AS TO THE ADMISSIBILITY OF

Application No. 27533/95
by Trevor H. V. MARTIN
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 28 February 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
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 20 April 1995 by Trevor H. V. MARTIN against the United Kingdom and registered on 7 June 1995 under file No. 27533/95;

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 facts as submitted by the applicant may be summarised as follows.

Particular circumstances of the case

The applicant is a British citizen born in October 1947 and is resident in Leeds. He is represented before the Commission by Mr. Stephen Grosz, a solicitor practising in London.

Since in or about 1966, when the applicant was approximately nineteen years old, he suffered from depression and/or psychological problems. He was diagnosed, in or around that period of time, as suffering from catatonic schizophrenia, psychopathy and accelerated intellectual maturity.

The applicant was admitted to Whitchurch Hospital on 30 August 1966 and was discharged on 28 September 1966. He was then treated as an outpatient during 1966 and 1967, was seen by a consultant psychiatrist on several occasions in 1968 and was admitted to another hospital on 3 September 1968 but discharged himself on 26 November 1968. Subsequently, he was seen at Whitchurch Hospital from November 1968 to July 1969 and was readmitted by compulsory order under the Mental Health legislation on 27 August 1969. He was discharged in

September 1969 and was treated as an outpatient from then until January 1970. As part of his treatment, the applicant received group therapy from a team led by consultant psychiatrists and a psychiatric social worker. During the course of this treatment the applicant fell in love with the social worker who, according to the applicant, was taken off his case as an act of clinical judgment prompted by his feelings for her.

Between 1969 and 1972 the applicant requested two relevant local authorities (the Mid Glamorgan Family Health Services Authority and the South Glamorgan Health Authority) on numerous occasions for access to his records. The basis for these requests was later expressed by the applicant as, inter alia, a desire to know whether the social worker was taken off his case, why it was thought necessary to commit him to hospital in 1969, the diagnosis at the time and the basis of his treatment. He went on in an affidavit in later legal proceedings to state that:

> "Many of the records I seek were compiled at a time when I was still an adolescent and suffering from some psychological problems because of this <the records> are the only way I can learn more about myself and what was happening to me at the time. I believe that only when I have seen these records can I make sense of what has happened to me in the past. Until I see these records I will continue to be preoccupied with what my reports might contain."

The applicant continued to make requests for his records to both relevant local authorities. On 17 July 1990 the applicant's requests to the first local authority were refused and no reasons were given. The second local authority responded on 5 September 1990 indicating that, before considering the applicant's request, the applicant must comply with a number of pre-conditions including giving an assurance to that local authority that their staff were not implicated in any potential litigation. While the applicant complied with the pre-conditions, he was not prepared to give the assurance about potential litigation. On 2 November 1990, the second local authority confirmed that, since a consultant had reached the view that disclosure of the records would be detrimental to the applicant, the authorities were not in a position to give the applicant access to the records.

On 24 March 1993 both local authorities conceded that that consultant did not have first hand information about the applicant's current state of health and, accordingly, they would release the records to a medical advisor appointed by the applicant and such an advisor would be "in a position to decide whether and to what extent disclosure could be made without causing harm to <the applicant> or third parties".

The applicant declined this offer and requested judicial review of the responses noted above of both local authorities dated 17 July 1990, 5 September 1990 and 2 November 1990. The issue before the High Court was whether a patient has an unconditional right of access at common-law to his medical records.

On 14 May 1993 the High Court concluded that the applicant had no legislative or common law right of access to his records. The High Court also concluded that even if Article 8 of the Convention was applicable, that Article had not been breached and that even if the court was wrong as regards the lack of a domestic right, the court would not exercise its discretion in favour of the applicant.

On appeal the Court of Appeal formulated the question before them as being whether a doctor or a health authority, as the owner of a patient's medical records, is entitled to deny him access to them on the ground that their disclosure would be detrimental to him. On 29 July 1994 the Court of Appeal dismissed the applicant's appeal. That

court noted that the applicant wanted his records not for litigation or for medical purposes but rather for a greater knowledge of his childhood, development and history and found that the offer by the relevant local authority, to supply them to a medical advisor appointed by the applicant in order to avoid harm to the patient, to be within the bounds of the qualifications on any right of access in common law. It was found that the applicant had expressly confirmed that the records were not required for medical purposes or in connection with any dispute or projected litigation.

A subsequent application for leave to appeal to the House of Lords was dismissed and the applicant was notified of the refusal by letter dated 15 December 1994.

Relevant domestic law and practice

Following the decision in the Gaskin case (Eur. Court H.R., Gaskin judgment of 7 July 1989, Series A no. 160), the Health records Act 1990 was enacted providing for a prima facie right of access to health records created after 1 November 1991 (section 3), for the retention of such health records in certain defined cases (section 4) and for the retention of records the disclosure of which would be likely to cause serious harm to the physical or mental health of the patient or which contain information in relation to a third party from which that third party could be identified (section 5).

The Data Protection Act 1984 makes provision for access by individuals to computerised information. The Data Protection (Subject Access Modification) (Health) Order 1987 applied to personal data consisting of information as to the physical or mental health of a data subject if the data is held by a health professional. Pursuant to regulation 4(2) thereof, the access provisions of the 1984 Act do not apply where such access would be either likely to cause serious physical or mental harm to the data subject or would be likely to disclose to the data subject the identity of a third party contributor.

Circular HM 59/88, a policy document issued by the Department of Health, indicated that "as a matter of principle patients should be allowed to see what has been written about them" and a further policy circular, (Circular HM 82/20) clarified that:

> "Guidance on the voluntary release of information about patients contemplating or engaged in civil legal proceedings is contained in circular HM 59/88. ... This advice remains applicable in particular that Authorities should not stand on their strict rights in these circumstances and the doctor concerned must always be consulted when medical matters are in any way involved. ... It has since become accepted practice that disclosure ... should be made to the applicant's medical advisor"

COMPLAINTS

The applicant complains that he is the victim of a violation of Article 8 of the Convention because of the non-disclosure of his records and under Article 13 of the Convention in that he has no effective domestic remedy in this respect.

THE LAW

1. The applicant complains about the refusal by certain local authorities to disclose to him medical records relating to his treatment while in their care. He invokes Article 8 (Art. 8) of the Convention which, insofar as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... 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 ..., for the protection of health ..., or for the protection of the rights and freedoms of others."

The applicant submits that the records contain highly personal details in relation to his early development and history and provide the main source of information about his past and formative years together with a "parental diary" of significant events in his life in respect of all of which he requires explanation for his own peace of mind. The applicant submits that the circumstances of his case mirror those of Mr. Gaskin, in whose case the Court found a violation of Article 8 (Art. 8) of the Convention (Eur. Court H.R., Gaskin judgment 7 July 1989, Series A no. 160). Yet, according to the applicant, he has been refused the relevant records.

The applicant also submits, in this context, that there is no express statutory or common law provision governing his right of access to the relevant records and no system of judicial control to ensure that the medical advisor (whom it is suggested will review his records to establish whether their disclosure will constitute a risk to the applicant's health) makes his determination as to disclosure with due regard to the applicant's fundamental rights.

At the outset and as regards these latter submissions of the applicant contained in the above paragraph, the Commission would recall that in the present case there has been no blanket denial of access to records. Rather the local authorities have gone so far as to agree to furnish the records to a medical advisor appointed by the applicant who would furnish the records to the applicant if that advisor considered that such disclosure would not pose a risk to the applicant's health. The decision of the medical advisor as to disclosure would therefore be essentially a medical decision as to the potential impact on the applicant's health of sight of the records. The Commission therefore considers that the net issue raised by the applicant under Article 8 of the Convention is whether the initial position adopted by the local authorities (namely, disclosure conditional on the medical review to be carried out by the applicant's doctor) constitutes a violation of Article 8 (Art. 8) of the Convention.

The Commission recalls that in the Gaskin case the Court found that local authority records, which contained details of a personal nature relating to Mr. Gaskin's childhood, development and history over a period of almost eighteen years, related to, inter alia, Mr. Gaskin's private life in such a way as access thereto fell within the ambit of Article 8 (Art. 8) of the Convention (Eur. Court H.R., Gaskin judgment 7 July 1989, loc. cit., p. 15, paras. 36-37). The Commission notes that the records to which the applicant requests access, though not relating to his childhood, contain information of a personal nature relating to personally significant incidents in his life and, accordingly, considers that access to such records falls within the scope of Article 8 (Art. 8) of the Convention.

Since this application involves a complaint in relation to the State's failure to disclose records unconditionally, the Commission has considered below whether the State was in breach of a positive obligation flowing from Article 8 (Art. 8) of the Convention (Eur. Court H.R., Gaskin judgment, loc. cit., pp. 16-17, para. 41).

In accordance with the constant case-law of the Convention organs, the Commission, in determining whether or not such a positive obligation exists, will have regard to the fair balance that has to be struck between the interest of the applicant in obtaining the relevant records and the aim sought to realised by the position adopted by the local authorities. In striking this balance, the aims mentioned in the second paragraph of Article 8 (Art. 8) of the Convention may be of

certain relevance (see, for example, Eur. Court H.R., Rees judgment of 17 October 1986, Series A no. 106, p. 15, para. 37).

It is recalled that the justification advanced for the position of the local authorities in relation to the applicant's records, as expressed by the Court of Appeal, is the risk to the applicant's health and the Commission considers that this constitutes a legitimate aim under Article 8 of the Convention on the part of the local authorities, the second paragraph of Article 8 (Art. 8-2) referring to "the protection of health".

As to the question of whether a fair balance exists between that legitimate aim and the interest of the applicant in obtaining the relevant records (the determination of which must be carried out bearing in mind the particular circumstances of each case), the Commission notes that in the present application the relevant records relate to less than a four year period, that that period began when the applicant was already approximately nineteen years old, that the treatment given during this time was intermittent and that the applicant was treated both as an inpatient and outpatient. Therefore the question of reconstituting information in relation to his childhood from the relevant records does not arise in this application and the applicant has not at all demonstrated that there is no other source of information, as to his treatment period, available to him.

The Commission recalls, in this respect, that the records in the Gaskin case (which case the applicant claims mirrors his own application) covered almost the entire period when Mr. Gaskin was in voluntary and involuntary care with a local authority with little contact with his natural family or continuity of care from a substitute family, from when he was almost one year old until he was eighteen years old and his records therefore provided an otherwise unavailable trace of his entire childhood (Eur. Court H.R., Gaskin judgment, loc. cit., p. 8, para. 10).

The Commission also notes that in the present application the relevant records are not required for medical purposes or in connection with any dispute or projected litigation. Furthermore and as noted above, the applicant can appoint the medical advisor to whom the records will be disclosed.

The Commission therefore considers that, in the circumstances of the present application, the position adopted by the local authorities as regards disclosure of the relevant records strikes a fair balance between the legitimate aim sought to be realised and the applicant's wish to have access to the relevant records and concludes that no positive obligation to disclose the records can be derived, in the circumstances of this case, from Article 8 (Art. 8) of the Convention.

Accordingly, the Commission finds the applicant's complaint under Article 8 (Art. 8) of the Convention manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant submits, although in the context of his complaints under Article 8 (Art. 8) of the Convention, that the domestic courts failed to consider adequately, or at all, whether the State was in breach of Article 8 (Art. 8) of the Convention and failed to give any, or any adequate, reasons why Article 8 (Art. 8) of the Convention was not relevant to the present case and/or why there had been no breach of Article 8 (Art. 8) of the Convention.

The Commission considers that these submissions of the applicant are most appropriately considered under Article 13 (Art. 13) of the Convention and, in this regard, recalls that neither Article 13 (Art. 13) nor the Convention lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the provisions of the Convention and that a State is

not obliged to incorporate the Convention into its legal order (Eur. Court H.R., Silver and others judgment of 25 March 1983, Series A no. 61, p. 42, para. 113). Consequently, the courts of the United Kingdom are not obliged to consider or deliver a ruling, as suggested by the applicant, on the impact of an Article of the Convention in a domestic context.

As regards the applicant's more general complaint, made directly under Article 13 (Art. 13) of the Convention, about the lack of an effective domestic remedy, the Commission recalls that the case-law of the Convention organs establishes that Article 13 (Art. 13) of the Convention does not require a remedy in domestic law for all claims alleging a breach of the Convention; the claim must be an arguable one (Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52).

In light of the above conclusions of the Commission concerning the applicant's complaint under Article 8 (Art. 8) of the Convention, the Commission finds that the applicant does not have an arguable claim of a breach of his rights and freedoms which warrants a remedy under Article 13 (Art. 13) of the Convention.

It follows that the applicant's complaints under Article 13 (Art. 13) of the Convention 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.

Secretary to the First Chamber — President of the First Chamber

(M. F. BUQUICCHIO) — (C. L. ROZAKIS)