AS TO THE ADMISSIBILITY OF

Application No. 23418/94
by George CURRIE
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 12 October 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

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 21 August 1993 by George Currie against the United Kingdom and registered on 7 February 1994 under file No. 23418/94;

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 1938 and resident in Cardross. The facts as submitted by the applicant and as may be deduced from the documents may be summarised as follows.

The applicant and his wife separated in January 1989. There were two children of the family, S. born in 1984 and I. born in 1985.

The applicant initially enjoyed access visits to the children. On 22 June 1989, the magistrates' court denied access to the applicant after a hearing. The applicant did not appeal.

The applicant made an application for access on 2 November 1989 in the divorce proceedings which had been instituted. His application came before the County Court on 10 November 1989, when it was adjourned for compilation of a welfare report. Interim access was refused on 15 December 1989 pending the welfare report.

The court welfare officer's report was drawn up on 20 April 1990 and concluded that a psychiatric report should be obtained. An order by consent was made on 18 May 1990 for joint instruction of a psychiatric doctor. The doctor's reports were drawn up on 29 May 1990 and 1 June 1990.

On 22 October 1990, the case came before County Court judge who found that the court welfare officer had never been able to see the children with the applicant. The case was adjourned by the judge with a view to bringing it back before him on the earliest date available in 1991.

On 24 November 1990, the court welfare officer witnessed a visit between the applicant and the children. The officer shortly afterwards fell ill. An addendum dated 28 November 1990 was added to her report.

The case came back before the County Court judge on 2 October 1991. The welfare officer's report indicated that the access visit had been successful and both children had been happy to see their father. Following a hearing on 2 October 1991, the matter was adjourned by consent for a further period of access and observation.

The applicant who had been represented by solicitor and counsel during the proceedings at this stage decided to act in person.

By 16 November 1991, S. was vigorously rejecting the applicant and after a visit on 11 January 1992, I. refused to go on further visits to the applicant.

The case was reviewed by the County Court judge on 19 February 1992. By consent of the parties, it was ordered that the review should be postponed until August 1992 the applicant undertaking not to seek to meet the children and the mother undertaking to pass on cards, presents and school reports.

When the matter came back before the court for a hearing on 7 September 1992, the mother had made an application for access to the applicant to end. After hearing the parties and witnesses and viewing videotaped film taken by the applicant of access with his children, the County Court judge held in his judgment of 14 September 1992 that in view of the apparent distress which the children suffered in their contacts with applicant due to his inappropriate behaviour, the continuation of access would cause only harm. The applicant's application for access was accordingly refused. The judge commented in his judgment of the delay in the proceedings between October 1990 and October 1991 attributing the lapse of time to the illness of the court welfare officer "coupled with an apparent lack of concentration upon the matter by solicitors or the court ".

The Court of Appeal rejected the applicant's appeal on 17 May 1993 finding that no other order was possible in view of the children's emphatic rejection of further contact. As regarded the delay in the proceedings, it commented:

> "On October 1990 the matter came for the first time before <the County Court judge>. There had been a delay of some nine months and some eleven months between the time the <applicant> made his application and this hearing. No satisfactory explanation has been given for this delay which is deplorable. The <applicant> was at this time represented by solicitors and they ought to have seen that the matter was dealt with with much greater expedition...
>
> The <applicant> had criticised the delays in the court procedure in his case ...He particularly criticises the delay in court welfare officers' reports and points out that delay in fact involved disobedience to court orders which is to be deplored. The delays have occurred; they are not the responsibility so far as we know of the mother; the <applicant> and his solicitors should have been the driving force, because it was his application..."

The applicant had wished to rely in his appeal on the videotaped

evidence shown before the County Court but although it had been in the custody of the court the films proved untraceable. The Court of Appeal held that it was not necessary in order to reach its decision to view these films which had been seen at first instance by the judge, parties and welfare officer.

The House of Lords refused leave to appeal on 27 July 1993.

COMPLAINTS

The applicant complains, inter alia, of being deprived of access to his children; that the courts ignored and lost his evidence and reached decisions wrong in fact, law and procedure and that the proceedings took an unreasonable time. He invokes Articles 8 and 6 of the Convention.

THE LAW

1. The applicant complains of being deprived of access to his children. He invokes Article 8 (Art. 8) of the Convention which provides as relevant:

> "1. Everyone has the right to respect for his ... family life
> 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 in accordance with its established case-law that the decision refusing the applicant access to his children constituted an interference with his right to respect for his family life under the first paragraph above (see eg. Eur. Court H.R., Eriksson judgment of 22 June 1989, Series A no. 156, p. 27, 59).

The Commission has consequently examined whether this interference is justified under Article 8 para. 2 (Art. 8-2), namely, whether it is "in accordance with the law" pursues one or more of the legitimate aims enumerated in Article 8 para. 2 (Art. 8-2) and whether it is "necessary in a democratic society" for one or more of those reasons.

The Commission recalls that access to the applicant's children was refused by the County Court and confirmed on appeal, in the context of the exercise of the courts' jurisdiction in the pending divorce action. The decision was taken on the basis of the courts' assessment that further access would be detrimental to the children. The Commission accordingly finds that the decision was taken "in accordance with law" and pursued the legitimate aims of protecting the children's health and rights.

The question remains whether the measure was necessary within the meaning of Article 8 para. 2 (Art. 8-2). The case-law of the Commission and Court establishes that the notion of necessity implies that the interference corresponds to a pressing social need and that it is proportionate to the aim pursued. Further in determining whether an interference is necessary the Commission and Court will take into account that a margin of appreciation is left to the Contracting States who are in principle in a better position to make an initial assessment as to the necessity of given measure (see eg. Eur. Court H.R., W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 27, para. 59).

When determining whether or not the decision refusing access was necessary, the Commission observes that it is not its task to take the

place of the competent national courts and make a fresh examination of all the facts and evidence. The Commission's task is to examine whether the reasons adduced to justify the interference at issue are "relevant and sufficient" (see eg. Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no. 130, para. 68).

The Commission recalls that the decision to end access was made in light of the courts' findings as to the welfare of the children, in particular, the distress access had caused to the children, the inappropriate behaviour by the applicant and the children's refusal to see the applicant. The Commission is satisfied that the decision was not arbitrary or unreasonable and was supported by "relevant and sufficient reasons".

As regards the procedural requirements implied in Article 8 (Art. 8) of the Convention to ensure effective respect for family life, the Commission notes that the applicant was represented initially in the proceedings by solicitor and counsel, though after the consent order of October 1991 he chose to represent himself in person. The Commission is satisfied that the applicant was given the possibility of putting forward any views which in his opinion would be decisive for the outcome of the case. While there was delay (further considered below) it does not appear that it led to a de facto determination of the issues by mere effluxion of time or deprived the applicant of a decision upon the merits of the case. The Commission finds that the procedural requirements implicit in Article 8 (Art. 8) were complied with and that the applicant was involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interest (see eg. Eur. Court H.R., H. v. UK judgment of 8 July 1987, Series A no. 120, pp. 27-28, paras. 87-90 and W. v. UK judgment, loc. cit., pp. 28-29, pp. 63-65).

The Commission therefore finds, bearing in mind the margin of appreciation accorded to the domestic authorities, that the interference in the present case was justified in the present case as being "necessary in a democratic society" for the protection of the health and rights of the children. Consequently, 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 complains about the decisions taken and the procedures adopted by the courts. He particularly complains about the delay in the proceedings. He invokes Article 6 para. 1 (Art. 6-1) which provides as relevant:

> "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..."

i. Insofar as the applicant complains about the decisions taken by the courts, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see eg. No. 458/59, X v Belgium, Dec. 29.3.60, Yearbook 3 pp.222, 236; No. 5258/71, X v Sweden, Dec. 8.2.73, Collection 43 pp.71, 77; No. 7987/77, X v Austria, Dec. 13.12.79, D.R. 18 pp. 31, 45).

The Commission notes that the applicant, inter alia, complains that the courts ignored his evidence and lost his videotapes. The Commission recalls that the videotapes were viewed in first instance and the Court of Appeal did not find it necessary to see them on

appeal. As regards the assessment of the evidence, it is not for the Commission to re-assess the factual or legal elements of the case before the domestic courts, given that the decisions taken had a basis in law and were, as found above, based on relevant and sufficient reasons (see eg. Eur. Court H.R., Schenk judgment of 12 July 1988, Series A no. 140, Barbera, Messegué and Jabardo judgment of 6 December 1988 and De Moor judgment of 23 June 1994, Series A no. 292-A).

The Commission concludes that the applicant was not in the circumstances of the case deprived of a fair hearing within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

ii. As regards the applicant's complaint about the delay in the proceedings, the Commission recalls that the proceedings were instituted by the applicant on 2 November 1989 and terminated on 27 July 1993, a period of almost three years nine months.

According to the constant case-law of the Convention organs, the reasonableness of the delay in civil proceedings must be considered with regard to the circumstances of the particular case and with the help of the following criteria: the complexity of the case, the conduct of the parties and the conduct of the authorities dealing with the case and what was at stake in the litigation for the applicant (see eg. Eur. Court H.R. H. v. UK judgment of 8 July 1987, loc. cit. p. 59, para. 87-71).

In the present case, while the subject-matter of the proceedings -issues of access to children- was not particularly complex, the Commission has had regard to the sensitive nature of the decision-making process in these types of case which frequently require the compilation of expert reports based on observation over a period of time. It recalls in the present case that the matter was adjourned twice, with consent of the parties, for such reports to be prepared or access to be observed.

The Commission has had careful regard to the importance of what was at stake for the applicant. The proceedings were decisive for his future relationship with his children and in a case of such kind there is a duty to exercise exceptional diligence in view of the risk that the lapse of time may result in the de facto determination of the matter before the court. There is however also a duty to ensure that all the evidence which may be needed for the court to make a decision of such importance to the applicant is collected and put before the court. In the present case, the Commission is satisfied that the matter was determined on the merits of the case, the necessary material being before the court.

As regards the conduct of the parties, both the first instance judge and the Court of Appeal respectively criticized the eleven month gap between the applicant's application for access and its consideration by the County Court on 22 October 1990 and the further eleven month gap until the matter was brought back on 2 October 1991. While the County Court itself or through the element of time lost through the illness of its welfare officer cannot be immune from incurring a degree of responsibility for the delay, the Commission considers that the applicant's solicitors, who had brought the application for access in divorce proceedings, bore primary responsibility for ensuring the matter proceeded diligently. They did not however take any steps to have the possible breaches of the court orders involved in this lapse of time brought to the attention of the County Court or otherwise take steps to expedite matters.

Consequently, the Commission finds, having weighed all the relevant circumstances that the proceedings, which involved three instances, did not exceed a reasonable time within the meaning of Article 6 para. 1 (Art. 6-1) 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.

For these reasons the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (A. WEITZEL)