so far as the matters complained of have been substantiated and are within its competence, the Commission finds that they do not disclose any appearance of a violation of those provisions.

It follows that this part of the application must be rejected in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)