AS TO THE ADMISSIBILITY OF

Application No. 14247/88
by C.
against the United Kingdom

The European Commission of Human Rights sitting in private on 3 July 1992, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
J.-C. SOYER
H. G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

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 10 June 1988 by C. against the United Kingdom and registered on 26 September 1988 under file No. 14247/88 ;

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

Having regard to the observations submitted by the respondent Government on 11 August 1989 and the observations in reply submitted by the applicant on 9 December 1991;

Having regard to the parties' submissions at the hearing on 3 July 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1924 and resident in Ipswich. He is a chiropodist. At present he is unemployed. He is represented before the Commission by Françoise Hampson, a law lecturer at Essex University.

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

The applicant's daughter S. was born on 5 March 1970. On 28 June 1979, the Hereford and Worcester County Council (the "Council") successfully applied for a care order in respect of S., who had been

described as an "elective mute", on the ground that the applicant was not allowing her to receive the treatment and educational assessment considered necessary by the Council. One major point of disagreement between the applicant and the Council was the applicant's desire for S. to receive mainstream schooling and the Council's belief that S. required special schooling.

Following the care order, S. was placed as a week-day boarder in a residential special school. On 10 January 1983, S. was admitted as a full time boarder to Ryes school, a special residential school. In April 1983 the applicant was separated from his wife, who retained custody of the other two children of the family.

The applicant was initially allowed weekly access to S. at Ryes school. In view of concern at the effect of these visits, the Social Services of Essex County Council (the "local authority"), who had taken over responsibility for supervision of the care order, decided, at a statutory review on 24 April 1985 to reduce the applicant's access to one visit per month, pending advice from a consultant child psychiatrist.

The applicant met with representatives of the Social Services Department in June 1985 but their differences remained unresolved. By letter dated 31 July 1985, the local authority reported to the consultant psychoanalyst that the applicant did not accept invitations to S.'s lessons or usual activities and that communication with him was made difficult as he refused to disclose his home address and insisted that they negotiate through his solicitor.

The applicant saw S. in July 1985. The applicant was invited to see the consultant with S. on 21 January 1986 for a psychiatric assessment to be made on the subject of continued access but the applicant declined the invitation. No further access visit took place until May 1986 when the applicant wrote to the school informing them of his intention to visit the following Sunday. When the applicant arrived, however, he was told that S. was not available.

By letter dated 10 August 1987 to the local authority, the applicant's solicitors requested access to S. for the applicant. On 20 November 1987, the applicant was served with a Notice of Termination of Access Order and the applicant applied to the Court pursuant to Section 12 B of the Child Care Act 1980 to review this decision.

A guardian ad litem was appointed to represent S. In her report dated 12 February 1988, with supplement dated 23 February 1988, the guardian ad litem, Mrs. J., reported that the applicant had not seen S. for 2 1/2 years and during the preceding 2 1/2 years there had been a deterioration in communication between the applicant and the school and an increasing concern by the school with what the school regarded as the applicant's inappropriate behaviour with S. and S.'s marked negative reaction to his visits. She commented however that there were times that S. appeared to enjoy seeing her father and that it was difficult to establish a connection between the applicant's visits and disturbances in S.'s behaviour. She concluded that she could not recommend that it was in S.'s interests to see her father. The Court also had before it a report from the headmaster of the special school where S was resident, containing the opinion that access should not take place without an independent psychiatric assessment of the effects of such access.

On 26 February 1988, the Colchester Juvenile Court refused the applicant access to S.

The care order in force in relation to S. expired on 5 March 1988 when she reached 18 years of age. By letter dated 25 May 1988 the applicant approached the local authority concerning access. By letter

dated 15 June 1988, the local authority agreed that S. was no longer in their care and that the decision of the court refusing access was no longer in force. The local authority stated however that the Social Services Department considered that it was not in S.'s interests for the applicant to have access and that they were not prepared to make any arrangements for access or to allow the applicant on their premises for the purpose of seeing S.

S. was transferred to a home for mentally handicapped young adults run by the local authority in July 1988. In October 1988, the staff of the home reviewed the question of access by the applicant to S. They took into account the reports before the Juvenile Court and S.'s continued extreme negative responses to questions about the applicant. They concluded that any sudden trauma might cause a regression and access should not be recommended. They proposed reviewing access in a year's time.

By letter dated 24 January 1989, the local authority replied to the applicant's solicitors' letter enquiring as to the legality of their actions that "...it has no right to deny access as such but conversely is under on obligation to make any arrangements for access." It recalled that S.'s previous school and the court has agreed with its view that access was not in S.'s interests. It also commented that the question of access did not revolve around one person's interests and that S. should have the right to decide whether she wanted to see the applicant. Since the appplicant had mentioned his intention to institute legal proceedings it suggested that steps should be taken for S. to be represented by the Official Solicitor.

On 14 July 1989, the local authority wrote to the applicant informing him that S. had settled down well and inviting him to come to discuss S.'s situation further. The applicant apparently did not respond to the invitation.

By a letter dated 20 November 1989, the applicant's solicitors informed the local authority that the applicant wished unsupervised access to S. away from the home.

By a letter dated 3 January 1990, the local authority informed the applicant that if access were agreed it would need to be a carefully planned programme of re-introduction. It considered that unsupervised access off their premises would not be in her interests. It informed the applicant that it was intended to try to ascertain the views of S. if possible on the subject and repeated its request for the applicant to come to have a talk with the Social Services Department.

By a letter dated 22 January 1990, the applicant's solicitors disagreed with the proposal to obtain a report on the wishes of S. which they did not consider necessary and repeated the applicant's request for unsupervised access off the premises.

By a letter dated 1 February 1990, the local authority maintained its view that S. as an adult had a right to express a choice. It informed the applicant that if S. wished to see him it would facilitate access though it strongly advised against unsupervised access away from the home. If S. expressed no preference it intended to commence a planned programme of re-introduction of access but if S. expressed a with not to see the applicant, no steps would be taken.

In a report dated 7 July 1990 by the previous guardian ad litem, it was concluded after ten meetings with S. exploring her wishes through, inter alia, photographs and drawings that S. associated her father with unhappy experiences and did not wish to see him.

> "... During the course of the ten meetings it became increasingly clear that S. was trying to tell us about some past unhappy experiences which she associated with her

father...

> It does not necessarily follow that if a young person has unhappy memories of a parent that he or she does not wish to see that parent. I did not therefore regard it as conclusive that because S. was telling us about some past trauma, she would totally refuse to entertain the idea of seeing her father. The focus of the meetings was therefore specifically directed towards parental visits being a normal and enjoyable event. Care was taken to be positive in asking S. if she would like to see her father. She was reminded that he loved her and sent cards and presents. It was made clear that he wanted to see her. At no time were any negative comments made to S. about her father. In my opinion, her reaction was very clear. She firmly said 'no' on two occasions to the suggestion of seeing her father and on another occasion responded by bringing up her bad experiences. When she said 'no' it was not a mechanical response but followed by appropriate expression of quiet and sadness.
>
> S.'s clear message in these meeitngs is that she does not wish to see her father. It is evident that despite her mental impairment, she is capable of indicating her wishes. Nothing has come to my notice to suggest that she has in any way been influenced in her reactions. I am satisfied that a fair, unbiased and comprehensive attempt has been made to ascertain her wishes and feelings. I do not consider that there are grounds for the Local Authority to promote a reintroduction between S. and her father, given her unequivocal response. ..."

RELEVANT DOMESTIC LAW AND PRACTICE

Local authorities are required by virtue of paragraphs 1 (a) and 4 of the Appendix to circular LAC 19/74 to make residential accommodation available for persons who are or have been suffering from mental disorder. The circular was issued under Section 12 of the Health Services and Public Health Act 1968, which was replaced by Schedule 8 to the National Health Service Act 1977. Under paragraph 2 of Schedule 8 the local social services authority may, with the Secretary of State's approval, and to such extent that he may direct, shall, make arrangements for the purposes of prevention of illness and for the care of persons suffering from illness. "Illness" includes mental disorder. Equivalent provisions require local authorities to provide residential accommodation for persons in need of care and attention which is not otherwise available to them by reason of age, infirmity or any other circumstances as directed in paragraphs 3 (a) and 4 of circular LAC 13/74 and Section 21 (1) of the National Assistance Act 1948.

Under the common law, the proprietor of premises is entitled to control access to and egress from those premises. There is no relevant statutory provision requiring local authorities to allow their premises to be used for the purposes of contact between residents and, as in this case, their relatives. The Government have stated that as a matter of practice, however, such contact between residents and their relatives is encouraged unless this would not be in the residents' interests.

As a public authority performing statutory and other duties, a local authority may be challenged in judicial review proceedings if it has acted unreasonably, for an improper purpose, with reference to irrelevant considerations or in a procedurally unfair manner.

COMPLAINTS

The applicant complains of interference with his family life contrary to Article 8 of the Convention in that he has been prevented from seeing his daughter since her 18th birthday when the care order expired. He submits that the refusal is not in accordance with law, that it does not pursue a legitimate aim and that there are insufficient procedural safeguards.

He further complains that he has no effective access to court to challenge the decision of the local authority refusing access contrary to Article 6 of the Convention. He also complains that he does not have an effective remedy for his complaints as required by Article 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 10 June 1988 and registered on 26 September 1988. The Commission decided on 13 April 1989 to bring the application to the notice of the respondent Government and invite them to submit written observations on the admissibility and merits of the applicant's complaints. The Government submitted observations on 11 August 1989.

On 8 September 1989, the Commission granted legal aid to the applicant.

By letter dated 22 September 1989 the applicant stated, in light of the Government's observations on domestic remedies, that he withdrew his application since he intended to apply for judicial review in respect of the local authority's decision to refuse him access to his daughter. He also expressed the intention of renewing his application if necessary, following exhaustion of local remedies. In these circumstances, the Commission decided on 4 December 1989 to strike the application off its list of cases. On 24 June 1990 the applicant was advised by Counsel that he would not be granted leave to apply for judicial review. On 27 June 1990 the applicant requested that his case be re-opened. On 12 October 1991, the Commission restored the case to the list.

The applicant submitted observations in reply to those of the Government on 9 December 1991.

On 31 March 1992, the Commission decided to hold an oral hearing.

On 7 May 1992, the Government submitted further observations.

At the hearing o 3 July 1992, the parties were represented as follows:

For the Government:

Mrs. D. Brookes Agent
Mr. D. Pannick Q.C.
Mr. R. Aitken Adviser
Mr. L. Took Adviser

For the applicant:

Ms. F. Hampson Senior Law Lecturer, University of Essex

The applicant himself was present.

THE LAW

Exhaustion of domestic remedies

The applicant makes a number of complaints concerning the refusal of the local authority to allow him access to his daughter who is a resident in one of their homes. He invokes Articles 6 and 13 (Art. 6, 13) of the Convention.

The Government submit that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention since he has not instituted judicial review proceedings. The applicant submits that such proceedings would not provide an effective remedy within the meaning of that provision.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach (cf. No. 9248/81, Dec. 10.10.83, D.R. 34 p. 78).

It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court. H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15, para. 26, and No. 9013/80, Dec. 11.12.82, D.R. 30 p. 96, at p. 102).

The Commission recalls that judicial review proceedings provide only a limited means of challenging a decision. They may be used to seek a remedy against the decision of a public authority on the grounds of illegality, irrationality or procedural impropriety but cannot impugn the merits of a decision. The opinion of the applicant's counsel dated 24 June 1990 indicated that the applicant had no prospect of success in judicial review proceedings.

In these circumstances, the Commission finds that the application cannot be declared inadmissible for non-exhaustion of domestic remedies.

Article 8 (Art. 8) of the Convention

The applicant complains that the local authority have prevented him from having access to his daughter S., who is resident in a home run by the local authority. He invokes Article 8 (Art. 8) of the Convention which provides:

> "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 applicant submits that his relationship as father to S. falls within the scope of the above provision. He contends that the refusal to facilitate access constitutes an interference with his right to respect for family life, which has no basis in law. He also complains that there are insufficient safeguards in the decision-making procedure to protect his rights.

The Government submit that there has been no interference contrary to Article 8 (Art. 8) of the Convention since S. has no wish

to see the applicant and Article 8 (Art. 8) does not guarantee the applicant a right of access to an adult member of his family who does not wish to see him.

The Commission recalls first of all that the existence or not of a family life falling within the scope of Article 8 (Art. 8) will depend on a number of factors and on the circumstances of each particular case (see e.g. No. 12402/86, Dec. 9.3.88, D.R. 55 p. 224). In the present case, the applicant is the father of S. who is mentally handicapped and who has lived since the age of nine in public care. The applicant enjoyed access to S. until 1985 and since then has continued to claim the right of access. In these circumstances, the Commission finds that the relationship between the applicant and S. falls within the scope of the concept of "family life".

Where a parent is denied access to a minor child taken into public care the Commission recalls that this would constitute in most cases an interference with the parent's right to respect of family life as protected by Article 8 para. 1 (Art. 8-1) of the Convention (see eg. Eur. Court H.R., W v the United Kingdom judgment of 8 July 1987, Series A No. 121). This however is not the case in respect of a refusal of access to a child, albeit suffering a mental handicap, who has reached the age of majority. Whether the restriction on access amounts to an interference or lack of respect for the right guaranteed in the first paragraph of Article 8 (Art. 8) will depend on the circumstances of the case. Relevant factors include the nature of the past relationship between the parent and the handicapped adult child, the capacity of the child to express its views and its preference if stated.

The Commission recalls in the present case that the applicant's access to S. was terminated when she was still a minor and that this decision was upheld as being in the child's best interests by the juvenile court on 26 February 1988. Shortly afterwards S. reached the age of 18 and the court order in force expired. The Commission notes that while the local authority has since then refused to facilitate access to S., it did not arbitrarily rule out the possibility of access. The correspondence between the applicant and the local authority indicates that the applicant was requiring unsupervised access outside the premises of the local authority, to which the local authority could not agree and that he refused to discuss the situation with the Social Services Department in person.

Further, the local authority took the view, which the Commission finds to be proper and reasonable, that the wishes of S. should be taken into consideration and at their request, the previous guardian ad litem supervised a series of ten sessions with a view to establishing whether S. was capable of communicating her wishes in respect of the applicant and if so, her preference. The conclusion was that S. clearly did not wish to see her father. The applicant has criticised this procedure. The Commission notes however that no complaint has been made as to bias on the part of Mrs. J. The Commission sees no weight in the allegation that there was an appearance of bias on the ground that Mrs. J. was involved in the earlier court proceedings. Her role at that stage was as an independent expert and there is no complaint or indication in the report that she showed herself not to be impartial. The applicant has also complained of the use of dolls in the sessions supervised by Mrs J. whatever criticism might be made od their use as a means of obtaining information, the Commission sees no indication that they invalidate the findings as to S.'s wishes.

In light of the above, the Commission considers that the local authority have acted reasonably and fairly in weighing up the interests of the applicant in seeing S. and the interests of S. The Commission has had regard also to the fact that the applicant, for whatever reason, has tended to show himself uncooperative with the local authority and to the past history of the relationship between the

applicant and S. The Commission concludes that the conduct of the local authority does not disclose any lack of respect for the applicant's family life within the meaning of Article 8 (Art. 8) of the Convention.

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

Article 6 (Art. 6) of the Convention

The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that he has no access to a court to determine the dispute as to access to S.

Article 6 para. 1 (Art. 6-1) provides in its first sentence:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Commission recalls first of all that the case-law of the Commission and the Court has established that Article 6 para. 1 (Art. 6-1) guarantees to everyone an effective right of access to the courts for the determination of their civil rights and obligations. The Commission must therefore consider whether a right was at all involved in the present case and, if so, whether that right was a civil right within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission notes that, generally speaking, Article 6 para. 1 (Art. 6-1) of the Convention is not aimed at creating new substantive rights which have no legal basis in the State concerned but at providing procedural protection to rights which are recognised in domestic law. It is not however decisive whether a particular benefit or expectation is characterised under the domestic legal system as a right since the term "right" must be given an autonomous interpretation under Article 6 para. 1 (Art. 6-1) of the Convention (e.g. Eur. Court H.R., König judgment of 28 June 1986, Series A No. 27, p. 29, para. 87). In W v. the United Kingdom (Eur. Court H.R., judgment of 8 July 1987, Series A No. 121, p. 32 et seq., para. 73) the Court stated:

> "It is true that Article 6 para. 1 (Art. 6-1) extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States (see, amongst other authorities, the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 70, para. 192)."

The Commission notes in the present case that there is no right as such in English law for parents to require that they be given access to their adult offspring. The availability of judicial review to challenge, in certain limited circumstances, the decision of a local authority cannot be taken as indicating the existence of a substantive right of access capable of falling within the scope of the concept of "civil rights".

In these circumstances, the Commission finds that the applicant cannot be said to have, on arguable grounds, a claim to a right of access under domestic law.

It follows that this complaint is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 6-1) of the Convention.

Article 13 (Art. 13) of the Convention

The applicant further submits that he does not have an effective remedy in respect of his complaints. He invokes Article 13 (Art. 13) of the Convention which provides:

> "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 case-law of the Commission establishes, however, that Article 13 (Art. 13) does not require a remedy in domestic law for all claims alleging a violation of the law. The grievance must be an arguable one in terms of the Convention (Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). In light of the conclusions that the applicant's complaints under Articles 6 and 8 (Art. 6, 8) of the Convention are incompatible ratione materiae and manifestly ill-founded, the Commission finds that the applicant does not have an arguable claim of a breach of these provisions for the purposes of a remedy under Article 13 (Art. 13) of the Convention. This part of the application must therefore be rejected as 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.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NORGAARD)