AS TO THE ADMISSIBILITY OF

Application No. 22173/93
by Egil BORSE
against Norway

The European Commission of Human Rights (Second Chamber) sitting in private on 17 May 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
H.G. SCHERMERS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Ms. M.-T. SCHOEPFER, 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 16 April 1992 by Egil Borse against Norway and registered on 7 July 1993 under file No. 22173/93;

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 1948. He is a civil engineer and resides at Trondheim, Norway.

I.

In 1978 the applicant married a Canadian citizen and in November 1980 his wife gave birth to their son, C. In 1985 the applicant and his wife separated and a detailed agreement concerning custody and access to C was made between the parents on 4 October 1985.

It appears, however, that the agreement could not be honoured to both parties' satisfaction for which reason the applicant instituted proceedings, on 6 May 1986, in the Trondheim City Court (byrett) in order to obtain sole custody of C. Experts were appointed and their report of 5 January 1987 concluded that both parents were capable of taking proper care of C and that, therefore, joint custody would be preferable. On 12 January 1987 the parties reached an agreement in court whereby the parents were given joint custody of C. It was furthermore agreed that C should live with the applicant and that the mother should have access as set out in the agreement.

However, the mother considered ultimately that the applicant did not fulfil his part of the agreement for which reason she instituted proceedings, on 22 October 1987, in the City Court against the applicant in order to obtain sole custody of C. The Court appointed

two experts who were asked to assess each parent's situation, having regard in particular to the interests of C. In their opinions of 21 March and 11 April 1988, respectively, one of the experts recommended that the mother should be granted custody whereas the other concluded that the parents were equally capable of taking care of C.

By judgment of 26 April 1988 the City Court awarded custody of C to the mother. The applicant was granted access in accordance with the applicable provisions of the Children's Act (Barneloven).

The applicant appealed against the judgment to the Frostating High Court (Lagmannsrett). While the appeal was pending the mother requested the High Court, as an interim measure, to award her custody until final judgment was pronounced. Her request was based on the fact that the applicant's employer had requested the applicant to take up employment in Oslo and that therefore he might take C with him. On 22 September 1988 the High Court decided in accordance with the mother's request and C moved to his mother's residence on 29 September 1988.

The case was examined in the High Court from 11 to 13 January 1989. The applicant and the mother were heard, as well as thirteen witnesses and two experts. On the basis of an evaluation of their statements as well as the documentary evidence submitted the High Court pronounced judgment on 13 February 1989 in which the City Court judgment was upheld. The High Court stated inter alia as follows:

(translation)

> Like the City Court the High Court finds that the case concerns two parents who both are strong and capable persons and who both have a sincere wish to serve the child's interests. ... Like the City Court the High Court finds that the difficulties which are at the heart of the present case must be the parents' mutual lack of harmony in their relationship and the lack of communication which follows therefrom when it comes to matters concerning the child. ... Both parents have satisfactory living conditions as well as other material conditions which would secure the child a good upbringing. ...
> ...
>
> Despite the equality between (C's) parents as regards their capability as his custodians differences in personality and character speak in favour of giving the mother custody. C is now in his ninth year. Despite the fact that he is physically and mentally well developed according to his age he needs a certain firmness in his life and vis-à-vis his superiors. The High Court finds no reason to doubt that (the applicant) as a father has a number of positive sides and features of great importance for the child's future development. The Court finds, however, that many of the difficulties in the child's daily life and the lax attitude towards agreements reached are due to the fact that (the applicant) has not sufficiently understood the importance of honouring the agreements reached. It appears that he has, as a father, on a number of occasions and based on insufficient grounds, let the child decide in situations where the issue was already regulated otherwise between the parents, with problematic effects a sa consequence.
> ...
>
> When reaching the conclusion that it is in the interest of (C) that the complicated and conflict-ridden situation of co-operation which exists between the parents is now sought solved by giving custody to the mother in that she alone is awarded parental rights and daily care over (C), the City

Court and the High Court expect that she is aware of, and will respect, the duties which follow therefrom vis-à-vis (the applicant) and his interests. The High Court finds no reason to blame unilaterally the father that the agreements reached were not always honoured as expected. Also the mother's attitude and reactions in the particular situations on which emphasis has been placed have probably contributed to an aggravation of the situation. However, based on the experts' evaluation the High Court considers that the mother ought to step in as the person responsible (for C) as the parents, in the previous arrangements in which the father was the central person, did not manage to make the arrangements work."

As regards access the High Court found that the usual arrangements pursuant to the provisions of the Children's Act could not be implemented as it found it established that the applicant's permanent residence was now Oslo. In these circumstances a specific access arrangement was set out in the judgment on which the parties could rely in case access could not be agreed upon between them.

The applicant subsequently applied to the Supreme Court (Høyesterett) for leave to appeal. On 5 October 1989, his request was rejected by the Appeals Selection Committee of the Supreme Court (Høyesteretts Kjæremålsutfalg).

Less than four months later, on 19 January 1990, the applicant instituted proceedings in the Trondheim City Court requesting that custody of C be transferred to him or, in the alternative, that he be granted access pursuant to the provisions of the Children's Act. By judgment of 27 August 1990 the City Court decided that custody of C should remain with the mother. Furthermore, the applicant was in the circumstances refused access. The applicant's appeal was rejected by the Frostating High Court on 29 March 1991 and leave to appeal was refused by the Appeals Seelection Committee on 31 Octobner 1991.

Less than two months later, on 22 December 1991, the applicant instituted new proceedings in the Trondheim City Court with a request for custody or access. By decision of 2 March 1992 the Court dismissed the case as it concerned substantially the same issues as previously dealt with and since it contained no relevant new information. This decisin was quashed by the High court on 29 September 1992 and the case was referred back to the City Court for examination on its merits. The Appeals Selection Committee of the Supreme Court confirmed the High Court's decision on 19 November 1992.

While the case was pending in the City Court again, the applicant requested the City Court judge to vacate his seat and to have another judge appointed to deal with the case. On 4 January 1993 the President of the City Court rejected the applicant's requests. The applicant's appeals on these points were rejected by the High Court on 18 February 1993 and by the Appeals Selection Committee of the Supreme Court on 27 April 1993.

The applicant then requested the City Court to grant him, provisionally, a right of access to C pending the outcome of the case. This request was rejected by the Court on 15 June 1993 inter alia due to the fact that an access arrangement on a voluntary basis actually existed. The applicant's appeals were subsequently rejected by the High Court on 9 July 1993 and by the appeals Selection Committee of the Supreme Court on 30 September 1993.

On 14 October 1993 the City Court held a hearing on the merits of the applicant's requests for a transfer of custody or, in the alternative, access to C. The applicant did not appear. The Court then dismissed the case after having established that the applicant had been called to appear and that he had not submitted any valid

justification for his absence. This decision was upheld by the High Court on 29 December 1993. On 3 March 1994 the Appeals Selection Committee of the Supreme Court dismissed the applicant's further appeal as it found that his appeal did not contain anything which the Supreme Court could consider.

Approximately three weeks later the applicant instituted new proceedings in the Trondheim City Court which scheduled the main hearing for 23 August 1994. However, the applicant did not appear for which reason the case was again dismissed as it was established that he had submitted no valid justification for his absence. This decision was upheld by the high Court on 24 October 1994.

II.

It appears from the above that the applicant and his ex-wife agreed, on 12 January 1987, to joint custody of C, that C should live with the applicant and that the mother should have access in accordance with the agreement. The applicant submits that C's name was accordingly entered in the applicant's passport. In the autumn of 1988 the applicant obtained a new passport from the Chief of Police of Asker and Bærum and C's name was again entered in the passport despite the fact that the Trondheim City Court on 26 April 1988 had awarded custody to the mother and despite the Frostating High Court's decision of 22 September 1988 to transfer, provisionally, custody of C to the mother.

Following the final judgment as regards custody and access and as these issues nevertheless, as set out above, continued to affect the daily life of C, his mother and the applicant, it appears that the police, in 1990, searched the applicant's home in order to find and to verify the contents of his passport as he apparently was no longer entitled to have C's name inscribed in it. On 5 April 1991 the police searched the applicant's office in Trondheim, brought the applicant to the police station and seized his passport. The same day the applicant went to the local hospital and obtained a medical statement as he found the police had used excessive force against him.

Subsequent to the seizure of his passport the Trondheim police decided on 11 April 1991 to confiscate it as C's name was still inscribed in it. It was returned to him approximately nine months later after C's name has been deleted.

In the meantime, however, the applicant had complained about the confiscation to the Ministry of Justice which, on 15 July 1991, confirmed the decision taken by the Trondheim police. This decision was maintained by the Ministry on 8 October 1991, By letter of 2 December 1992 the Parliamentary Ombudsman informed the applicant that he found no reason to citicise the decisions taken.

Following the Ministry of Justice's above decision of 15 July 1991 it appears that the applicant instituted proceedings against the Ministry in the Trondheim City Court maintaining that the decision to confiscate his passport was illegal. The outcome of these proceedings is unknown.

COMPLAINTS

The applicant complains that over the past ten years he has been subjected to inhuman and degrading treatment by the Norwegian authorities. In particular he refers to the custody conflict between him and his ex-wife and maintains that his right to respect for his family life has been violated due to the fact that the mother was awarded sole custody of C and he was refused access.

The applicant also maintains that he has been, and still is, harassed by the police.

He invokes Articles 3, 5, 6, 8, and 10 of the Convention.

THE LAW

1. The applicant complains of the fact that custody of his son, C, was awarded to the mother and that he has been refused access to C by the courts.

The Commission has examined this aspect of the applicant's case under Article (Art. 8) of the Convention which 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 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 recalls that proceedings concerning custody and access have been pending before the Norwegian courts for years. However, following the decision of the Appeals Selection Committee of the Supreme Court of 5 October 1989 the courts have dismissed the applicant's subsequent cases as he failed to appear. Nevertheless, the Commission does not find it necessary to determine whether the applicant in these circumstances has complied with the requirements of Article 26 (Art. 26) of the convention because this part of the application is in any event inadmissible for the following reasons.

In so far as the applicant complains of the fact that custody was awarded to the mother the Commission recalls that the national courts are often faced with the problem of making a choice between the parents. Their decisions in this respect will not as such disclose any lack of respect for the family life of the parent who is not granted custody. In the circumstances of the present case the Commission has not found any elements which could lead to another conclusion.

As regards the question of access the Commission recalls that in accordance with its established case-law the right to respect for family life within the meaning of Article 8 (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. The State may not interfere with the exercise of that right otherwise than in accordance with the conditions set out in Article 8 para. 2 (Art. 8-2) (cf. Hendriks v. the Netherlands, Comm. Report 8.3.82, para. 94, D.R. 29, p. 14).

The Commission furthermore 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 Article 8 (Art. 8) thus implies that this contact should not be denied unless there are strong reasons which justify such an interference.

The Commission observes that the decisions taken by the Norwegian courts in respect of access were based on the provisions of the Children's Act. The interference was thus inaccordance with the law within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

As regards the legitimate aim 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 Article 8 (Art. 8) of the Convention, the interests of the child predominate. The interference therefore has a legitimate aim in so far as it has been made for the protection of the child's interests (cf. No. 7911/77, Dec. 12.12.77, D.R. 12, p. 192). There can be no doubt that the interference in the present case with the applicant's right under Article 8 (Art. 8) had this purpose. What remains to be considered is therefore whether the interference was necesssary in a democratic society for the protection of the child's interest.

In examining whether the interference was necessary the Commission 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 Article 8 (Art. 8) the decision which the courts took in the exercise of their discretionary power.

It is an important function of the law in a democratic society to provide safeguards in order to protect children from harm and mental suffering resulting, for instance, from the break-up of the relationship of their parents. In such cases this purpose may be achieved by keeping the child away from a situation which could be detrimental to his or her mental development owing to the existence of a loyalty conflict vis-à-vis one or both of the parents and the ivevitable parental pressure put on him or her causing feelings of insecurity and distress (cf. Hendriks v. the Netherlands, loc. cit., para. 120).

In the present case the Commission finds that the competent national courts carefully considered the questions of custody and access. They came to the conclusion, however, that, given the difficulties between the parents, it was impoartant for the child's well-being to be kept out of these difficulties. In these circumstances the Commission is satisfied that the interference complained of was required by the interests of the child and that the courts, when so deciding, did not go beyond their discretionary power.

The Commission has not overlooked the applicant's situation. However, where, as in the present case, there is a serious conflict between the interests of the child and one of its parents, the interest of the child must under Article 8 (Art. 8) prevail. Furthermore, the applicant submits that he is in fact seeing his son on a voluntary basis.

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

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.

2. The Commission has examined the remainder of the applicant's complaints as submitted by him under Articles 3, 5, 6 and 10 (Art. 3, 5, 6, 10) of the Convention. However, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

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

(M.-T. SCHOEPFER) — (H. DANELIUS)