AS TO THE ADMISSIBILITY OF

Application No. 25653/94
by K.P.
against Finland

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

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 22 June 1994 by K.P. against Finland and registered on 14 November 1994 under file No. 25653/94;

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 Finnish citizen, born in 1949 and resident in Espoo. She is an executive manager. Before the Commission she is represented by Mr. Markku Fredman, a lawyer in Helsinki.

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

The applicant has two children, Roope, born in 1982, and Antti, born in 1984. Anticipating their split-up in 1984, the parents agreed to maintain joint custody of the children, who were to live with their mother. This agreement became enforceable on account of its approval by the Social Welfare Board (sosiaalilautakunta, socialnämnden) of Espoo on 1 November 1984.

The parents continued their cohabitation up to the end of 1988. In January 1989 the father took the children to his new home and refused to let the applicant see them.

In June 1989 the applicant requested enforcement of the 1984 agreement. In July 1989 the children's father requested that he be granted sole custody of the children. The applicant also requested sole custody.

On 11 September 1989 the County Administrative Board (lääninhallitus, länsstyrelsen) of Uusimaa ordered the father to hand over the children to the applicant or they would be fetched. The father refused to comply with the order and evaded enforcement.

In an interim order of 3 October 1989 the District Court (kihlakunnanoikeus, häradsrätten) of Espoo held that the children were to live with their father pending the outcome of the custody proceedings.

By a decision of 6 February 1990 the father obtained sole custody of the children and the applicant was awarded the right to visit and keep the children during the first and the third weekend of each month and during four weeks in the summer.

The applicant was unable to have these visiting rights enforced.

On 13 June 1990 the Espoo District Court's decision was upheld by the Helsinki Court of Appeal (hovioikeus, hovrätten).

In July 1990 the father requested enforcement of the custody order, submitting that the applicant had fetched Antti on 30 June 1990 and had refused to return him. The applicant opposed the enforcement request, stating that Antti had run away from the father's home and no longer wished to return to him.

On 17 August 1990 the applicant requested enforcement of her visiting rights in respect of Roope.

On 22 October 1990 the County Administrative Board ordered the applicant to restore Antti to his father. On the same day the father fetched Antti from his school.

On 20 February 1991 the applicant requested enforcement of her visiting rights in respect of Antti.

The father opposed enforcement of the applicant's visiting rights. He adduced, inter alia, an expert opinion submitted by Dr. Esko Varilo on 22 October 1990, who, on the basis of interviews with the father and his two maids, found a sufficiently strong suspicion that both children had been subjected to incest and that the applicant should therefore be refused access to them until the autumn of 1991. At any rate, access should take place in supervised conditions. The Conciliator (sovittelija, medlare) appointed by the Court had found no indication of sexual abuse.

On 19 June 1991 the City Administrative Court (maistraatti, magistraten) of Helsinki ordered the father to comply with the visiting rights confirmed on 13 June 1990 on pain of an administrative fine. The Court considered that the contents of the expert opinions invoked had essentially been brought to the attention of the ordinary courts which had nevertheless granted the applicant the visiting rights at issue.

On the father's appeal the Helsinki Court of Appeal on 14 November 1991 found that the applicant's visiting rights should be re-examined by an ordinary court in the light of the fresh expert opinions adduced by the father.

Following the father's death on 4 April 1992 the applicant, represented by counsel, requested custody of the children. A similar request was lodged jointly by the female friend of the father, R, as well as by the children's stepsister K. R had taken over the de facto care of the children without informing the applicant of their whereabouts. The local social authorities had agreed to this non-disclosure.

In the course of the proceedings the applicant subsidiarily requested to be granted visiting rights extending to every weekend and

one month in the summer.

By an interim order the Helsinki City Court on 22 June 1992 provisionally granted custody of the children jointly to R and K. The applicant was granted eight hours of visiting rights per month in supervised conditions.

By a judgment of 30 November 1992 the provisional custody order became final and the applicant was granted six hours of visiting rights per month until 31 May 1993 and fourteen hours per month as from 1 June 1993. The Court found it established that the children had been separated from the applicant for over two years except for certain brief visits and the four-month long period during which Antti had been staying with her. The conflicts within the family had resulted in the children's need for therapy and stable conditions.

The City Court had regard to, inter alia, witness testimony as well as a report of the Social Welfare Authority (sosiaalivirasto, socialverket) of Helsinki dated 25 November 1992. This report concluded, inter alia, that the applicant's living conditions remained in a state of flux. It noted that she was seeking treatment for her mental problems and her abuse of alcohol. It was thus not to be recommended that she be afforded custody. A further report submitted by the Espoo Social Authority on 18 November 1992 concluded that, although custody should not for the time being be afforded to the applicant, as extensive visiting rights as possible ought to be granted.

The applicant, no longer represented by counsel, appealed against the City Court's decision. She primarily challenged the custody order but also requested that her visiting rights be extended. In her additional submissions dated 14 January, 26 April and 21 June 1993 she claimed to have become better qualified than R to be her children's custodian; that her mental health was good; and that her living conditions had significantly improved.

On 8 September 1993 the Helsinki Court of Appeal upheld the City Court's decision, considering the applicant's appeal as pertaining only to the custody issue. It did not take into account her belated submissions.

On 27 December 1993 the Supreme Court (korkein oikeus, högsta domstolen) refused the applicant leave to appeal, having considered the matter as one concerning "a decision regarding custody etc.".

From 8 September 1993 to 1 October 1994 the applicant was able to meet both of her children on sixteen occasions and either of the children on three occasions. However, eleven of the planned meetings with the children were not organised, part of them for reasons given by R and part of them for reasons given by the applicant. It appears that at least on six occasions R refused to agree to these meetings being organised on dates differing from those ordered by the courts. The meeting on 1 October 1994 was cancelled by R after she had allegedly been informed by the authorities that the applicant and her children had met without R's and K's knowledge. According to the applicant, Roope had seen the applicant at his own initiative and without R's knowledge in August and September 1994.

Meanwhile, the applicant, on 8 August 1994, lodged a fresh request with the County Administrative Board for the enforcement of her visiting rights. This was opposed by R and K, requesting that the applicant's visiting rights should be revoked for at least a year. On 3 October 1994 R informed the applicant that she would not agree to any further meetings between the applicant and the children until the applicant had clarified the "secret" meetings between them.

On 20 December 1994 the County Administrative Board ordered R to

comply with the City Court's decision of 30 November 1992 concerning the applicant's visiting rights, on pain of an administrative fine in the amout of 2.000 FIM. R appealed.

On 27 January 1995 Antti eloped from R's home and stayed with the applicant until 3 February 1995, when R fetched him from school.

On 1 February 1995 R and K requested enforcement of the custody order in respect of Antti.

In accordance with her sons' wishes the applicant, in April 1995, lodged a fresh request for custody of them, alternatively more extensive visiting rigths.

On 3 June 1995 Antti and Roope moved to the applicant's home. On 18 June 1995 Antti was apparently again fetched by R, but on 23 June 1995 he again ran away and returned to the applicant's home.

On 6 July 1995 the Court of Appeal rejected R's appeal against the County Administrative Board's order of 20 December 1994.

In the course of the fresh custody proceedings the Helsinki District Court (käräjäoikeus, tingsrätten) on 25 July 1995 provisionally extended the applicant's visiting rights. It did not pronounce itself as to where the children should live.

The District Court also requested the Helsinki Social Welfare Authority's opinion apparently in regard to the custody matter. This was to be submitted by February 1996.

On 8 September 1995 R again fetched Antti from school.

On 13 September 1995 the County Administrative Board rejected R's and K's request for enforcement of the custody decision. The Board noted that the children had voluntarily left R and K for the applicant and had expressed a strong wish not to return to them. The children's wish was to be respected, having regard to their maturity. R and K appealed.

On 29 September 1995 Antti again returned to the applicant's home.

R's and K's appeal was rejected by the Court of Appeal on 7 December 1995.

As from the beginning of 1996 the children have been staying mostly with R. No opinion concerning the custody dispute has yet been submitted by the Social Welfare Authority.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention that the transfer of custody from their father to R and K and the visiting rights granted to herself did not respect her and her children's family life. As a result of the custody order the children were forced to live with R, a 56-year-old woman without children of her own and thus insufficiently qualified to be their custodian. The courts also failed to take into account the improvement in the applicant's living conditions as reflected, inter alia, in the report of the Espoo Social Welfare Authority. The custody order and the minimal visiting rights initially granted effectively amounted to a de facto placement in public care, since they did not aim at reuniting the family once the applicant had overcome her temporary problems.

In her submissions of 20 June 1996 the applicant furthermore complains that the District Court's interim order of 25 July 1995

effectively prevents her from obtaining the enforcement necessary for the upbringing of her children. Moreover, by delaying its reply to the District Court the Helsinki Social Welfare Authority is allegedly expecting her to withdraw her custody request.

2. The applicant furthermore complains under Article 6 of the Convention that the proceedings ending with the Supreme Court's decision of 27 December 1993 were unfair. The courts did not give any reasons for restricting her visiting rights to a minimum. This hampered her possibility of appealing, particularly as she was no longer represented by counsel. In addition, the Court of Appeal failed to consider her appeal insofar as it concerned her visiting rights. It was also under a special obligation to make a fresh assessment of her children's interests, as her living conditions had been improving while her appeal was pending before it. The Court of Appeal nevertheless refused to take notice of her belated submissions.

In her submissions of 20 June 1996 the applicant also complains about the excessive length of the pending custody proceedings.

3. Finally, the applicant complains under Article 6 para. 2 of the Convention of a breach of the presumption of innocence in the proceedings ending with the Supreme Court's decision of 27 December 1993. The court decisions were allegedly made in the light of incest suspicions which were never investigated.

THE LAW

1. The applicant complains of the transfer of custody of her children from their father to R and K and of the minimal visiting rights granted to her in 1992. The courts allegedly failed both to take into account the improvement in her living conditions and to provide for a reunification of her family once she had overcome her temporary problems. She furthermore complains that the District Court's interim order of 25 July 1995 prevents her from obtaining enforcement of the visiting rights granted to her. She finally complains about the Helsinki Social Welfare Authority's failure to submit its opinion on her custody request.

The applicant invokes Article 8 (Art. 8) of the Convention which, as far as it is relevant, reads as follows:

> "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."

(i) The Commission has first dealt with the complaint insofar as it concerns the events up to and including the Supreme Court's decision of 27 December 1993. It notes that the applicant lost custody of her children already in 1990, i.e. before custody of them was granted to R and K. The children were nevertheless of the applicant's and their father's marriage and were thus ipso jure part of the original "family" unit from the moment of birth and by the very fact of it. After her own loss of custody the applicant had certain access to them. After the second custody transfer she has continuously sought to obtain extended visiting rights. These links are sufficient to establish "family life" within the meaning of Article 8 para. 1 (Art. 8-1) between the applicant and her children (see, e.g., Eur. Court H.R., Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, pp. 19-20, para. 54). The Commission will therefore assume that this provision

applies both in respect of the transfer of custody from the children's father to R and K and in respect of the related restriction of her visiting rights and that these measures amounted to an interference with her right to respect for her family life.

In order to be justified under the terms of Article 8 para. 2 (Art. 8-2) this interference must satisfy three conditions: it must be "in accordance with the law", it must pursue one or more of the legitimate aims enumerated in Article 8 para. 2 (Art. 8-2) and it must be "necessary in a democratic society" for that or those legitimate aims. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, requires that it be proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society", the Commission must determine whether the reasons adduced to justify the interferences at issue were "relevant and sufficient", bearing in mind the margin of appreciation left to the Contracting State (see, e.g., Eur. Court H.R., Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, pp. 31-32, paras. 67-68). Finally, certain procedural requirements are also implicit in Article 8 (Art. 8) to the extent that in child care matters the parents must have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests (see, e.g., Eur. Court H.R., W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, pp. 28-29, paras. 63-65 and the above-mentioned Olsson judgment, p. 33, para. 71).

In the present case it has not been alleged that the interference was not in accordance with the law. It can furthermore reasonably be assumed to have been intended to safeguard the development of the applicant's children. It therefore served the legitimate aim of protecting their health and rights.

As regards the necessity of the interference, the Commission finds no indication of arbitrariness in the national courts' examination. It notes, in particular, that before restricting the applicant's visiting rights to the extent complained of the Helsinki City Court heard witnesses and had at its disposal, inter alia, reports submitted by the social welfare authorities of Helsinki and Espoo. Having regard to the children's need for stable conditions, the Court found it appropriate to extend the applicant's visiting rights gradually, thereby rejecting her request for visiting rights extending to every weekend. The reasons invoked by the City Court were clearly relevant and sufficient to justify the interference with the applicant's rights under Article 8 (Art. 8).

Finally, the Commission finds no indication that the applicant was insufficiently informed of the investigations of her and her children's living conditions. Nor can it find that she was at any stage of the proceedings prevented from presenting her views. She was thus sufficiently involved in the decision-making process, seen as a whole, so as to provide her with the requisite protection of her interests.

Taking all the circumstances of the case into account and having regard to the State's margin of appreciation, the Commission is satisfied that the Finnish courts were reasonably entitled to consider that the transfer of custody from the children's father to R and K and the related restriction of the applicant's visiting rights in 1992 were necessary in order to achieve the above-mentioned legitimate aim. Accordingly, there is no appearance of any violation of Article 8 (Art. 8) on this point.

(ii) Insofar as the complaint concerns the further developments after the Supreme Court's decision of 27 December 1993, the Commission recalls that the essential object of Article 8 (Art. 8) is to protect the individual against arbitrary interference by the public authorities. There may in addition be positive obligations inherent in

an effective "respect" for family life. Whilst the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition, the applicable principles are similar. In particular, in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual or individuals involved as well as the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation. What is decisive is whether the national authorities have taken all necessary steps as can reasonably be demanded in the special circumstances of each case (cf. the above-mentioned Hokkanen judgment, p. 20, para. 55 and p. 22, para. 58).

The question now arising is essentially whether there has been a failure on the part of the Finnish authorities to respect the "family life" prevailing between the applicant and her children while attempting to strike a fair balance between their respective interests, rights and freedoms and those of R and K (cf., ibid., p. 22, para. 58).

In the Hokkanen judgment the Court noted that the applicant's adversaries, who de facto had been caring for his child, had repeatedly refused to comply with the court-ordered provisional access arrangements concerning the child and the applicant; that they had subsequently refused to fulfil their court-ordered obligation to restore the child to him; and that they had finally refused to cooperate with the authorities for the purpose of implementing the court-ordered final access arrangements between the two (see ibid., pp. 10 et seq., paras. 11 et seq.). Despite this refusal on the part of the applicant's adversaries the authorities had considered themselves unable to intervene in the dispute with a view effectively to enforcing the court orders issued at the applicant's request. Eventually custody of the child was transferred to the applicant's adversaries, having regard to her lengthy stay with them (see ibid., pp. 13-14, para. 29).

The present applicant complains that the District Court's interim order of 25 July 1995 prevents her from obtaining enforcement of the visiting rights granted to her. The Commission finds that this allegation has not been sufficiently substantiated. In any case, the facts of the present application distinguish it from the Hokkanen case. The Commission notes, in particular, that already prior to the District Court's interim order of 25 July 1995 the applicant was able to meet her children on a significant number of occasions. Subsequent to that order the children have occasionally also been living with her.

The applicant also complains about the Helsinki Social Welfare Authority's failure to submit its opinion on her custody request. Indeed it appears that the Authority's opinion has not yet been submitted, although the time-limit fixed by the Helsinki District Court expired already in February 1996.

Nevertheless, having regard to the presently prevailing circumstances, the conflicting interests at stake and the State's margin of appreciation, the Commission cannot find that the authorities have so far failed to make reasonable efforts to show respect for the applicant's "family life". Accordingly, there is no appearance of any violation of Article 8 (Art. 8) on this point either.

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

2. The applicant furthermore complains that the proceedings ending with the Supreme Court's decision of 27 December 1993 were unfair. Allegedly, the courts did not give any reasons for restricting her visiting rights to a minimum. This hampered her possibility of appealing, particularly as she was no longer represented by counsel. In addition, the Court of Appeal failed to consider her appeal insofar

as it concerned her visiting rights. It was also under a special obligation to make a fresh assessment of her children's interests, as her living conditions had been improving while her appeal was pending before it. The Court of Appeal nevertheless refused to take notice of her belated submissions. In her submissions of 20 June 1996 the applicant also complains about the excessive length of the pending custody proceedings.

The applicant invokes Article 6 (Art. 6) of the Convention which, as far as it is relevant, reads as follows:

> "1. In the determination of his civil rights ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

(i) The Commission has first dealt with the complaint insofar as it concerns the proceedings ending with the Supreme Court's decision of 27 December 1993. It recalls that under Article 26 (Art. 26) of the Convention it may only deal with an application after all domestic remedies have been exhausted, according to the generally recognised rules of international law. An applicant must make normal use of remedies likely to be effective and adequate in respect of the matters of which he complains (see, e.g., No. 13251/87, Dec. 6.3.91, D.R. p. 68 pp. 137 et seq. at pp. 163-164).

In the present case the Commission finds no indication that the applicant challenged, at least in substance, the unfairness of the proceedings allegedly resulting from the City Court's failure to provide proper reasons for the restriction of her visiting rights; the Court of Appeal's failure to consider her appeal insofar as it concerned her visiting rights; and its failure to take notice of her belated submissions in support of her appeal.

It is true that in the proceedings before the Court of Appeal and the Supreme Court the applicant was no longer represented by counsel. The Commission considers, however, that she was not, for this reason, absolved from the requirement to exhaust domestic remedies (cf., e.g., Cardot v. France judgment of 19 March 1991, Series A no. 200, pp. 18-19, paras. 34-36; No. 11244/87, Dec. 2.3.87, D.R. 55 p. 98; No. 11921/86, Dec. 12.10.88, D.R. 57 p. 81).

The Commission therefore concludes that the applicant did not exhaust the remedies available to her under Finnish law. Moreover, an examination of this aspect of the complaint does not disclose the existence of any special circumstance which might have absolved her, according to the generally recognised rules of international law, from exhausting those remedies.

It follows that this aspect of the complaint must be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

(ii) Next the Commission has dealt with the complaint concerning the allegedly excessive length of the pending custody proceedings. It recalls that the reasonableness of the length of the proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant as well as that of the competent authorities. On the latter point, the importance of what is at stake for the applicant in the litigation has to be taken into account (see, e.g., the above-mentioned Hokkanen judgment, pp. 25 et seq., paras. 69 et seq.).

The Commission notes that the custody proceedings which the applicant instituted in April 1995 are still pending before the Helsinki District Court which sofar appears to have issued only an interim order on 25 July 1995.

In the circumstances of the case the Commission does not find that the present length of the proceedings could be considered unreasonable for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention. Accordingly, there is no appearance of a violation of that provision.

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

3. Finally, the applicant complains of a breach of the presumption of innocence in the proceedings ending with the Supreme Court's decision of 27 December 1993. The court decisions were allegedly made in the light of incest suspicions which were never investigated. She again invokes Article 6 (Art. 6) of the Convention.

The Commission has considered this complaint in the light of Article 6 para. 2 (Art. 6-2) of the Convention which reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Commission observes that the applicant was not charged with any criminal offence. Nor is there any indication of any other voicing of suspicions or a finding of guilt which could raise an issue under Article 6 para. 2 (Art. 6-2). Accordingly, there is no appearance of any violation of this provision.

It follows that this complaint must also be rejected as being 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.

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