AS TO THE ADMISSIBILITY OF

Application No. 28323/95
by Clara BUCKLEY
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 26 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, 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 May 1995 by Clara BUCKLEY against the United Kingdom and registered on 30 August 1995 under file No. 28323/95;

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 applicant is a British citizen born in 1934 and resident in London. She is represented before the Commission by Ms. Kate Harrison, a solicitor practising in London. The facts as represented by the applicant may be summarised as follows.

A. Particular circumstances of the case

The applicant is the mother of Orville Blackwood, who died in Broadmoor Hospital on 28 August 1991, where he was detained under the Mental Health Act 1983. Orville Blackwood died after having been injected with Fluphenazine Decanoate (Modecate 150mg intramuscularly) and Promazine (Sparine 150 mg intramuscularly). The drugs were administered without consent.

Orville Blackwood was born in Jamaica on 19 June 1960. He came to the United Kingdom as a baby with his mother and other siblings and obtained British Nationality on 4 July 1989. He had a history of court appearances, dating from young adolescence, mainly for theft and burglary. He had served custodial sentences in a detention centre, borstal and prison.

In 1982 Orville Blackwood was first admitted to psychiatric hospital with a history of disturbed and aggressive behaviour. Thereafter he was frequently admitted on compulsory detention orders under the Mental Health Act 1983. He was noted to have psychotic symptoms including delusional ideas, auditory hallucinations and thought disorder, resulting in aggressive behaviour. He appears to have responded well to anti-psychotic treatment on most occasions. During these admissions he was described as being a major management problem, violent towards others and threatening to harm himself. He was diagnosed as suffering from a paranoid schizophrenic illness, possibly induced by drugs. In April 1986 he was convicted of robbery and the possession of an imitation firearm with intent and sentenced to 4 years imprisonment. He was detained in the prison system and subsequently placed in the psychiatric wing of HMP Grendon Underwood. In 1987 he was referred to a regional secure unit, but his behaviour there was so disturbed that he was transferred to Broadmoor on 20 October 1987. After 11 September 1988, the earliest date of release from his prison sentence, Orville Blackwood was detained in hospital under the Mental Health Act 1983.

On the 27 August 1991, the day before his death, his clinical notes state that he was argumentative. On 28 August 1991 after an incident when he refused to attend occupational therapy and shouted his objections, he became agitated and a decision was made by the Charge Nurse that he should go to a seclusion room. The patient went voluntarily. On the afternoon of 28 August 1991 Orville Blackwood was reviewed by the junior hospital doctor, and as the patient was refusing to take any form of medication, the doctor decided medication would be administered by injection. It had previously been agreed by the consultant psychiatrist that Orville Blackwood should receive a depot neuroleptic injection in the form of intramuscular Fluphenazine, at a dose of 150mg. The doctor decided in view of Orville Blackwood's aggressive, uncooperative manner, to administer an intramuscular injection of a phenothiazine drug into his other buttock, to achieve a more immediate response. A number of nurses entered the room, in which the patient was being detained, they applied a degree of restraint, and he then received an injection of Fluphenazine Decanoate (Modecate 150 mg intramuscularly) and an injection of Promazine (Sparine 150 mg intramuscularly). Within minutes the patient collapsed. Attempts were made to resuscitate him. He was taken to the casualty department at a local general hospital, where further unsuccessful attempts at resuscitation were made.

Two inquests were held into Orville Blackwood's death. The first, in October 1991, returned a verdict of "Accidental Death", with the cause of death being given by the pathologist as "Cardiac failure associated with the administration of Phenothiazine Drugs". A second inquest was held from 29 March to 2 April 1993 and confirmed the verdict of the first.

In 1991, the Special Hospitals Services Authority, which is responsible for the management of special psychiatric institutions, set up a Committee of Inquiry to investigate the circumstances of Orville Blackwood's death, to examine the previous inquiry reports in the cases of two other Afro-Caribbean patients who died in Broadmoor in 1984 and 1988 in order to identify any similarities and to make recommendations. In the report published in 1993, the Committee noted a concern for the decision taken on 28 August 1991 to seclude Orville Blackwood which seemed based on an exaggerated anticipation of danger and taken without any attempt to discuss his objections to occupational therapy. It nonetheless found that it was an understandable decision in light of the ethos on the ward and the pervasive sense of ever present danger. It also commented critically on the amount of sparine injected which exceeded the recommended level (150mg instead of 50mg) and on the decision to inject two drugs (sparine and modecate) on the same occasion, rather than allowing the faster-acting one first to take effect. It made a number of recommendations with regard to reviewing

the continued use in Broadmoor of sparine and the undesirability for a doctor who has been involved in an incident with a patient (threat or assault) to take an immediate decision to adjust treatment without consulting other medical staff. The report further recommended that extreme caution should be taken in injecting struggling patients, and that wherever possible this should be avoided.

The applicant instructed solicitors with a view to taking proceedings. The opinion of a consultant psychiatrist was sought. His report dated 31 October 1994 concluded there had been no medical negligence and that the death was not caused by either the choice or combination of the drugs used or the manner in which the drugs were injected. Counsel's opinion was sought at a conference, attended by the consultant psychiatrist (author of report 31 October 1994), the applicant and her solicitors. The consultant psychiatrist reaffirmed his view that the actions of the hospital did not amount to negligence and counsel advised that there was not a "better than even" chance of success. By letter dated 17 November 1994, the applicant was advised by her solicitors that without a medical opinion supporting the allegation that medical negligence was involved in the death, the case would not be able to proceed further. On 4 March 1995 the applicant's legal aid certificate was discharged on the grounds that counsel's opinion did not consider there to be a reasonable prospect of success in the action.

B. Relevant domestic law and practice

Detention

Under the Mental Health Act 1983 a person transferred from prison to hospital can be detained after the expiry of their sentence.

Consent to treatment

Part IV of the Mental Health Act 1983 concerns consent to treatment and is applicable to patients who are liable to be detained.

Under Part IV of the Mental Health Act 1983:

The consent of a patient is not required for any medical treatment given to him for the mental disorder from which he is suffering, not being one of the specific treatments requiring consent and/or a second opinion under the Act, provided the treatment is given by or under the direction of the medical practitioner in charge of the treatment of the patient. (Section 63)

Protection for acts done in pursuance of the Mental Health Act 1983

No person will be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable in respect of any act purporting to be done in pursuance of the Mental Health Act 1983 or any regulations or rules made under the Act, unless the act in question was done in bad faith or without reasonable care. (Section 139).

The protection provided does not prevent the High Court from entertaining an application for judicial review in respect of an act done in pursuance of the 1983 Act.

The protection does not apply to proceedings against the Secretary of State, a health authority, a special health authority (such as controlled Broadmoor Hospital), or a national health service trust. (Section 139)

COMPLAINTS

The applicant invokes Articles 2, 3, 8, 13 and 14 of the Convention.

The applicant complains that the death of Orville Blackwood constituted a violation of Article 2 and that the treatment of her son was inhuman or degrading treatment or punishment in violation of Article 3.

The applicant complains that the Mental Health Act 1983 permitted the treatment, namely the administration of the stated psychiatric drugs in the stated doses, which caused her son's death.

The applicant submits that the enforced medical treatment of Orville Blackwood was a violation of the right to respect for private life under Article 8 of the Convention.

The applicant complains that the Mental Health Act 1983 and in particular section 139, which concerns the protection for acts done in pursuance of the said Act, in combination with the law of negligence, resulted in there being no effective remedy before a national authority in breach of Article 13.

The applicant considers that her son suffered discrimination contrary to Article 14, on the ground of race and his status as a patient detained in a special hospital under the Mental Health Act 1983.

THE LAW

1. The applicant is the mother of Orville Blackwood and complains of violations of the Convention arising from the treatment of and circumstances surrounding the death of her son.

2. The Commission notes that the applicant has not pursued a claim for medical negligence or any proceedings relating to the circumstances of Orville Blackwood's death. Whilst the Commission considers this raises, prima facie, the issue of non-exhaustion of domestic remedies, the Commission finds it unnecessary to resolve this issue as the application is in any event manifestly ill-founded for the reasons below.

3. The applicant complains of a violation of Article 2 (Art. 2) in respect of the death of Orville Blackwood.

Article 2 (Art. 2) of the Convention provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection."

The Commission notes that two inquests were held into Orville

Blackwood's death, the first recording a finding of "accidental death" and the second confirming this finding. Further the Commission notes that the applicant's own medical (consultant psychiatrist) and legal (solicitors and counsel) advisors were unable to conclude that there had been any negligence on the part of the hospital in relation to Orville Blackwood's death, and in consequence no domestic proceedings were commenced.

The Commission notes the concerns and recommendations of the committee of inquiry which investigated the circumstances of Orville Blackwood's death, including the concern surrounding the decision to seclude Orville Blackwood on the day of his death, and the dosage and combination of drugs injected to a struggling patient. However the Commission does not find that the circumstances, as presented to the Commission, disclose any failure, substantive or procedural, to protect the applicant's right to life as required by Article 2 (Art. 2.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

4. The applicant complains under Article 3 (Art. 3), in relation to the treatment of Orville Blackwood by the hospital staff.

Article 3 (Art. 3) of the Convention provides as follows:

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

The Commission recalls that in the Eur. Court HR, Ireland v. United Kingdom judgment of 18 January 1978, Series A no. 25 p. 65 para. 162 it was held:

> "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and in some cases, the sex, age and state of health of the victim, etc."

The Commission notes the findings of the committee of inquiry, which was set up to investigate the treatment of Orville Blackwood and the circumstances surrounding his death. However, none of the circumstances as presented to the Commission discloses that the treatment of Orville Blackwood was anything other than part of a therapeutic regime. The Commission recalls that as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading (see Eur. Court HR, Herczegfalvy v. Austria judgment of 24 September 1992). Taking into account the fact the applicant's own medical expert found no grounds on which to criticise the hospital for negligent treatment, the Commission finds no grounds on which to depart from the general rule. The Commission thus does not find, in the circumstances as presented to it, there to have been any treatment amounting to a violation of Article 3 (Art. 3).

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.

5. The applicant also complains under Article 8 (Art. 8) of the Convention, the right to respect for private life. The Commission considers, for the reasons given above, that in the circumstances of the case there is no appearance of a violation of Article 8 (Art. 8) of 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.

6. The applicant complains under Article 14 (Art. 14) of the Convention, in respect of discriminatory treatment of Orville Blackwood, either on grounds of race, or due to his status as a patient detained in a special hospital under the Mental Health Act 1983.

Article 14 (Art. 14) of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission finds no evidence of discrimination in respect of the treatment of Orville Blackwood either on grounds of race, or his status as a patient detained in a special hospital under the Mental Health Act 1983.

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.

7. The applicant further complains that under Article 13 (Art. 13) there was no effective protection for acts done under the Mental Health Act 1983 and no effective remedy before a national authority.

Article 13 (Art. 13) of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls that Article 13 (Art. 13) does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an "arguable claim" of a violation of the Convention (Eur. Court HR, Boyle and Rice v United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23 para. 52).

The Commission finds that it cannot be said that this application discloses any "arguable claim" of a violation of Convention rights.

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.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

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| M.F. BUQUICCHIO | J. LIDDY |
| Secretary | President |
| to the First Chamber | of the First Chamber |