AS TO THE ADMISSIBILITY OF

Application No. 21687/93
by B.H.
against Norway

The European Commission of Human Rights (Second Chamber) sitting in private on 12 October 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 26 October 1992 by B.H. against Norway and registered on 20 April 1993 under file No. 21687/93;

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

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a Norwegian citizen, born in 1956. She is residing at Skogbygda, Norway. Before the Commission she is represented by Mrs. Liv Clemetsen, a lawyer practising in Oslo.

A. Particular circumstances of the case

The applicant has a daughter, born in 1972, and a son, A, born in 1979. The applicant divorced the children's father in 1980 and received custody over both children. In 1986 the daughter experienced certain psychological problems in which the social authorities were involved and thereby became aware of A's problems in connection with his starting school. He had showed very aggressive behaviour and restlessness at school and during the following two years the social authorities assisted the applicant in the upbringing of A and, in addition, he attended weekly special classes at a child and youth psychiatric clinic.

However, the social authorities noticed that A's behaviour worsened and the situation around him in general became precarious. Therefore, on 30 May 1988, they suggested to the Client and Patient

Committee of Østensjø (Østensjø klient- og pasientutvalg), hereinafter the CPC, that A should be taken into public care. The CPC decided on 28 September 1988 to place A in a children's home until a foster home was found.

The applicant appealed against this decision to the County Governor (Fylkesmannen) of Oslo and Akershus who suspended the care order until A had undergone some already planned somatic and psychological examinations. However, on 30 March 1989 the applicant agreed to the public care as she apparently was no longer able to take care of A, with the result that her appeal to the County Governor was withdrawn. On 26 June 1989 A was accordingly placed in a children's home and started in a new school.

On 16 March 1990 the applicant withdrew her consent and claimed that she had misunderstood the procedure. She had never intended to withdraw her appeal to the County Governor but had merely accepted that the appeal should not suspend the care order.

On 1 June 1990 the results of the above-mentioned examinations became available and on 12 June 1990 the CPC decided to maintain the care of A according to Section 16 (a) of the Child Welfare Act (Lov om Barnevern). The CPC noted in its decision that A was a neurotic child who had suffered mentally but that he had shown signs of improvement and of a positive development after having been placed at the children's home and changing schools. The CPC feared, however, that the applicant did not have sufficient knowledge of the boy's problems or would not manage to give him the required security and firm limits which he needed in order to continue this positive development. The applicant appealed against this decision to the County Governor. Meanwhile, on 7 August 1990, A was placed in a foster home with regular access to his mother and sister. On 30 January 1991 the County Governor upheld the care order of 12 June 1990.

Following the decision of the County Governor, the applicant instituted proceedings in the Oslo City Court (Oslo byrett) on 5 February 1991 maintaining that the care order of 12 June 1990 should be lifted.

On 6 February 1991 the defendant State represented by the Child and Family Department (Staten v/ Barne- og familiedepartementet) submitted their observations and requested the Court to maintain the care order.

On 10 May 1991 the Court appointed two experts, who were asked to evaluate A's care needs and the applicant's ability to take care of him both at present and also in respect of the future. The experts were also asked to assess how it would affect A's development if he either returned to the applicant or stayed in the foster home with regular visits by the applicant.

The experts submitted their reports on 28 June 1991 and 30 July 1991, respectively. One expert recommended that the public care of A be maintained whereas the other reached the conclusion that A should return to the applicant.

The Court held hearings from 12 to 14 August 1991. The applicant, assisted by her counsel, was heard as well as fourteen witnesses and the appointed experts. On the basis of the evidence so obtained the Court upheld the care order. In its judgment of 22 August 1991 the Court concluded as follows:

(translation)

> "The Court finds - with certain doubts - that given the questionable home environment [A] should stay in the foster home in public care. Restitution [of the care to the

applicant], as the Court sees it, would expose him to a real risk of considerable regression as regards his development compared to a continued placement in the foster home. In the foster home he has shown clear progress in his work at school and in the environment at home. Here he has his friends and takes part in various sports activities. The foster parents follow this up very well. He gets good support from his foster mother with homework each evening. In the Court's view it is important to secure this social situation for a while. The Court refers here to (a psychologist's) statement where she points out that the next two years are very important for the boy's development. A restitution would on the other hand now imply many factors of uncertainty both in relation to the applicant's capability to bring up the boy in accordance with his needs, his situation at school and in his spare time. Indeed, this assumed uncertainty surpasses surely the degree of uncertainty that any other change of home for a 12-year-old would lead to. The Court notes that it has no basis for presuming that the foster parents no longer manage to take care of the child even if his behavioural problems, contrary to expectations, should worsen.

> The Court finds it difficult, in this connection, to attach any decisive importance to the boy's explicit wish to come home. He is apparently strongly attached and loyal to his mother. At the same time he is attached to the foster family. The foster mother explained that [A] had expressed a wish to live both with his mother and with the foster family, and that he would like to educate himself further in [the area where the foster family lives].

The Court notes, however, that a restitution in the present conditions would seem to be possible well before [A] reaches the age of 18, perhaps after he has completed [secondary school]. At present the son visits the applicant one week-end every second month and she may also visit him once a month in the foster home. The Court also considers it important that the access be extended with the aim that he should receive a more regular, and thereby a more natural, contact with his mother."

On 18 September 1991 the applicant appealed against this judgment to the Supreme Court (Høyesterett). In her appeal she pointed out, inter alia, that it was A's explicit wish to come home and as he was now more than 12 years old his wish should be of considerable importance.

The defendant State filed a reply on 21 October 1991 requesting the Supreme Court to uphold the City Court judgment.

The Supreme Court appointed two new experts who subsequently submitted a common statement recommending that A should remain in the foster home. The Court then held a hearing during which the applicant, who was assisted by her counsel, as well as ten witnesses, were heard. On 5 May 1992 the Court pronounced its judgment and noted, inter alia, that while it found that the CPC had mistakenly characterised A as neurotic and psychologically damaged, the Court agreed that it had been necessary at that moment in time to take A into care. The Court then stated, inter alia, as follows:

(translation)

> "Apparently the situation could be understood as a question of the return of a normal well-functioning boy to his well-functioning mother, with whom he has kept in close contact

even after being taken into care, through visits and in other ways, and expressed that he wishes to return to her. Had the situation been as just described the request of lifting the care order would most probably have been granted. If a restitution [of the boy's care to the applicant] is to be refused, there must be a real danger that the boy will be exposed to considerable harmful effects.
...

In reaching the conclusion that such a real danger of considerable harmful effects is present, [the Court] has especially emphasised the following: the progress and development which [A] has shown can only be explained and understood in the light of a comprehensive and consistent monitoring of him and his activities. It seems difficult to conclude otherwise than that such monitoring of him will still be necessary. Furthermore, very strict limits will be required also in the future. The court-appointed experts have pointed out, and developed further in their explanations to the Court, that [A] latently possesses the features which resulted in extreme restlessness and aggression. [A] is a very ambitious boy. Today he finds an outlet for his ambitions in his school work and sports activities. If he does not get support in such a way that he can still cope with this, there is a considerable danger that he will compensate for this through negative activities, for example criminal actions, in negative environments. Should such a situation develop, of which there is a real possibility when he moves to a new environment, it may be very difficult to correct this situation.

The experts find it is obvious that the mother cannot provide the support which is necessary for [A], should he return to her, to continue his positive development. [The Court] agrees with this. It is true that [the applicant], as already set out, in many ways has developed personally and she is clearly a loving mother who wishes the best for her son. However, [the Court] cannot see that it has been made probable that there have been changes to her more fundamental character due to which she let [A] set his own limits and left it to him to solve his own problems. This is the reason for the fears that the mother is not able to fulfil the care need which will be especially present in the time after a restitution of the boy's care to her. As pointed out, an unfortunate development, which cannot be corrected, will have considerable detrimental effects on [A].
..."

The boy is still placed in the foster home.

B. Relevant domestic law

According to Section 16 (a) of the Child Welfare Act protective measures may be implemented if a child lives under such conditions that its physical and mental health or development is liable to be impaired or is seriously endangered.

According to the second paragraph of Section 31 of the Children's Act (Barnelov) a child has from the age of 12 the right to express its opinion before a decision is taken in any matter concerning its personal welfare. It is furthermore emphasised that great importance should be attached to the child's opinion.

COMPLAINTS

1. The applicant complains, on behalf of her son, that he has been taken away from her against his will and, therefore, his right to liberty and security of person under Article 5 of the Convention has been violated. The decision to uphold the care order was illegal as according to Section 31 of the Norwegian Children's Act a child has from the age of 12 the right to express its own opinion before a decision is taken in any matter concerning its personal welfare. The applicant maintains that her son's wish to return to her was not taken into consideration by the courts although he is now 14 years old.

2. Finally, the applicant complains, under Article 8 of the Convention, that the taking into care of her son was an unnecessary interference with the right to respect for her family life.

THE LAW

1. The applicant complains, on behalf of her son, that he has been taken away from her against his will and, therefore, his right to liberty and security of person as provided by Article 5 (Art. 5) of the Convention has been violated. Article 5 para. 1 (Art. 5-1) reads, as far as relevant, as follows:

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

In the present case the Commission notes that the applicant complains on behalf of her son that his right to liberty has been violated. It is clear that the alleged violation does not concern the applicant directly and the Commission recalls furthermore that the Court has previously held that Article 5 (Art. 5) was not applicable to such restrictions on a child's liberty as resulted from the exercise of the parents' or the custody holder's parental rights (cf., mutatis mutandis, Eur. Court H.R., Jon Nielsen v. Denmark judgment of 28 November 1988, Series A no. 144, para. 73, p.26).

The Commission finds that the same applies when the social authorities, as in the present case, have taken over the responsibility for a child. It goes without saying that when a child is taken into public care and placed in a foster home some restrictions are imposed upon the child which, inter alia, prevent the child from leaving the foster home and returning to the parents.

In such circumstances the Commission finds that the placement of A did not amount to a deprivation of liberty within the meaning of Article 5 (Art. 5), but was a responsible exercise by the social authorities of their custodial rights in the interest of A following the decision to take him into care.

In view of the above considerations, the Commission concludes that this part of the application does not disclose any appearance of a violation of Article 5 para. 1 (Art. 5-1) of the Convention and is, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant has furthermore complained, under Article 8 (Art. 8) of the Convention, that the care order regarding her son was an unnecessary interference with the right to respect for her family life. Article 8 (Art. 8) of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority

with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission finds that the decision to take the applicant's son into care constituted an interference with the applicant's right to respect for her family life as ensured by Article 8 para. 1 (Art. 8-1) of the Convention.

It must therefore be examined whether this interference was justified under the terms of Article 8 para. 2 (Art. 8-2). In this respect the Commission recalls that three conditions must be satisfied: the interference must be "in accordance with the law", it must pursue one or more of the legitimate aims enumerated in Article 8 para. 2 (Art. 8-2) and it must be "necessary in a democratic society" for that or those legitimate aims.

As regards the first condition, the Commission recalls that the decision of the Norwegian authorities to take the applicant's child into care was taken in accordance with the Norwegian Child Welfare Act and was, therefore, a decision in accordance with the law.

The Commission furthermore finds that the interference had a legitimate aim under Article 8 para. 2 (Art. 8-2), namely the interests of the child, which in this case falls under the expression "for the protection of health or morals" and "for the protection of the rights and freedoms of others".

It remains hereafter to determine whether the interference was "necessary in a democratic society" in the interests of the child.

According to the established case-law of the Commission and the Court, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, requires that it be proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society", the Commission furthermore has to take into account that a margin of appreciation is left to the Contracting States (cf. Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no. 130, pp. 31-32, para. 67). That does not mean, however, that the Commission's review is limited to ascertaining whether the respondent State has exercised its discretion reasonably, carefully and in good faith. It cannot confine itself to considering the relevant decisions in isolation but must look at them in the light of the case as a whole. It must determine whether the reasons adduced to justify the interference at issue are "relevant and sufficient" (cf. the above-mentioned Olsson judgment, p. 32, para. 68).

The present applicant claims that the social authorities' decision to take A into care and the following refusals by the courts to lift the care order were not based on sufficiently relevant reasons.

The Commission recalls that both the City Court and the Supreme Court held oral hearings. The applicant was present at both hearings and was assisted by counsel. Before these courts, the applicant had the possibility of presenting the views which in her opinion would be decisive for the outcome of the case. Having regard to these facts, the Commission finds that, in so far as certain procedural requirements are implicit in Article 8 (Art. 8), these requirements were satisfied since the applicant was involved in the proceedings to a degree sufficient to provide her with the requisite protection of her interests.

As regards the decision of public care in 1988 the Commission

recalls that the applicant gave reason to believe that she consented to the public care of her son for which reason the case before the County Governor was withdrawn. It was not until June 1990 the authorities decided not to terminate the care of A, a decision which was subsequently upheld by the City Court and the Supreme Court.

Concerning this refusal to terminate the care of A the Commission recalls the judgments of the City Court and the Supreme Court of 22 August 1991 and 5 May 1992, respectively. The courts established that although the boy had developed favourably he still needed a firm and secure social framework. A change of school and environment in general was likely to be detrimental for him, who still was found to possess the features which resulted in extreme restlessness and aggression. Finally, the courts found it unlikely that the applicant would be able to secure the comprehensive monitoring and support which the boy needed.

These conditions are clearly relevant for deciding to maintain the care. Furthermore, the Commission recalls that a number of reports made by experts were available to the courts when they considered the care issue. The experts had, all but one, concluded that it was premature to terminate the care as it would be detrimental to the boy to return to the applicant due to the high degree of uncertainty as to her abilities of meeting his care needs.

In the light of the above the Commission finds that the refusal to terminate the care was supported by relevant and sufficient reasons and that, having regard to their margin of appreciation, the Norwegian courts were reasonably entitled to think that it was necessary to uphold the care of A. Accordingly, the Commission concludes that this decision can be regarded as "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention in the interest of the child.

It follows that this part of the application is also manifestly ill-founded within the meaning of 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)