AS TO THE ADMISSIBILITY OF

Application No. 16702/90
by Cecilia ERIKSSON
against Sweden

The European Commission of Human Rights sitting in private on 16 January 1992, the following members being present:
MM.C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs.G. H. THUNE
SirBasil HALL
MM.F. MARTINEZ RUIZ
C.L. ROZAKIS
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 8 March 1990 by Cecilia ERIKSSON against Sweden and registered on 11 June 1990 under file No. 16702/90;

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

Having regard to the observations submitted by the respondent Government on 30 January 1991 and the observations in reply submitted by the applicant on 15 March 1991;

Having deliberated;

Decides as follows:
THE FACTS

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

The applicant is a Swedish citizen, born in 1942 and resident at Arboga. She is a geriatrics nurse. Before the Commission she is represented by Mrs. Siv Westerberg, a lawyer practising in Gothenburg.

A. The particular circumstances of the case

The applicant has previously, on her own behalf and on behalf of her daughter Lisa born in February 1978, brought an application before the Commission (No. 11373/85) concerning the prohibition for the applicant against taking Lisa from the foster home after the public care had been terminated. On 14 July 1988 the Commission adopted a Report under Article 31 of the Convention finding a violation of Article 8 and Article 6 para. 1 of the Convention. The European Court

of Human Rights subsequently held that there had been violations of the applicant's rights under Article 8 and Article 6 para. 1 of the Convention essentially due to the long duration of the prohibition on removal and the fact that the applicant during this period had been unable to secure any meaningful access to her daughter with a view to being reunited with her (Eur. Court H.R., Eriksson judgment of 22 June 1989, Series A no. 156).

Before the European Court of Human Rights delivered judgment the Social Council (socialnämnden) of Lidingö had, on 22 October 1987, introduced an action before the District Court (tingsrätten) of Sjuhäradsbygden requesting that the legal custody of Lisa be transferred from the applicant to the foster parents pursuant to Chapter 6 Section 8 of the Parental Code (föräldrabalken). On 17 December 1987 the District Court rejected the Social Council's request for an interim order that custody of Lisa be transferred to the foster parents; the proceedings as such continued.

On 10 July 1989 the applicant brought proceedings before the County Administrative Court (länsrätten) of the County of Halland requesting that Lisa be transferred to the applicant pursuant to the regulations in Chapter 21 of the Parental Code as she had legal custody over her.

Later, in a letter to the Social Office (socialbyrån) of Lidingö, which arrived on 17 July 1989, the applicant requested the Head of the Social Office to make arrangements allowing the applicant to meet her daughter at her home from 24 to 30 July 1989. The Head of the Social Office replied that in the present situation the Office could not assist in letting Lisa visit her mother as Lisa was firmly opposed to such visits. Furthermore, the Social Office, with reference to the Secrecy Act (sekretesslagen 1980:100), refused to supply any information about Lisa's address during the summer holidays. The decision not to inform the applicant about Lisa's address was appealed against to the Administrative Court of Appeal (kammarrätten) of Stockholm. On 29 August 1989 the Court granted the applicant's appeal since it considered that revealing Lisa's address to her mother could not be regarded as causing Lisa suffering of such significance as referred to in the relevant provision of the Secrecy Act, Chapter 14 Section 4.

On 6 September 1989 the County Administrative Court refused to transfer the child, as requested by the applicant on 10 July 1989, and ordered the applicant to pay the legal costs of the foster parents. The Court gave the following reasons:

(translation)

"Lisa has stayed in [the foster home] since she was 14 days old. The contacts between her and [the applicant] have been very sporadic, partly on account of decisions extensively restricting access, partly because of the existing disputes between [the applicant] and the foster parents. Insofar as it appears from the documents [the applicant] has not seen Lisa since December 1987.

The question whether any measures should now be taken with a view to transferring Lisa to [the applicant] shall be assessed in the light of the facts which are at hand today. The fact that the prohibition on removal and the restrictions on access in the past have reduced the possibilities of reuniting [the applicant] and Lisa and thereby violated their human rights cannot be decisive for the present issue of enforcement.

In its judgment of 31 October 1988 the Administrative Court of Appeal found that lifting the prohibition on removal and

transferring Lisa to [the applicant] would involve a risk, which was not of a minor nature, that the child's mental health would be jeopardised. Great importance was at that time attached to the will of Lisa who was then ten and a half years old and who was firmly opposed to leaving the security she had in the foster home. It appears from the investigations made by the Social Council ... that this assessment was valid also in February 1989, and since then there have been no facts which would indicate that the now eleven and a half years old Lisa had changed her will or that the risk of damage to her mental health in case of a transfer would have diminished. It is therefore not possible in the enforcement case to arrive at a conclusion different from that reached by the Administrative Court of Appeal less than a year ago.

However, the main reason for refusing to transfer Lisa now is that the circumstances obviously require a determination of the legal custody of Lisa. Such a procedure is pending and a decision is expected within some months. After investigations the Social Councils of both Halmstad and Köping propose that the custody of Lisa should be transferred to [the foster parents]. To order the transfer of Lisa to [the applicant] in such a situation is plainly inappropriate."

The applicant appealed to the Administrative Court of Appeal (kammarrätten) of Gothenburg, which rejected the appeal on 27 October 1989. On 20 December 1989 the Supreme Administrative Court (Regeringsrätten) refused leave to appeal.

In a judgment of 2 January 1990, the District Court (tingsrätten) of Sjuhäradsbygden decided that the foster parents be appointed custodians of Lisa. It further ordered that the applicant have the right of access to Lisa once a month from Friday 18.00 hours to Sunday 18.00 hours and for one week during Lisa's summer holiday as from 1990. The Court ordered that these decisions apply immediately. It gave the following reasons:

(translation)

"Lisa is a girl who attains the age of 12 years on 24 February 1990. All her life she has stayed and has been fostered in [the foster home]. A lot has been said in the case about what has been done and about what has not been done from the one and the other side respectively. However, it is established beyond any reasonable doubt that [the applicant] is, in all respects, a well functioning member of society with all the qualities which may be attributed to a good parent. But is this what the case really is about? The longer the proceedings have lasted the less the parties have spoken about Lisa. It appears to the Court that a tug of war has arisen between the Council, the Swedish administration, and [the applicant], the individual. Of course this may be of interest, but the case should in the first place address the issue of what is in the best interests of Lisa. In this respect, it is of great significance what Lisa wishes and feels herself. It must in this context not be forgotten that Lisa will soon be twelve years old and obviously has her own will which ought to be respected as far as possible. The Social Council has, as written evidence, invoked inter alia a letter from Lisa (Annex to the judgment). The letter can be said to speak for itself, but it undeniably expresses the anxiety which Lisa has for, as she sees it, the risk of separation from the two persons (the foster parents) whom

Lisa sees as her true parents. Is it not the right of a mother, [the applicant], to be reunited with her child? Yes, but the mother's wish in this respect must yield to the wish of the daughter. What Lisa so badly needs is calm and quiet. She must at last get the security which all children need to have. Lisa has always been together with the [foster parents] and the bonds which have thereby arisen must not be cut off. Of course the blood-related bonds ought also to be respected. In order to give Lisa security and harmony for the future, the custody of her should be transferred to [the foster parents]. On the other hand, [the applicant] should be given a certain right of access to Lisa, a right of access which eventually ought to be extended..."

The applicant appealed to the Court of Appeal (hovrätten) for Western Sweden claiming that the judgment of the District Court be quashed or, if that request was not granted, that she be granted a right of access to Lisa every weekend and during all her school holidays. Furthermore, the applicant requested the Court of Appeal to rule that the foster parents, as guardians, deliver and collect Lisa when she visited [the applicant] and pay for all costs relatin
Appeal t
visits. This ruling should, the applicant requested, be made immediately and remain in force until the Court of Appeal delivered judgment.

The Social District Council requested the Court of Appeal not to grant the applicant any access at all or alter the decision regarding access and to decide that a third person, in whom Lisa had confidence, be present when Lisa was to visit her mother. The Council also requested the Court of Appeal to order that the decision of the District Court regarding the question of access should not be enforceable until the Court of Appeal had taken its decision on the question of custody and access.

On 5 February 1990 the Court of Appeal rejected the applicant's and the Social District Council's requests for interim measures regarding the question of access.

A new request made by the applicant to quash the District Court's decision making its judgment immediately enforceable, was rejected by the Court of Appeal on 16 August 1990.

While the case relating to the issue of custody and access was pending before the Court of Appeal the applicant and the foster parents had some contact. At the beginning of January 1990 the applicant invited Lisa to visit her over a weekend. According to the foster father Lisa refused a meeting with the applicant. Later, the foster parents tried to arrange a meeting in their home on 20 January 1990, but in vain.

At that time, the applicant had already requested enforcement of her right to access at the County Administrative Court (länsrätten) of the County of Halland. This request was made in a letter dated 9 January 1990. The applicant specified that she wished to have access to Lisa from 26 to 28 January 1990 and from 16 to 18 February 1990. She furthermore requested that the enforcement be carried out with the assistance of the police.

The foster parents, who at that time were also Lisa's legal representatives as guardians appointed by the District Court, opposed the applicant's request, in essence on the ground of Lisa's strong reaction towards visiting her mother.

On 1 February 1990 the County Administrative Court refused to order the requested enforcement. It referred to Chapter 21 Sections

5 and 6 of the Parental Code (föräldrabalken) according to which enforcement may not take place against the wish of a child who has attained the age of twelve years unless the Court finds it necessary in the best interests of the child. The same applies if the child is not yet twelve years old but has attained such a maturity that his or her wish ought to be respected in the same way. The Court found it established that Lisa was clearly opposed to meeting her mother alone outside the foster home. It further found that Lisa's own wish ought to be respected and that enforcement against her wish might involve a major risk to her mental health.

On 13 February 1990 the Administrative Court of Appeal of Gothenburg refused the applicant's request for enforcement with regard to the access on 16 to 18 February 1990. On 23 February 1990 the Supreme Administrative Court refused leave to appeal.

In a judgment of 17 January 1991 the Court of Appeal upheld the judgment of the District Court of Sjuhäradsbydgen of 2 January 1990 concerning the custody of and the access to Lisa. The Court of Appeal gave the following reasons:

(translation)

"If a child has continuously been cared for and brought up in a private home other than that of the parents, and it is obviously in the best interests of the child that this arrangement continue and that the custody be transferred to those who have taken care of the child, the court shall, pursuant to Chapter 6, Section 8 of the Parental Code (föräldrabalken), appoint them to exercise custody of the child as specially appointed guardians.

Under the Parental Code decisions relating to custody are as a general rule to be made in accordance with what is in the best interests of the child.

While exercising the custody of a child, the guardian shall, pursuant to Chapter 6, Section 11 of the Parental Code, give, as the child grows older, increasing consideration to its views and wishes in its personal matters. A similar approach must be adopted when deciding who should have custody of the child. In just over a month Lisa will be thirteen, and will thus have reached an age when her wishes are important. It is worth mentioning that pursuant to Chapter 21, Section 5 of the Parental Code a judgment or order relating to custody or right of access may not be enforced against the wishes of a child who has reached the age of twelve, unless it is considered necessary for the child's own good. In practice this means that such a judgment or order can rarely be enforced against a child's wishes.
...
There is a strong presumption that the natural parents, or one of them, should have custody of their children. This is clearly indicated by the wording of Chapter 6, Section 8 of the Parental Code. This attitude is also clearly reflected in the travaux préparatoires which emphasise the desirability of reuniting parents and children.

The question of who should have custody of Lisa is a very different matter from the issues that normally arise in custody disputes between parents who have both lived together with their child. The situation also differs from the situation primarily envisaged by the legislator in the provision relating to reunion between natural parents and children. It is clear from the investigation that Lisa has

been cared for and brought up by the [foster family] ever since her birth. Irrespective of the appropriateness of the various decisions responsible for this state of affairs, this fact is crucial when considering the issue of custody of the child.

The investigation in the case, inter alia the child care report (vårdnadsutredningen) and Lisa's own letters, clearly indicate that moving Lisa from her foster home would be against her wishes. The objection that Lisa may be influenced by her foster parents in this respect cannot in itself be considered decisive. She is old enough to form an opinion of her own. In view of Lisa's long and close relationship with her foster parents such influence appears natural.

Lisa's wishes are obviously the result of her long attachment to her foster home, with foster parents and a foster brother, and her strong emotional ties to this home. Her other links, such as school, her friends and the environment as a whole, must also be taken into account. Furthermore, it must be remembered that Lisa is in a sensitive age. The best way of fulfilling her need of security is to allow [the foster parents] to have a parental role as complete as possible. Their intention is to continue to take care of Lisa. They are suitable guardians.

On the other hand, it must be borne in mind that [the applicant] has made every effort to get Lisa back ever since Lisa was taken from her or at least to get the chance to meet her. It is no exaggeration to state that these efforts of hers have encountered great resistance, especially during Lisa's earliest childhood. By and large, [the applicant] cannot be blamed for the fact that mother and daughter have had relatively little contact with each other. Nevertheless, the lack of a close relationship between them is a circumstance that cannot be disregarded when deciding the question of custody.

Having considered the evidence in the case the Court finds that the requirements set forth in Chapter 6, Section 8 of the Parental Code relating to transfer of the custody of Lisa are fulfilled. [The foster parents] as specially appointed guardians should therefore be granted custody of Lisa.

This decision raises the issue of [the applicant's] right to access to Lisa.

In the long term, in particular, it is important that Lisa should have the chance to establish and maintain a good relationship with her natural mother. When [the foster parents] have finally been granted custody of Lisa, her life will be more stable and secure. This is likely to improve the prospects of a normal relationship between Lisa and her mother. It must be assumed that the right of access can be exercised in a regular manner without involving any risk for Lisa.
A right of access as comprehensive as [the applicant] has demanded is not realistic and does not seem to reflect her real wishes.

The changes of the environment involved in the exercise of the right of access are always, to a greater or lesser extent, distressing to a child. Lisa's attitude to the

right of access and the fact that there is not a close relationship between her and [the applicant] indicate that it is not appropriate in this case to grant a right of access to a more usual extent. The Court of Appeal finds that the right of access ordered by the District Court is appropriate. There are no circumstances indicating a need for the right of access to be exercised in the presence of a third party. The Court wishes to emphasise in this respect that pursuant to Chapter 6, Section 15 of the Parental Code [the foster parents] will have a direct responsibility for ensuring that Lisa's need of meeting [the applicant] is satisfied as far as possible.

[The applicant] has also requested that in the exercise of her right of access [the foster parents] be obliged to bring Lisa to the meetings, to take her home after the visits and to defray any expenses that may be incurred. Such a procedure would impose unreasonable obligations on [the foster parents] and it is not clear how this would benefit the relations between mother and child. This request should therefore be rejected.

As regards [the applicant's] objections relating to the European Convention on Human Rights and the judgment of the European Court of Human Rights, it may be noted that the judgment of the Court related to a different matter from that at issue in this case and that the criticism expressed applied primarily to the restrictions on the right of access, especially in conjunction with the long-term prohibition on removal. Furthermore, the European Convention on Human Rights and the decisions of the European Court of Human Rights are not directly binding on the judicial exercise in Sweden. In this context the UN Convention on the Rights of the Child of 20 November 1989, to which Sweden has acceded, is worth mentioning. Article 3 of that Convention states that in all actions concerning children the best interests of the child shall be a primary consideration. Furthermore, in Article 12 it is stated that in all matters affecting the child the views of the child shall be given due weight in accordance with its age and maturity. Like the European Convention on Human Rights, the UN Convention on the Rights of the Child is not, however, directly binding on the judicial exercise in Sweden."

One of the six judges in the Court of Appeal expressed a separate opinion and rejected totally the applicant's request for access. In essence he found that, in view of Lisa's attitude to meetings with her mother, it could not be considered to be in the girl's interests that the applicant was granted a right to access which in any case could not be enforced against Lisa's own will.

The applicant appealed against the judgment to the Supreme Court (Högsta domstolen), which on 12 June 1991 refused leave to appeal.

The applicant also reported the handling of the case by the Social Council of Lidingö to the Parliamentary Ombudsman (Justitieombudsmannen). In her complaint, made on 2 August 1989, she alleged that despite the outcome in the Eriksson judgment of 22 June 1989 of the European Court of Human Rights, the social authorities continued to prevent her from meeting her daughter at her home.

The Parliamentary Ombudsman ordered the Social Council of Lidingö to submit its observations on the issue. Later the applicant was invited to comment on the Council's observations.

On 7 May 1990 the Ombudsman submitted an opinion. After having

stated that the Swedish courts and administrative authorities are not legally bound by the judgments of the European Court of Human Rights the Ombudsman stated inter alia the following:

(translation)

"The 1980 Act with Special Provisions on the Care of Young Persons (lagen 1980:621 med särskilda bestämmelser om vård av unga) prescribes that the care shall be terminated when it is no longer needed. If there is a risk, which is not of a minor nature, that the child's health would be endangered if it were not allowed to remain in its foster home, a prohibition on removal may be issued by virtue of Section 28 of the Social Services Act (socialtjänstlagen). The prohibition on removal is intended as a temporary measure to prevent the parents from taking the child home immediately and to allow some time in order to prepare for a reunification. Even though the aim should be to have the parents and their child reunited, it cannot be disregarded that there are cases where a reunification within a foreseeable time must be considered unrealistic. For instance, this is the case when care has been provided for a child outside its own home since a very tender age and when it grows up and gets rooted in a foster home. If, in such circumstances, there is no longer a need for public care under the 1980 Act the issue whether to have the custody transferred to the foster parents should be addressed. Thus, the prohibition on removal must not be used as a permanent measure in order to achieve the aim of letting the child remain with its foster family.

In the present case the prohibition on removal has remained in force for a long period of time. The question regarding the authority of the Social Council to take decisions in matters concerning access between the child and its mother has then arisen.

As has been pointed out by the Supreme Administrative Court and the European Court of Human Rights, there is under the present legislation no possibility to decide on matters concerning access between parents and children as long as a prohibition on removal is in force. The reason why, while

a prohibition on removal is in force, the question of access has not been regulated in the Social Services Act appears to have been that the prohibition on removal should be regarded as a temporary measure.

Thus, the question of how the Social Council shall act when there is a need for regulating the right to access between a child and its parents while a prohibition on removal is in force is at present not regulated in law. According to the new Act with Special Provisions on the Care of Young Persons, which enters into force on 1 June 1990, there is a possibility for the Social Council to issue such restrictions on access between a child and its parents as it deems necessary for the sake of the child in the same way as in regard to the care under the 1980 Act (Section 31). Such a decision of the Social Council may be appealed to the County Administrative Court (Section 41, Subsection 1, p. 3).

The investigation shows that the Social Council has acted solely out of consideration for the child. In view of this fact and in view of the lacunae in the present legislation, which have resulted in amendments to the legislation, and the fact that there are proceedings concerning a transfer

of custody to the child's foster parents pending at present, I close the matter with what now has been stated."

Particulars concerning the contacts between the applicant and Lisa

As mentioned above, the applicant invited Lisa at the beginning of January 1990 to come and visit her over a weekend. However, according to her foster father, Lisa had reacted strongly upon this invitation and had refused to go. Lisa's foster mother and Lisa decided to discuss this problem with the child psychologist who previously had treated Lisa at the Children's and Juveniles' Psychiatric Clinic of Halmstad. A few days later the foster parents invited the applicant to come and visit Lisa at their home on 20 January 1990. However, no visit took place in January 1990.

The foster parents also arranged for a visit at the beginning of February 1990 but the applicant could not come due to her son's illness.

In February 1990 Lisa's foster father suggested that the applicant visit Lisa on two occasions in March 1990. The applicant was able to come once, on 10 March. On that day she visited Lisa in the foster home a couple of hours in the afternoon. Her travel expenses were paid by the social authorities.

On 19 May 1990 the applicant visited Lisa a couple of hours. Also this time the social welfare authorities paid for her expenses.

In July 1990 Lisa's foster mother wrote to the applicant and suggested that she contact the foster family for the purpose of fixing a date for a new visit at their place. According to the Government, the applicant preferred to wait until after the hearing of the Court of Appeal, which was to take place in September 1990. However, the Court decided to postpone the hearing until December 1990. The applicant and the foster parents then decided that the applicant should visit Lisa on 17 November 1990. The applicant suggested that she should stay over night at the foster home or at an hotel in order to make the visit last longer. However, the foster parents did not agree to such an arrangement. The social authorities were prepared to pay the applicant's travel costs but not her costs for staying at an hotel. Shortly before the visit was about to take place the applicant informed the foster parents that she could not come.

B. Applicable domestic law

Regarding the questions of transfer of custody, enforcement of the right to access and transfer of a child to its custodian, certain rules in the Parental Code (föräldrabalken) - Chapter 6, Section 8 and Chapter 21, Sections 1, 3 and 5-7 - are applicable. These provisions, in their relevant parts, read as follows:

(translation)

Chapter 6, Section 8

"If a child has been permanently cared for and brought up in a private home other than its parental home and if it is obviously in the best interest of the child that the prevailing relationship may continue and that custody be transferred to the person or persons who have received the child or to one of them, the court shall appoint the said person or persons to exercise custody of the child as specially appointed guardians."

Chapter 21, Section 1

"Requests for enforcement of judgments or decisions by an ordinary court (allmän domstol) concerning custody, access or surrender of children are made to the county administrative court. If the judgment or decision has not come into force and permission has not especially been given for enforcement to take place nevertheless, the county administrative court may not take the steps specified in Sections 2-4."

Chapter 21, Section 3

"If the county administrative court issues an enforcement order, it may impose a conditional fine (vite) or decide that the child be collected through the police authority. An order of this kind, however, may only be made in the cases and subject to the conditions specified in subsections two and three.

In connection with a judgment or decision concerning the custody or surrender of a child, the county administrative court may order the child to be collected if enforcement is otherwise impossible or if collection is necessary in order to prevent the child from being seriously harmed.

In connection with a judgment or a decision concerning access between the child and a parent who is not the child's custodian, the county administrative court may order the child to be collected if enforcement is not otherwise possible and the child is in particularly great need of access to the parent.

Questions concerning the imposition of conditional fines shall be examined by the county administrative court if the party who has requested the enforcement so demands."

Chapter 21, Section 5

"If the child has reached the age of 12, enforcement may not take place against its will, unless the county administrative court finds it necessary, having regard to the best interest of the child. The same applies if the child has not yet reached the age of 12 but is of such maturity that its will should be respected in a similar manner."

Chapter 21, Section 6

"If it is obvious that conditions have changed since the ordinary court's judgment or decision was given, the county administrative court may refuse to issue an enforcement order if with regard to the best interest of the child it considers that the question of changes regarding custody or access should be re-examined. Such questions are examined by the ordinary court on an application from a party to the case before the county administrative court or from the Social Welfare Committee.

The county administrative court may refuse to issue an enforcement order also in other cases if there is a risk, which is not insignificant, that the child's physical or mental health is jeopardised."

Chapter 21, Section 7

"Even if no judgment or decision as described in Section 1 exists, the child's custodian may, when the child is

staying with someone else, call upon the county administrative court to have the child transferred to him- or herself.

The county administrative court may refuse to take the measure requested if the best interests of the child require that the question of custody be examined by an ordinary court.

Sections 2 to 6 are otherwise applicable."

In the travaux préparatoires on the provision in Chapter 6, Section 8 concerning transfer of custody to a specially appointed guardian (Gov. Bill 1981/82: 168 p. 70) the following is stated:

(translation)

"Generally speaking, a child must have been in a foster home for a number of years before there can be any question of transferring custody to the foster parents under this provision. The court must of course investigate the child's relationship with this home and the relationship between the child and its natural parents. If the parents have not shown any interest in the child while it has been in the foster home, or if contacts have been sporadic or have been distressing for the child, transfer of custody may be considered. However, great importance must be attached to the child's wishes. As indicated above, it is necessary that the child must be so strongly attached to its new home that it regards it as its own."

During the examination in Parliament the Parliamentary Standing Committee on Civil Law Legislation (lagutskottet) stated inter alia the following (LU 1982/83:17 pp. 22 and 23):

(translation)

"In cases where the child has been together with the foster parents for a long period and has become attached to them, and where at the same time contact with its natural parents has been sporadic or non-existent, it may be best for the child to remain with the foster parents and for them to take over legal custody. The Committee wishes to emphasise, however, that this is an exceptional provision which must therefore be applied with great caution. ... Obviously, custody should not be transferred from a parent who has made every effort to maintain a good relationship with the child during its stay in the foster home. ... In decisions on such matters great importance must also be attached to the wishes of the child."

In the Bill to Parliament in which the Government proposed the introduction of a new law on the care of young persons, the 1990 Act, this special problem was mentioned. In the Bill (Gov. Bill 1989/90: 28, pp. 93 and 94) the Minister responsible for the Bill stated:

(translation)

"A fundamental principle as far as public care is concerned is that the care shall not continue longer than necessary. The Social Welfare Committee has a responsibility to see to it that contacts between the parents and the child during the period during which care is provided are such that a reunification can take place without any harm to the child when the prerequisites for public care are no longer at hand.

Although efforts should be made to unite parents and children, one cannot ignore the fact that in some cases a reunion in the foreseeable future is not realistic. This is the case, for example, when care is provided for a child at an early age and it grows up in a foster home. In such a situation the child tends to regard the foster home as its "real" home. It becomes attached to the foster parents and treats them as its own parents. This may even occur if the child has had a satisfactory relationship with its natural parents during the period in care.
...
Also in cases where the child has formed a lasting attachment to its foster home after being in care there for a long time the social welfare committee should, in my view, consider transferring custody to the foster parents more frequently than appears to have been the case hitherto. This should be done, in particular, in those cases where the natural parents request that the child be returned to them after a period of many years and it is clearly in the interest of the child that it be allowed to remain in its foster home."

The Bill did not result in any new legislation with respect to the question of legal custody, but when the Bill was considered by Parliament the Parliamentary Standing Committee on Social Questions (socialutskottet) stated (SoU 1989/90:15) that, for similar reasons as given in the Bill, it shared the Minister's conclusion that the possibility to have the custody of a child transferred to the foster parents should be resorted to more frequently than is the case at present.

COMPLAINTS

The applicant complains that the situation has not changed after the Eriksson judgment by the European Court of Human Rights; the violation of her rights to respect for her family life, according to Article 8, continues.

In addition the applicant alleges new violations of Article 8 of the Convention which relate to the fact that Lisa was not transferred to her, that the foster parents later were appointed custodians of Lisa, that she does not have access to her daughter and that she has no effective remedy to secure her right to access to Lisa as the foster parents do not allow her meeting Lisa and her requests for enforcement were not granted by the courts. In this respect she invokes Articles 6 and 13 of the Convention. Finally, she submits that Sweden is in violation of Article 53 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 8 March 1990 and registered on 11 June 1990.

On 1 October 1990 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit, by 11 January 1991, written observations on the admissibility and merits of the application.

After an extension of the time-limit the Government submitted their observations on 30 January 1991. The applicant's observations in reply were submitted on 15 March 1991.

Legal aid under the Addendum to the Commission's Rules of Procedure was granted to the applicant on 7 June 1991.

THE LAW

1.The applicant alleges that, although the European Court of Human Rights has delivered a judgment in her favour, the violation of her rights under Article 8 (Art. 8) of the Convention continues. She also invokes Article 53 (Art. 53) of the Convention.

The Commission first recalls the Eriksson judgment of 22 June 1989 (Eur. Court HR., Series A no. 156, at para. 71), in which the Court made the following statement concerning Article 8 (Art. 8):

"In cases like the present a mother's right to respect for family life under Article 8 (Art. 8) includes a right to the taking of measures with a view to her being reunited with her child. The care order had been lifted, and there was no doubt as to the suitability of Mrs. Eriksson to take care of children or of the conditions in her home (...). The Social Council's decision of 21 January 1983 (...) made it clear that once the care order was no longer in force, the aim was the reuniting of parent and child. Furthermore the Supreme Administrative Court stated, in its judgment of 11 October 1984 (see paragraph 22 above) that '[i]rrespective of the duration of the prohibition, the [Social Council] is obliged to see to it that appropriate measures aimed at reuniting parents and child are taken without delay'.

However, it appears that under Swedish law Mrs. Eriksson did not, after the lifting of the care order, have any enforceable visiting rights while the prohibition on removal was in force. Furthermore, and in particular on account of the restrictions on access, she was in fact denied the opportunity to meet with her daughter to an extent and in circumstances likely to promote the aim of reuniting them or even the positive development of their relationship. In this situation she has not been able to have the prohibiton on removal lifted. The resulting stress on the relations between the applicants and the uncertainty with regard to Lisa's future have already continued for more than six years, causing great anguish to both applicants.

The Government admitted that the system as implemented had failed on this occasion, but argued that situations such as the present could not be prevented whatever system would have been applied, as all depended on the persons involved. The Court recognises that difficulties may arise in consequence of the termination of public care of young children, especially where the child has been taken into care at a very young age and has spent many years away from his natural parents' home. However, the unsatisfactory situation that has ensued in the present case seems to a large extent to stem from the failure to ensure any meaningful access between mother and daughter with a view to reuniting them.
Having regard to the foregoing and notwithstanding Sweden's margin of appreciation, the Court concludes that the severe and lasting restrictions on access combined with the long duration of the prohibition on removal are not proportionate to the legitimate aims pursued."

The European Court of Human Rights found that Article 8 (Art. 8) of the Convention had been violated.

The Commission also recalls the Parliamentary Ombudsman's opinion

of 7 May 1990 in which she inter alia stated:

"As has been pointed out by the Supreme Administrative Court and the European Court of Human Rights, there is under the present legislation no possibility to decide on matters concerning access between parents and children as long as a prohibition on removal is in force. The reason why, while a prohibition on removal is in force, the question of access has not been regulated in the Social Services Act appears to have been that the prohibition on removal should be regarded as a temporary measure.

Thus, the question of how the Social Council shall act when there is a need for regulating the right to access between a child and its parents while a prohibition on removal is in force is at present not regulated in law. According to the new [1990] Act with Special Provisions on the Care of Young Persons, which enters into force on 1 June 1990, there is a possibility for the Social Council to issue such restrictions on access between a child and its parents as it deems necessary for the sake of the child in the same way as in regard to the care under the 1980 Act."

The Government admit that the same legal situation with no legal basis for a request to obtain access which constituted one of the elements leading to the finding by the Court of Human Rights of a violation of Article 8 (Art. 8) in the previous Eriksson case, existed until the above-mentioned 1990 Act entered into force. The Government stress, however, that in the present case this only affected the applicant until the pronunciation of the judgment of the District Court of 2 January 1990, when custody was transferred to the foster parents.

Insofar as the applicant complains of the fact that she was not reunited with Lisa as a consequence of the judgment of the European Court of Human Rights, the Commission recalls that the Court gave its judgment in this case on 22 June 1989.

The Commission notes that a decision as to where to place a child necessarily must be based on an assessment of the situation at the time when such a decision is to be taken.

The Commission recalls that at the time of the Court's judgment Lisa was 11 years old and had lived with her foster parents almost all her life. Furthermore the Commission notes that Lisa had herself expressed the wish to stay in the foster home.

In these circumstances the Commission cannot find that the interference with the applicant's family life was not justified within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

Insofar as the applicant complains that the lack of a legal basis for the restrictions on access continued after the judgment of the European Court of Human Rights, contrary to Article 8 (Art. 8) of the Convention, the Commission notes that Sweden after the judgment started a process to have this legal situation changed in order to comply with the judgment. The legal situation was rectified as from 1 June 1990 when the 1990 Act entered into force. Furthermore, the applicant was not affected, by the lack of a legal basis for the restrictions on access, after the judgment of the District Court of 2 January 1990, as custody was then transfered to the foster parents and the applicant was granted a right of access to Lisa. Consequently, the situation found by the European Court on 22 June 1989 to constitute breaches of the applicant's rights under the Convention continued to exist for about half a year after the judgment of the Court of Human Rights. In these circumstances the Commission considers that there has not been in the present case any new breach of the Convention in addition to those already found by the European Court.

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 Commission is competent, however, to examine the new complaints submitted by the applicant.

3.The applicant alleges that the fact that Lisa was not transferred to her, that the transfer of custody of Lisa to the foster parents and the refusal to enforce the access regulations constitute violations of Article 8 (Art. 8) of the Convention, which reads as follows:

"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 Government submit that it is uncertain whether there exists a family life within the meaning of Article 8 (Art. 8), as Lisa has lived with the foster parents for such a long period of time.

The Commission recalls that the Court of Human Rights has stated on several occasions that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life; furthermore the natural family relationship is not terminated by reason of the fact that the child has been taken into public care (see among others Eur. Court H.R., Eriksson judgment of 22 June 1989, Series A no. 156, p. 24, para. 58).

The applicant has, ever since Lisa was taken into care, unsuccessfully struggled to have her daughter back. The measures complained of, i.e. the transfer of the custody and the decisions not

to transfer Lisa to the applicant or to enforce her right to access, must be considered to interfere with the applicant's right to respect for her family life within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention.

The Commission must therefore examine whether the interference is justified under the terms of paragraph 2 of Article 8 (Art. 8-2). For an interference to be justified, it has to be shown to be "in accordance with the law", to have an aim or aims that is or are legitimate under this paragraph and to be "necessary in a democratic society" for the aforesaid aim or aims (Eur. Court H.R., Eriksson judgment, ibid.).

On this point the Government argue that the interference must be considered justified as being in "accordance with the law", with the legitimate aim to protect Lisa's own interests, and "necessary in a democratic society", mainly because of the long period she had stayed with the foster parents and because of the child's own wish. The Government also submit that a transfer of Lisa against her wish to the applicant would have violated the UN Convention of the Rights of the Child.

As regards the phrase "in accordance with the law" the Commission recalls that for Convention purposes a "law" must be sufficiently precise; there must be a measure of protection against arbitrary interferences by the public authorities with inter alia the right to

respect for family life; if the law confers a discretion, its scope and manner of exercise must be indicated with sufficient clarity to afford such protection (Eur. Court H.R., ibid., para. 59).

The Commission is of the opinion that the relevant domestic law in the present case, which by its very nature must be worded to cover different situations and therefore give some measure of discretion, together with the relevant preparatory work, is sufficiently precise to give an acceptable protection against arbitrary interferences. Furthermore, the Commission recalls that its power to review compliance with domestic law is limited; it is in the first place for the national courts to interpret and apply that law (Eur. Court H.R., ibid., para. 62). Nevertheless, the Commission notes that the decisions concerning the transfer of Lisa, the transfer of custody and the enforcement of access all had their basis in the relevant national law, i.e. Chapters 6 and 21 of the Parental Code. The interference was thus "in accordance with the law".

The Commission furthermore has no doubt that the relevant decisions were taken with a view to safeguarding the interests of Lisa. This is clearly a legitimate aim under Article 8 para. 2 (Art. 8-2) falling under the expression "for the protection of the rights and freedoms of others".

It remains to be examined whether the interference was "necessary in a democratic society" in the interests of the child.

According to the established case-law the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" the Commission furthermore has to take into account that a margin of appreciation is left to the Contracting States. However, the Convention organs' review is not limited to ascertaining whether a respondent State has exercised its discretion reasonably, carefully and in good faith. They cannot confine themselves to considering the relevant decisions in isolation but must look at them in the light of the case as a whole. They must determine whether the reasons adduced to justify the interference at issue are "relevant and sufficient" (Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no. 130, pp. 31 and 32, paras. 67 and 68).

The Commission also recalls what the Court of Human Rights stated in its judgment in the Eriksson case: the right of a mother, who is separated from her child, "to respect for family life under Article 8 (Art. 8) includes a right to the taking of measures with a view to her being reunited with her child" (Eur. Court H.R., Eriksson judgment of 22 June 1989, Series A no. 156, p. 26, para. 71).

In the light of this case-law, the Commission has examined the reasons adduced by the courts and the evidence available to them in order to establish the necessity of the decisions in question.

As regards the refusal to transfer the child to the applicant, the Commission recalls the grounds on which the judgment of the County Administrative Court of 6 September 1989 - later upheld by the Court of Appeal - was based. The Court noted that at the time of the judgment the applicant had not seen Lisa for more than one and a half years. Furthermore, the Court emphasised the risk that Lisa's mental health could be jeopardised by a transfer and took Lisa's own wishes into consideration. The main reason to refuse the transfer was, however, that a procedure concerning the transfer of custody to the foster parents was pending before the District Court.

The Commission finds these reasons relevant for refusing a transfer at that time.

As regards the transfer of custody, the Commission recalls that this question was examined by both the District Court and the Court of Appeal. The courts considered in essence that in view of Lisa's long attachment to her foster home, the environment related to that home such as school, and her own wish, and having regard to her age (at the time of the judgment by the Court of Appeal, Lisa was almost 13 years old), it was, according to the Courts obviously in Lisa's best interest to have custody transferred to the foster parents.

The Commission considers these reasons to be sufficient and relevant for the transfer of custody.

As finally regards the administrative courts' refusal to enforce access, the Commission notes that the County Administrative Court refused to enforce the access which earlier had been ordered by the District Court. The Administrative Court of Appeal did not change this decision. The refusal to enforce the access was essentially based on Lisa's own wish. In these circumstances, and taking into account the above-mentioned margin of appreciation left to the Contracting States, the Commission considers the refusal to enforce the access acceptable.

Although it understands that the interference as a whole has caused considerable suffering to the persons concerned, the Commission concludes that the measures taken could be considered as "necessary in a democratic society".
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.As regards the applicant's complaints under Articles 6 and 13 (Art. 6, 13) of the Convention that she had no effective remedy, the Commission observes that the issues concerning the transfer of Lisa, the transfer of custody and the enforcement of access were each considered by courts at two levels and that finally the Supreme Court and the Supreme Administrative Court, respectively, refused leave to appeal.

In these circumstances, the Commission finds no indication of a violation of Articles 6 or 13 (Art. 6, 13) 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.

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. NØRGAARD)