AS TO THE ADMISSIBILITY OF

Application No. 24671/94
by Orvo Helge Juhonpoika KAIJALAINEN
against Finland

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 5 March 1994 by Orvo Helge Juhonpoika KAIJALAINEN against Finland and registered on 25 July 1994 under file No. 24671/94;

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 Swedish citizen, born in 1937. He is a journalist residing in Haninge, Sweden. Before the Commission he is represented by Mr. Eilert Uusijärvi, a lawyer practising in Stockholm.

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

The applicant is the father of a girl called J, born in 1980. The applicant has never had custody of his daughter. The applicant and the child's mother, called P, co-habited in Sweden for about one year after the child's birth.

On 20 January 1983 the District Court (tingsrätten) of Södra Roslag, Sweden, granted the applicant access rights on an interim basis. In the course of 1983 the applicant visited his daughter several times.

In 1984 the child's mother, together with the child, left Sweden for a place unknown to the applicant. The applicant searched for them with the assistance of Interpol.

In 1984 the District Court granted the applicant access rights and on 4 April 1985 the Svea Court of Appeal (hovrätten) upheld the

District Court's decision.

In or around 1987 the child and her mother were traced in Helsinki, Finland.

Apparently, soon after the child and her mother had been found in Finland the applicant lodged a request for enforcement of his access rights, based on the above-mentioned Swedish Court of Appeal decision of 4 April 1985. The City Administrative Court (maistraatti) of Helsinki rejected his request.

In 1989 the applicant instituted proceedings in the City Court (raastuvanoikeus) of Helsinki requesting that he be granted access rights. The court had at its disposal opinions from both the Finnish and Swedish child welfare authorities. The Social Welfare Board (sosiaalilautakunta) of Helsinki stated in its opinion that the child should be given psychotherapy before visits between her and her father could be arranged. Towards the end of 1989 and in 1990 the child attended a children's hospital in Helsinki for psychotherapy.

On 7 September 1989 the City Court rejected the applicant's request concerning his access rights. On 24 January 1990 the Court of Appeal (hovioikeus) of Helsinki upheld the City Court's decision.

On 25 February 1992 the applicant instituted new proceedings in the City Court requesting that he be granted access rights. The court had at its disposal two medical reports, both to the effect that the child's own opinion on visiting arrangements should be taken into consideration. The child psychiatrist, who had met J both in 1989 and again in 1992, stated that J had said clearly and repeatedly that she did not want to see her father. The child psychiatrist stated further that J's mental age corresponded to 13 years and that she had a mature understanding of the realities of life.

The child's mother requested that J be heard in court. The applicant objected to this request. The City Court decided not to hear J in court. Instead it decided to ask for an opinion from the Social Welfare Board since it found that this way of hearing the child's point of view was more appropriate and less damaging for her.

In its opinion of 6 October 1992 the Social Welfare Board stated that the applicant ought not to be granted access.

On 12 October 1992 the City Court rejected the applicant's request for access. The City Court stated that J was twelve years old and mature for her age. She had not met her father for nine years. She had a close relationship with her new family (her mother, her step-father and one step-sister). For her, the step-father was her only father. The court further stated that she did not want to meet her (biological) father and that she wished that she herself could take the initiative as regards visiting him. On this basis the City Court found that it was not in the interests of the child to grant the applicant access rights. The court's judgment was based on sections 2, 9, 10, 11 and 12 of the 1983 Act on Custody and Visiting Rights with regard to Children (laki lapsen huollosta ja tapaamisoikeudesta).

On 11 November 1992 the applicant appealed to the Court of Appeal of Helsinki, which on 12 May 1993 upheld the City Court's judgment.

On 7 September 1993 the Supreme Court (korkein oikeus) refused the applicant leave to appeal.

COMPLAINTS

1. The applicant complains, under Article 8 of the Convention, that his right to respect for his family life has been violated. He alleges that the authorities have failed to take positive measures in order to

facilitate a reunion between himself and his daughter. He maintains, furthermore, that his daughter's opinion is influenced by her mother's opinion of the applicant.

2. The applicant complains further, under Article 6 of the Convention, that his right to a hearing within a reasonable time has been violated. He maintains that he instituted proceedings as early as 1987 and the final decision was taken only on 7 September 1993.

3. Under Article 13 of the Convention the applicant complains that he has not had an effective remedy before a national authority, taking into account the authorities' passivity, which had caused the ties between the applicant and his daughter to be loosened.

4. Finally, in a letter of 15 July 1994, the applicant complained that his right to enjoy equality with the child's mother in their relationship with the child had been violated. He invokes Article 5 of Protocol No. 7 to the Convention.

THE LAW

1. The applicant complains that the refusal to grant him right of access to his daughter violates his right to respect for his family life.

Article 8 (Art. 8) of the Convention reads:

> "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 Commission notes, firstly, that the Convention entered into force with respect to Finland on 10 May 1990. The facts that relate to a period prior to this date are therefore outside the Commission's competence ratione temporis. This applies to the enforcement proceedings concerning the Swedish decision on access rights as well as the first set of proceedings in Finland concerning access rights, i.e. the proceedings which ended with the Court of Appeal's decision on 24 January 1990 as well as the complaint concerning the alleged failure of the public authorities to take positive action.

It follows that in so far as the applicant's complaints relate to these proceedings, they are incompatible ratione temporis with the provisions of the Convention and must be rejected under Article 27 para. 2 (Art. 27-2).

The Commission notes, however, that events prior to 10 May 1990 may be taken into account as a background to the issues before the Commission.

In accordance with the Court's and Commission's established case-law, the right to respect for family life within the meaning of Article 8 (Art. 8) of the Convention includes the right of a divorced parent who is deprived of custody following the breakup of the marriage to have access to or contact with his or her child. The boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition, but 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 and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see Hokkanen v. Finland judgment of 23 September 1994, Series A no. 299-A, p. 20, para. 55).

In the present case the applicant is not a divorced parent, but he had lived with his child and its mother for about one year after the child's birth and he is her biological father. In these circumstances the Commission assumes that the decision of the courts, in the final resort in the Supreme Court on 7 September 1993, to refuse the applicant's request for access rights interfered with the exercise of his right to respect for his family life within the meaning of Article 8 para. 1 (Art. 8-1). The Commission must therefore examine whether the interference complained of was justified under Article 8 para. 2 (Art. 8-2) of the Convention, i.e. whether the interference was in accordance with the law and had an aim which was legitimate and necessary in a democratic society.

The Commission notes that the decisions taken by the Finnish courts were based on, inter alia, section 9 of the Act on Custody and Visiting Rights with regard to Children. Under this provision the court is empowered to decide on access. The interference was thus in accordance with the law within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

As regards the legitimate aim the Commission has consistently held that, in assessing the question of whether or not the refusal of a right of access to the non-custodial parent was in conformity with Article 8 (Art. 8) of the Convention, the interests of the child predominate. The interference therefore has a legitimate aim in so far as it was effected for the protection of the child's interests (cf. No. 7911/77, Dec. 12.12.77, D.R. 12 p. 192). There is no doubt that, in the present case, the interference with the applicant's right under Article 8 (Art. 8) had this purpose. It remains to be considered whether the interference was necessary in a democratic society for the protection of the child's interest.

The Commission points out that in examining whether the interference was necessary it does not intend to substitute its own judgment for that of the competent domestic courts. Its function is to assess, from the point of view of Article 8 (Art. 8), the decision which those courts took in the exercise of their discretionary power.

It is an important function of the law in a democratic society to provide safeguards in order to protect children from harm and emotional suffering resulting, for instance, from the breakup of the relationship between their parents. In such cases this purpose may be achieved by keeping the child away from a situation which could be detrimental to his or her psychological development owing to the existence of a conflict of loyalty vis-à-vis one or both of the parents and the inevitable parental pressure put on him or her causing feelings of insecurity and distress (cf. Hendriks v. the Netherlands, Comm. Report 8.3.82, para. 120, D.R. 29 p. 14).

In the present case the Commission finds that the competent national courts carefully considered the applicant's request for access to his daughter. The courts had at their disposal statements from two doctors and an opinion from the local Social Welfare Board. Furthermore, they had evidence to the effect that the child, who was mature for her age, did not wish to meet her father. The courts came to the conclusion that it was in the child's interest not to grant the applicant access rights.

In these circumstances the Commission is satisfied that the interference complained of, namely the refusal of the applicant's request for a visiting arrangement, was required by the interests of the child and that the courts, in so deciding, did not go beyond their

discretionary power.

The Commission has not overlooked the applicant's situation. The absence of ones' child may cause considerable suffering to the non-custodial parent. However, where, as in the present case, there is a serious conflict between the interests of the child and one of its parents which can only be resolved to the disadvantage of one of them, the interest of the child must, under Article 8 (Art. 8), prevail.

The Commission concludes that the interference with the applicant's right to respect for his family life, being proportionate to the legitimate aim pursued, could be considered necessary in a democratic society, within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention, for the protection of the rights and freedoms of another person, namely the child concerned.

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 applicant complains further that his right to a hearing within a reasonable time has been violated. He maintains that the proceedings lasted from 1987 to 1993.

Article 6 (Art. 6) of the Convention reads, as far as relevant, as follows:

> "1. In the determination of his civil rights and obligations ... , everyone is entitled to a ... hearing within a reasonable time ... "

As regards the period to be considered, the Commission notes, firstly, that although the applicant had at the end of the 1980s instituted enforcement proceedings and, later in 1989, proceedings for access rights, these proceedings were terminated in 1988 and in 1990, respectively. These proceedings were completely separate from the fresh proceedings which the applicant instituted in 1992. Thus the pre-1992 proceedings, which furthermore took place before the Convention entered into force with regard to Finland, cannot be taken into account even as a background in assessing the length of the relevant proceedings.

The Commission recalls that the applicant instituted new proceedings concerning his access rights on 25 February 1992. The final decision in this respect was taken by the Supreme Court on 7 September 1993. Thus the proceedings lasted altogether about 18 months.

The Commission reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the following criteria: the complexity of the case, the conduct of the parties and that of the authorities dealing with the case (see Eur. Court H.R., Vernillo judgment of 20 February 1991, Series A no. 198, p. 12, para. 30).

The Commission notes that the case was not very complex as regards either the legal issues or the facts. The proceedings in the City Court lasted about seven months, during which the City Court obtained an opinion from the local Social Welfare Board. The proceedings in the Court of Appeal lasted from 11 November 1992 to 12 May 1993, i.e. six months. The proceedings in the Supreme Court lasted about four months. Taking into account that the case was heard altogether at three instances, the Commission considers that a reasonable time was not exceeded.

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.

3. The applicant complains further that his right to have an effective remedy before a national authority as regards his family life has been violated. The applicant invokes Article 13 (Art. 13) of the Convention, which reads:

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

The Commission notes that the applicant had the opportunity to request access rights before national courts, which he indeed did. The requirement of effectiveness does not mean that the outcome of the proceedings should correspond to the applicant's objectives.

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.

4. Finally, the applicant complains that his rights as regards his relationship with his child have not been respected equally with those of his former partner. He invokes Article 5 of Protocol No. 7 (P7-5) to the Convention, which reads as follows:

> "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."

The Commission notes that the applicant and his former partner, with whom the applicant has never been married, are not "spouses" within the meaning of Article 5 of Protocol No. 7 (P7-5). This provision is therefore not applicable in the instant case.

It follows that this part of the application is incompatible ratione materiae with the Convention 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) — (C.L. ROZAKIS)