AS TO THE ADMISSIBILITY OF

Application No. 13557/88
by B.N.
against Denmark

The European Commission of Human Rights sitting in private on 9 October 1989, the following members being present:

MM. S. TRECHSEL, Acting President
C.A. NØRGAARD
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
Mrs. G.H. THUNE
Sir Basil HALL
MM. C.L. ROZAKIS
L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 2 December 1987 by B.N. against Denmark and registered on 27 January 1988 under file No. 13557/88;

Having regard to the report provided for in Rule 40 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 Danish citizen, born in 1949. He is a journalist and resides at T..

The applicant's then common-law wife gave birth to a son in 1982. However, the parents' relationship broke down in 1985 and, as they were not married, only the mother had parental custody rights over the child according to the Custody and Guardianship of Children Act (Myndighedsloven). Sections 8 and 9 of this Act read as follows:

(translation)

Section 8. Where the parents are married to each other when the child is born, or where they subsequently marry each other, they share the parental custody rights. Where the parents have separated when the child is born, however, the mother has the parental custody rights alone, unless the matrimonial cohabitation between the spouses is resumed.

(2) Where the parents are not married to each other the

mother has the parental custody rights alone.

> Section 9. Parents who are not married or who have separated may, subject to the county's approval, agree on joint parental custody. The agreement will be approved unless this is contrary to the interests of the child.

Until 1987 the applicant's access to his son was effected on a "gentleman's agreement" basis but subsequently it was arranged that the applicant saw his son every other week-end.

The applicant was apparently not satisfied with this arrangement and he therefore contacted the Århus County Authorities (Århus Statsamt) in order to obtain custody rights over his son on an equal footing with the mother. On 1 December 1987 he was informed, however, that according to Section 8 subsection 2 of the Custody and Guardianship of Children Act only the mother had parental custody rights over the child as the parents were never married. Accordingly, since the mother refused to accept joint custody as envisaged under Section 9 of the Act, such an arrangement would not be possible.

COMPLAINTS

The applicant complains that Section 8 subsection 2, whereby he is prevented from obtaining joint parental custody rights over his son, born out of wedlock, violates Article 3 of the Convention.

He furthermore complains that he has no possibility of obtaining in court a determination of the issue of joint parental custody and he invokes in this respect Article 6 of the Convention.

Under Article 8 of the Convention the applicant also maintains that the legal situation in Denmark, preventing him from obtaining joint parental custody, shows disrespect for his family life.

Finally, the applicant invokes Article 14 of the Convention maintaining that the principle of equality has been violated by the application of Section 8 subsection 2 of the Custody and Guardianship of Children Act.

THE LAW

1. The applicant has complained of the fact that he cannot obtain joint parental custody which in his opinion amounts to a violation of Article 3 (Art. 3) of the Convention which reads:

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

According to the case-law of the European Court of Human Rights and that of the Commission, treatment will be considered inhuman only if it reaches a certain degree of severity, causing considerable mental or physical suffering. Furthermore, as for the criterion "degrading treatment", the treatment itself will not be degrading unless the person concerned has undergone humiliation or debasement attaining a minimum level of severity. That level has to be assessed with regard to the circumstances of the concrete case (cf. for example, Eur. Court H.R., Ireland v. United Kingdom judgment of 18.1.78, Series A no. 25).

Having regard to the above and to the applicant's submissions the Commission does not consider that the present application discloses any appearance of a violation of Article 3 (Art. 3) of the Convention and 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 applicant has also complained that he has no possibility

of obtaining in court a determination of the issue of joint parental custody and he refers in this respect to Article 6 (Art. 6) of the Convention.

Article 6 para. 1 (Art. 6-1) reads, insofar as relevant for the present case, as follows:

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

When considering this particular complaint the Commission has first to determine whether Article 6 (Art. 6) is applicable to the case, i.e. whether it concerns the determination of a civil right or obligation.

Article 6 para. 1 (Art. 6-1) of the Convention does not in itself guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States and according to the established case-law of the European Court of Human Rights Article 6 para. 1 (Art. 6-1) extends only to disputes on "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law (cf. Eur. Court H.R., W, B and R judgments of 8 July 1987, Series A no. 121, pp. 32, 77 and 122, paras. 73 and 78).

In the present case it is undisputed that the applicant has access to his son who stays with him every other week-end and the Commission has previously established that the possibility exists in Denmark for a father to obtain from a court, in accordance with the relevant provisions of the Guardianship and Custody of Children Act, a determination on the merits covering the question of transfer of custody from the mother to him (cf. Nielsen v. Denmark, Comm. Report 12.3.87, paras. 16 and 49). It is clear, however, that the applicant could not, under Danish law, claim a right to obtain custody, either alone or together with the mother, over his son. Accordingly the applicant seeks a determination of a "right" which he does not have under domestic law.

It follows, however, from the case-law mentioned above that Article 6 para. 1 (Art. 6-1) does not extend to such disputes for which reason this part of the application is incompatible ratione materiae with the provisions of the Convention and must be rejected in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

3. Under Article 8 (Art. 8) of the Convention the applicant has complained that the legal situation in Denmark, whereby he is prevented from obtaining joint parental custody, shows disrespect for his family life.

Article 8 para. 1 (Art. 8-1) of the Convention reads as follows:

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

It is true that this provision protects the relationship between married parents and their children as well as the relationship between unmarried parents and their children (see Eur. Court H.R., Marckx judgment of 13 June 1979, Series A No. 31, p. 14, para. 31). Furthermore the Commission recalls that it has on several occasions been confronted with the question whether a legal situation, whereby the unmarried father cannot obtain joint parental custody, complies with Article 8 (Art. 8) of the Convention (cf. No. 9519/81, Dec. 15.3.84, unpublished, No. 9530/81, Dec. 14.5.84, unpublished, No. 9558/81, Dec. 15.3.84, unpublished, No. 9639/82, Dec. 15.3.84, D.R. 36 p. 130, and No. 13776/88, Dec. 14.3.89, unpublished).

Like in its previous case-law the Commission finds that the situation of children born out of wedlock necessitates a distinct legislative regulation which has to take into account the problems involved. The Danish legislator has opted for a regulation which is considered to be in the best interests of the child born out of wedlock. Such a premise is neither wrong nor arbitrary. Indeed the present case shows that when the parents do not live together and cannot agree on matters concerning the child it is indispensable in the interest of the child that it is kept away from situations which could be detrimental to its development owing to the existence of a loyalty conflict vis à vis one or both of the parents and the inevitable parental pressure causing feelings of insecurity and distress.

Thus, the Commission maintains its view expressed in the above-mentioned case-law that a regulation giving the right to care and custody to the mother as regards children born out of wedlock does not in general disclose any appearance of a violation of the right to respect for the applicant's family life as guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention.

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.

4. Under Article 14 (Art. 14) of the Convention the applicant has finally complained that the principle of equality secured under this provision has been violated by the application of Section 8 subsection 2 of the Custody and Guardianship of Children Act.

The Commission recalls that the question of discrimination was also examined in the case-law mentioned above. The Commission found, and finds likewise in the present case, that the special situation of the child born out of wedlock is an objective and reasonable justification for the legislator's decision to confer the right of care and custody exclusively to the mother instead of to both parents.

The disadvantages of the unmarried father, which may emerge in the case of dissension with the child's mother, are proportionate to the aim the regulation in question is seeking to realise, namely, the safeguarding of the child's well-being. Hardships can be avoided, as in the present case, by granting the father access to his child even against the mother's will.

Therefore the Commission concludes that the examination of the applicant's complaint on this point does not reveal any appearance of discrimination at variance with Article 14 (Art. 14) of the Convention. This part of the application is consequently also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — Acting President of the Commission

(H. C. KRÜGER) — (S. TRECHSEL)