AS TO THE ADMISSIBILITY OF

Application No. 29046/95
by Molly McINTYRE
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 21 October 1998, the following members being present:

MM M.P. PELLONPÄÄ, President
N. BRATZA
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
I. BÉKÉS
G. RESS
A. PERENIČ
C. BÎRSAN
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

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 29 September 1995 by Molly McINTYRE against the United Kingdom and registered on 2 November 1995 under file No. 29046/95;

Having regard to:

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

- the observations submitted by the respondent Government on 22 April 1997 and the observations in reply submitted by the applicant on 26 June 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1984. She brought domestic proceedings by her mother and next friend. She is represented before the Commission by Mr J. Rabinowicz, a solicitor practising in London. The facts of the application, as submitted by the parties, may be summarised as follows.

A. The particular circumstances of the case

The applicant suffers from muscular dystrophy.

In 1991, the Local Education Authority ("LEA") made a formal assessment and statement of the applicant's special needs in accordance with the provisions of the Education Act 1981, with a view to deciding where to send the applicant for her primary school education. A draft statement of the applicant's special needs was issued in September 1992 and agreed with the applicant's mother. The medical report annexed to the statement commented:

"She walks with difficulties - will require transport to school (at present buggy) and she should not have to climb the stairs."

The educational psychologist's report annexed to the statement included, under the heading of "Special Educational Needs", the sub-heading, "Particular attention to physical layout of building", and commented:

"She has difficulty climbing stairs and walking distances and is, possibly, becoming gradually less mobile."

In September 1992, after the issue of the draft statement of special educational needs, the applicant's mother expressed a preference that her daughter (then aged 7 years, 11 months) should attend Sudbourne School, a mainstream, state run school, rather than a special school, although the latter option was also available to her. Current educational opinion in the United Kingdom holds that, where reasonably possible, disabled pupils should be educated alongside able-bodied pupils of the same age. The statement was finalised in May 1993 but did not differ materially from the version which was current when the applicant began to attend Sudbourne School in September 1992 and it identified the applicant's particular needs, including additional time to move around the school buildings during class changes, a seat at the front of the class and her need for full access to the national curriculum.

In December 1993, a review was made of the applicant's statement of special needs. The applicant's physical condition had deteriorated since the previous review and she increasingly used a wheelchair. In this review the applicant's general attendant (special carer), the applicant's teacher and the applicant's mother, all expressed concern about the applicant's inability to negotiate stairs. The applicant was due to move into the

first of her two senior years at the school, and this would involve the use of classrooms, in particular the science room and the library, situated on the first floor.

Sudbourne School is not "designated" in a formal sense by the LEA as a school with a priority for disabled access but is one of eight schools in the area which the LEA decided to target for spending (□50,000 for all eight schools) in order to improve access for pupils with limited mobility and was therefore given some priority in financial terms, for example, □15,000 for ramps and a disabled lavatory. However, it is a mainstream, rather than a special, school.

Due to the applicant's increased lack of mobility, she made repeated requests for a lift to be installed in order to facilitate access to the first floor classrooms. The LEA investigated the cost of installing a lift and calculated in 1994 that it would cost □47,376. The LEA considered that expenditure on such a scale was not practical and that the installation of a lift would not be an efficient use of resources. The applicant was therefore unable to participate in lessons in the science room or library, due to the difficulty of access to the first floor. She was left alone with a care assistant, while her class made use of the facilities. The school made some alternative arrangements for the applicant. The lessons in the science room were irregular and no more than one lesson per week was held there. Library books were brought to the applicant at her request and the headteacher visited her on the ground floor rather than in her own room on the first floor. The applicant's class's fixed classroom was moved to the ground floor. The LEA allocated additional resources to the school towards the provision of a special care attendant to help the applicant at school and a portable computer and printer.

The applicant, by her mother and next friend, brought proceedings against the LEA, seeking to judicially review their refusal to install a lift in the applicant's school. This application was dismissed by the High Court on 26 April 1995. The applicant applied to the Court of Appeal for leave to appeal against the decision of 26 April 1995. On 26 May 1995, the Court of Appeal dismissed the application for leave to appeal, giving as reasons the fact that there was no legal obligation on the LEA to provide a lift, that the refusal to install a lift could not be said to be unreasonable and that there was no expectation upon which the relief sought could be based.

B. Relevant domestic law

Since the determination of the applicant's case in the domestic courts, the relevant Education Acts have been consolidated, but not materially amended, into the Education Act 1996. The relevant statute at the time the applicant's case was before the domestic courts was the Education Act 1993 which set out the LEA's statutory duty towards the applicant.

Section 168(5) of the Education Act 1993 provides:

"Where a local education authority maintain a statement under this section - (a) unless the child's parents have made suitable arrangements, the authority - (i) shall arrange that the special educational provision specified in the statement is made for the

child; and (ii) may arrange that any non-educational provision specified in the statement is made for him in such manner as they consider appropriate..."

Section 156(1) provides:

"For the purposes of the Education Acts, a child has 'special educational needs' if he has a learning difficulty which calls for special educational provision to be made for him...(4) In the Education Acts, 'special educational provision' means - (a) in relation to a child who has attained the age of two years, educational provision which is additional to, or otherwise different from, the educational provision made general for children of his age in schools maintained by the local education authority (other than special schools) or grant-maintained schools in their area..."

COMPLAINTS

The applicant complains that she is discriminated against by virtue of her disability, contrary to Article 14 of the Convention, in that she is denied full enjoyment of her right to education as contained in Article 2 of Protocol No. 1 of the Convention. She complains that she was not afforded the same access to all classes attended by her able-bodied peers and therefore did not have full access to the national curriculum.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 September 1995 and registered on 2 November 1995.

On 17 January 1997 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 22 April 1997, after an extension of the time-limit fixed for that purpose. The applicant replied on 26 June 1997, also after an extension of the time-limit.

On 28 May 1997 the Commission granted the applicant legal aid.

THE LAW

The applicant complains that the LEA's failure to install a lift at her school prevented her from enjoying her right to education under Article 2 of Protocol No. 1 to the Convention and discriminated against her on grounds of her disability in breach of Article 14 of the Convention.

Article 2 of Protocol No. 1 of the Convention provides, so far as relevant, as follows:

"No person shall be denied the right to education."

Article 14 of the Convention provides as follows:

"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."

The Government accept that the right to education includes the right of access to existing state educational institutions and a right to an effective education, but do not accept that either right is absolute. They consider that the applicant had access to existing state institutions, and had an effective education, even though she did not have access to each and every room in the school. They consider that Article 2 of Protocol No. 1 and Article 14 of the Convention do not give such a right, nor do they secure a right to the most effective possible education. The Government contend that in the field of both Article 2 of Protocol No. 1 and Article 14 of the Convention, a balance must be struck between the needs of disabled pupils, the wishes of parents, the interests of other pupils and the availability of public funds. They consider that this balance was struck in the present case.

In addition, the Government do not accept that the words "or other status" in Article 14 of the Convention include discrimination on grounds of physical disability, and submit that as the applicant is now at a secondary school which has a lift, the application is in any event moot.

The applicant claims that she has been excluded from appropriate facilities and refers to the statement of special educational needs issued by the LEA which required that she have access to the full national curriculum and facilities for mobility within the school. She argues that the school did not plan for her mobility problems in advance. She accepts that the LEA and the school acted to help her but considers that the relevant question is whether the applicant did not receive an effective education because of the lack of a lift, regardless of other resources made available to her. The applicant does not accept the Government's contention that disruption to the applicant's education was minimal and maintains that her education suffered as she did not progress as well as she had previously done.

The Commission will first consider the Government's argument that, in effect, the applicant is no longer a victim of a violation of Article 25 of the Convention as she is now at a school where she has full access to the educational facilities. In this connection, the Commission notes that the applicant's complaint relates to the final two years of her time at primary school. The mere fact that the applicant has now moved on to another school does not affect the complaints which she has in respect of the earlier period. The Commission therefore considers that the applicant may claim to be a victim of the alleged violations of the Convention, within the meaning of Article 25 of the Convention.

The Commission is not required to determine whether the words "or other status" in Article 14 of the Convention include physical disability as a "status" as the application is in any event inadmissible for the following reasons.

The Commission recalls that the right under Article 2 of Protocol No. 1 "by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals", as long as the substance of the right to education is preserved (Eur. Court HR, Belgian Linguistic judgment of 23 July 1968, Series A no. 6, pp, 30-32, paras. 3-5). The Commission has more recently recognised "that there must be a wide measure of discretion left to the appropriate authorities as to how to make the best use possible of the resources available to them in the interests of disabled children generally" (see No. 14688/89, Dec. 4.12.89, D.R. 64, p. 194 and No. 28915/95, Dec. 17.1.97, unpublished).

For the purposes of Article 14 of the Convention, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship" of proportionality between the means employed and the aim sought to be realised (see, inter alia, Eur. Court HR, Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 16, para. 33).

The Commission notes that the LEA provided the applicant with a number of additional resources to accommodate her disability in accordance with the statement agreed between the LEA and her mother. This included arranging that any disruption to her education be minimal and, in the light of her increased difficulty in climbing the stairs, led to the school moving her class's fixed classroom to the ground floor to minimise the need for her to go to the first floor. The LEA kept the applicant's condition under review and, together with the school, re-organised her education and the location of her classes as much as possible. The fact that the statement includes the need for full access to the national curriculum does not, in the opinion of the Commission, entail the specific need for a lift to be installed as long as the applicant still receives an adequate education. The Commission notes that the applicant suffered frustration at not being able to move freely around the building of her own will, but it cannot be said that in the present circumstances, given the alternative arrangements made, the LEA's refusal to install a lift denied her "the right to education".

As for the complaint relating to the denial of education taken in conjunction with a complaint of discrimination under Article 14 of the Convention, the Commission notes that the applicant was treated differently from her able-bodied peers only in that they could attend classes on the first floor whereas she could not, on grounds of her disability.

The Commission considers that the legitimate aim of the LEA's policy is to provide the educational facilities in a manner that is consistent with a practical and efficient use of resources and public funds. The Commission notes that the LEA carefully considered the request for a lift by arranging for a technical report to be carried out on the viability of such an installation. Given the fact that the school is a small,

primary school, a sum of £47,000 is large, especially when balanced with the other demands of the area's schools and the particular needs of the applicant. The Commission does not accept that, in the light of all the other measures taken by the LEA to assist the applicant, that the refusal to provide a lift at Sudbourne School can be said to be disproportionate to that aim.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber