AS TO THE ADMISSIBILITY OF

Application No. 16969/90
by Joseph KEEGAN
against Ireland

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

MM.C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A. WEITZEL
H.G. SCHERMERS
Mrs.G. H. THUNE
SirBasil HALL
Mr.C.L. ROZAKIS
Mrs.J. LIDDY
MM.L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ

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 1 May 1990 by
Joseph Keegan against Ireland and registered on 2 August 1990 under
file No. 16969/90 ;

Having regard to:

-the report provided for in Rule 47 of the Rules of Procedure of
the Commission;

- the written observations submitted by the respondent Government
on 12 February 1991 and the observations in reply submitted by the
applicant on 7 May 1991;

-the oral submissions of the parties at the hearing on
13 February 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Irish citizen born in 1964 and resident in
Dublin. He is represented by Brendan Walsh and Partners, solicitors
practising in Dublin.

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

On 29 September 1988, the applicant's girlfriend V., with whom
he had been living, gave birth to a daughter S. of which the applicant
was the natural father. While the pregnancy had been planned by both
the applicant and V., V. had broken off her relationship with the
applicant prior to the birth and on 17 November 1988 placed the child
for adoption. On 22 November 1988 V. informed the applicant of the

placement.

The applicant sought legal advice and instituted proceedings to be appointed guardian under Section 6 (a) of the Guardianship of Infants Act 1964 which would have enabled him to oppose the proposed adoption. Pursuant to the Adoption Act 1952, an adoption order cannot be made without the consent of the child's mother or the child's guardian or other person having charge or control of the child. While a married father is a guardian of his children, an unmarried father is not unless so appointed by the Court.

On 29 May 1989 the Circuit Court appointed the applicant guardian and awarded him custody.

On appeal the High Court found in July 1989 that the applicant was a fit person to be appointed guardian and that there were no circumstances involving the welfare of the child which required that the father's rights be denied. The High Court judge held:

> "I am of the opinion that in considering the applications both for custody and guardianship I must have regard to circumstances as they presently exist and that in considering the welfare of the child I must take into account the fact that she has been placed for adoption. Each application must be taken as part of a global application and not as a separate and distinct one. The test therefore is:
>
> > (1) whether the natural father is a fit person to be appointed guardian, and, if so:
> >
> > (2) whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed.
>
> In the present case, I am of the opinion that he satisfies the first condition and that unless the welfare of the child is to be regarded as the sole consideration, he satisfies the second condition ...
>
> In my opinion, having regard to the purposes of the Status of Children Act 1987, the rights of the father should not be denied by considerations of the welfare of the child alone, but only where - and they do not exist in the present case - there are good reasons for so doing."

The matter was then referred by the Court by way of case stated to the Supreme Court. The questions put to the Supreme Court by the High Court judge were:

> (1) Was he correct in his opinion as to the manner in which section 6A of the Guardianship of Infants Act 1964 as inserted by section 12 of the Status of Children Act 1987 should be construed?
>
> (2) If not, what is the proper construction of that section and what other, if any, principles should he have applied or considered whether in relation to guardianship or custody which derive either from law or from the provisions of the Constitution?

On 1 December 1989, the Supreme Court gave its judgment. It held that the High Court had erred in its application of the Act in presuming a natural father had a right to be a guardian. It considered that the Act did not give a natural father a right to be a guardian but only the right to apply to be guardian. The first and paramount consideration in the exercise of the Court's discretion was the welfare

of the child, and the blood link between child and father was merely one of the many relevant factors which may be viewed as relevant to that question. It considered that

"... regard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child unless the Court has first concluded that the quality of welfare which would probably be achieved for the infant by its present custody which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved by custody with the father is not to an important extent better."

The matter was referred back to the High Court for the case to be decided in light of this interpretation.

On 9 February 1990, the High Court resumed the case. It also heard additional evidence including evidence of a consultant child psychiatrist, who gave his opinion that the child would suffer short-term trauma if moved and would also suffer the long-term effect in later years of being more vulnerable to stress and having possible difficulty in forming trust relationships. The Court found that with the additional passage of time S's attachment to her adoptive parents had grown stronger and the likely traumatic effect of the move greater. Applying the test laid down by the Supreme Court, the High Court judge concluded:

> "In my view these differences and the danger to her psychological health are of such an importance that I cannot hold that the quality of welfare likely to be achieved with the prospective adopters would not be to an important extent better than that likely to be achieved by custody with the father. That being so, his wish and desire to be involved in the guardianship of and to enjoy the society of his child is not a factor which I am to take into account. In these circumstances, the welfare of the infant requires her to remain in her present custody. Accordingly the application for relief must be refused."

The appeal of the natural mother and prospective adopters was therefore allowed.

The question of the adoption of the applicant's daughter is still to be considered by the Adoption Board.

COMPLAINTS

1. The applicant complains that Article 8 of the Convention has been violated. He submits that the State has failed to respect his family life, that it has failed to allow him to form a close relationship with his daughter, that it has failed to create a legal nexus between natural father and child in that there is not even a defeasible right to be appointed guardian and that it has failed to introduce legal safeguards that render possible a child's integration in its family from the moment of its birth.

2. The applicant also complains under Article 14 in that he as a natural father is treated differently as regards his child than a married father would be.

3. He further complains of a violation of Article 6 of the Convention in that he has no standing before the Adoption Board.

4. The applicant also complains that the above matters violate the rights of his daughter to respect for her family life.

RELEVANT DOMESTIC LAW AND PRACTICE

Adoption

The principal Irish legislation providing for the adoption of children is the Adoption Act 1952. Three amending acts were passed to that Act in 1964, 1974 and 1976.

Section 8 of the 1952 Act established the Adoption Board (An Bord Uchtala) to examine and grant applications for the adoption of children.

As regards the requisite consent of the natural parent, the 1952 Act provides in section 14 as follows:

> "(1) An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with any such consent in accordance with this section.
>
> (2) The Board may dispense with the consent of any person if the Board is satisfied that that person is incapable by reason of mental infirmity of giving consent or cannot be found.
>
> ...
>
> (6) A consent may be withdrawn at any time before the making of an adoption order."

As regards those persons who are entitled to be heard on an application for an adoption order, the 1952 Act provides in section 16 as follows:

> "(1) The following persons and no other persons shall be entitled to be heard on an application for an adoption order -
>
> (a) the applicants,
>
> (b) the mother of the child,
>
> (c) the guardian of the child,
>
> (d) a person having charge of or control over the child,
>
> (e) a relative of the child,
>
> (f) a representative of a registered adoption society which is or has been at any time concerned with the child,
>
> (g) a priest or minister of a religion recognised by the Constitution (or, in the case of any such religion which has no ministry, an authorised representative of the religion) where the child or a parent (whether alive or dead) is claimed to be or to have been of that religion,
>
> (h) an officer of the Board,
>
> (i) any other person whom the Board, in its

discretion, decides to hear.

(2) A person who is entitled to be heard may be represented by counsel or solicitor.

(3) The Board may hear the application wholly or partly in private.

(4) Where the Board has notice of proceedings pending in any court of justice in regard to the custody of a child in respect of whom an application is before the Board, the Board shall make no order in the matter until the proceedings have been disposed of."

Proceedings for custody and guardianship

As regards proceedings relating, inter alia, to the custody or guardianship or upbringing of an infant, the Guardianship of Infants Act 1964 provided as follows:

"3. Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

"Welfare" in relation to an infant is defined as follows in section 2 of the said Act:

"'Welfare', in relation to an infant, comprises the religious and moral, intellectual, physical and social welfare of the infant."

It should be noted that the 1964 Act, in section 2, defined "father" as including a male adopter under an adoption order but this definition did not include the father of an illegitimate infant.

Section 6 of the 1964 Act provided as follows:

"(1) The father and mother of an infant shall be guardians of the infant jointly.

(2) On the death of the father of an infant the mother, if surviving, shall be guardian of the infant, either alone or jointly with any guardian appointed by the father or by the court.

(3) On the death of the mother of an infant the father, if surviving, shall be guardian of the infant, either alone or jointly with any guardian appointed by the mother or by the court."

The Status of Children Act, 1987 amended the Guardianship of Infants Act, 1964 in the following way:

"11. Section 6 of the Act of 1964 is hereby amended by the substitution of the following subsection for subsection (4):

'(4) Where the mother of an infant has not married the infant's father, she, while living, shall alone be the guardian of the infant unless there is in force an order under section 6A (inserted by the Act of 1987) of this Act or a guardian has otherwise been appointed in accordance with this Act.'

12. The Act of 1964 is hereby amended by the insertion after section 6 of the following section:

> '6A (1) Where the father and mother of an infant have not married each other, the court may on the application of the father, by order appoint him to be a guardian of the infant.
>
> (2) ... the appointment by the court under this section of the father of an infant as his guardian shall not affect the prior appointment of any person as guardian of the infant under section 8 (1) of this Act unless the court otherwise orders ...'"

As regards the powers and duties of guardians, the 1964 Act provides as follows:

> "10 (1) Every guardian under this Act shall be a guardian of the person and of the estate of the infant unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide.
>
> (2) Subject to the terms of any such deed, will or order, a guardian under this Act
>
> (a) as guardian of the person, shall, as against every person not being, jointly with him, a guardian of the person, be entitled to the custody of the infant and shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant;
>
> (b) as guardian of the estate, shall be entitled to the possession and control of all property, real and personal, of the infant and shall manage all such property and receive the rents and profits on behalf and for the benefit of the infant until the infant attains the age of twenty-one years or during any shorter period for which he has been appointed guardian and may take such proceedings in relation thereto as may by law be brought by any guardian of the estate of an infant.
>
> (3) The provisions of this section are without prejudice to the provisions of any other enactment or to any other powers or duties conferred or imposed by law on parents, guardians or trustees of the property of infants."

As regards court applications for custody of an infant, the 1964 Act provided as follows:

> "11 (1) Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper.
>
> (2) The court may by an order under this section
>
> (a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother ..."

This section of the 1964 Act was amended by the 1987 Act as follows:

"13. Section 11 of the Act of 1964 is hereby amended by the substitution of the following subsection for subsection (4):

> '(4) In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him'."

The Constitution of Ireland

Article 40 of the Constitution of Ireland provides as follows:

"1. All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function...

3. 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen ..."

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 1 May 1990 and registered on 2 August 1990.

On 1 October 1990, the Commission decided to communicate the application to the respondent Government and to invite them to submit written observations on the admissibility and merits.

The Government's observations were submitted on 13 February 1991 after an extension of the time-limit and the applicant's observations were submitted on 7 May 1991 after an extension of the time-limit.

The Commission decided on 6 March 1991 to grant legal aid to the applicant.

On 10 October 1991, the Commission decided to hold an oral hearing.

At the hearing which took place on 13 February 1992, the parties were represented as follows:

For the Government:
Ms. Emer KILCULLEN:Agent, Department of Fopreign Affairs
Mr. Dermot GLEESON:Senior Counsel
Mr. Michael HANNA:Counsel
Mr. John F. GORMLEY:Adviser, Office of the Attorney General
Mr. Bernard CAREY:Adviser, Department of Health

For the applicant

Ms. Dervla BROWNE:Counsel
Mr. Brendan WALSH:Solicitor
Mr. Joseph KEEGAN:Applicant

THE LAW

The applicant complains under Article 8 (Art. 8) of the Convention that the State has failed to respect his family life in that inter alia it allows the placement of a child for adoption without the knowledge or consent of the natural father and that the natural father has not even a defeasible right to be appointed guardian. He also complains that he was discriminated against as a natural father, contrary to Article 14 (Art. 14), and that he has no standing before the Adoption Board, contrary to Article 6 (Art. 6) of the Convention.

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

"1.Everyone has the right to respect for his private and family life, his home and his correspondence.

2.There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 (Art. 14) of the Convention provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 6 (Art. 6) of the Convention provides in its first sentence:

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

The Government submit that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention since he did not complain of the failure to consult him about the adoption in the domestic proceedings, and did not invoke Articles 40.1 and 40.3 of the Constitution.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to

constitute a remedy, do not in reality offer any chance of redressing the alleged breach (cf. Application No. 9248/81, Dec. 10.10.83, D.R. 34 p. 78).

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

As regards the issue of prior consultation, the Commission finds no indication that it could usefully have been raised in the guardianship proceedings which were concerned solely with the question of whether the applicant should be appointed guardian and awarded custody. As regards the applicant's alleged failure to raise Articles 40.1 and 40.3 of the Constitution, the Commission notes that the Supreme Court had regard to the provisions of the Constitution and held that the applicant had no constitutional right to guardianship. The Commission is therefore unable to accept that the application should be declared inadmissible for non-exhaustion of domestic remedies.

The Government also submit that the applicant's complaint under Article 6 (Art. 6) of the Convention fails to comply with the six month time- limit imposed by Article 26 (Art. 26) of the Convention since the applicant did not introduce this complaint within six months of the commencement of the adoption proceedings.

The Commission recalls that the six month period runs from the date of the final decision constituting the exhaustion of domestic remedies (see e.g. Nos. 9266/81, Dec. 28.1.83, D.R. 30 p. 155 and 1017/82, Dec. 12.7.84, D.R. 38 p. 90). Since the applicant's application for guardianship would have had the result, if successful, of giving him standing in the adoption proceedings, the Commission finds that the six months period runs from the conclusion of those proceedings. This complaint cannot therefore be rejected as failing to comply with Article 26 (Art. 26) of the Convention.

As regards the substance of the application, the Commission has had regard to the submissions of the parties. It considers that the application raises difficult questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The application cannot therefore be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

No other grounds for declaring the application inadmissible have been established.

For these reasons, the Commission, by a majority

DECLARES THE APPLICATION ADMISSIBLE,
without prejudging the merits.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)