AS TO THE ADMISSIBILITY OF

Application No. 13635/88
by Annette NORDBORG
against Sweden

The European Commission of Human Rights sitting in private on 4 April 1990, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES

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 7 September 1987 by Annette Nordborg against Sweden and registered on 29 February 1988 under file No. 13635/88;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a Swedish citizen, born in 1966. She is an employee in a geriatric hospital and resides in Östersund. Before the Commission the applicant is represented by Mr. Gunnar Hillström, a lawyer practising in Östersund.

The applicant has a son Pierre, born in 1984. He was taken into care in 1984. On 9 November 1986 the applicant gave birth to a daughter, Jennie.

On the same day Jennie was taken into immediate care pursuant to a decision by the Chairman of the Social Council (socialnämnden) in Östersund. After about a week Jennie was taken to a foster home where she is still living.

On 18 November 1986 the immediate care order was confirmed by the County Administrative Court (länsrätten) of the County of Jämtland. The Court found that it was likely that Jennie needed care under the 1980 Act with Special Provisions on the Care of Young Persons (lagen med särskilda bestämmelser om vård av unga; "the 1980 Act") and that the Court's decision on care could not be awaited because of the risk to Jennie's health and development. The applicant appealed to the Administrative Court of Appeal (kammarrätten) of Sundsvall, which confirmed the decision on 8 December 1986.

In the meantime, the Social Council lodged a request with the County Administrative Court for an order that Jennie be taken into care pursuant to the 1980 Act.

The County Administrative Court held a hearing in the case at which the applicant was present and assisted by counsel. The Court heard seven witnesses (three at the applicant's request) and two psychologists as experts. The presiding judge had previously taken the decision of 18 November 1986 concerning the immediate care order. He was now assisted by two lay assessors. In a judgment of 22 December 1986 the Court ordered that Jennie be taken into care.

The applicant appealed to the Administrative Court of Appeal in Sundsvall, which held a hearing. The Court was composed of three judges and two lay assessors. The three judges had previously taken the decision of 8 December 1986.

At the hearing the applicant was present and assisted by counsel. One of the psychologists was heard again as an expert. In a judgment on 26 February 1987 the Administrative Court of Appeal confirmed the judgment of the County Administrative Court. The Court stated inter alia:

"The Administrative Court of Appeal has to decide, on the basis of the findings concerning (the applicant's) person and her present living conditions, whether or not she would be able, on her own, to give her daughter the necessary care. The question whether it was justified or not to admit (the applicant) to a special school for the mentally retarded or the fact that she has previously been the object of special measures by the public authorities is not in itself decisive. The assessment shall be made in view of the findings concerning her ability under her prevailing circumstances. In this respect, the facts indicate no deficiency in her intellectual and emotional capacity which would appear to exclude that she could take care of the daughter herself, provided however that she receives considerable support from others. It seems impossible to get such necessary assistance from anybody closely related to the applicant. (The applicant) has firmly stated that she is opposed to any co-operation with the Social Council. The Administrative Court of Appeal finds that her statement - even if it may be the result of the situation in which she finds herself - must be taken as an expression of her true attitude. It must therefore be assumed that a favourable co-operation with supportive measures by the Social Council will not be established.

As it is impossible to provide for such supportive measures, which the Administrative Court of Appeal finds manifestly necessary if (the applicant) is to take care of her child, the Court finds that the conditions for care under the 1980 Act are satisfied."

The applicant appealed to the Supreme Administrative Court (regeringsrätten) which, on 10 July 1987, refused leave to appeal.

Section 1 of the 1980 Act reads as follows in its relevant

parts:

"Care is to be provided pursuant to this Act for persons under 18 if it may be presumed that the necessary care cannot be given to a young person with the consent of the person or persons having custody of him and, in the case of a young person aged 15 or over, if a similar presumption can be made concerning his own consent.

Care is to be provided for a young person if

(1) his health or development is endangered by lack of care or other conditions in his home, or ..."

Care orders are issued by the County Administrative Court at the request of the Social Council.

Under Section 6 of the 1980 Act the Social Council is authorised to order that a child be taken into care immediately. The order may be made by the Chairman of the Social Council if the decision of the Council cannot be awaited. The conditions for an immediate care order are that "it is likely that the young person needs to be given care under the 1980 Act and that "the Court's decision cannot be awaited owing to the risk to the young person's health or development or because the continued investigation can be seriously impeded or further measures prevented."

An immediate care order under Section 6 of the Act must be submitted for confirmation to the County Administrative Court within a week from the date of the decision. The Court shall examine the decision as soon as possible, normally within a week from the day on which the case was submitted to the Court.

Section 8 of the Act provides that, if the Court confirms an immediate care order, the Social Council shall apply for a final care order within four weeks from the day on which the child was taken into care. If the application is not made within that time limit the immediate care order shall cease to be valid.

COMPLAINTS

1. The applicant complains that she has been the victim of a violation of Article 8 of the Convention on the ground that her daughter has been taken into care. The applicant maintains that Swedish law does not satisfy the requirements as to the quality of the law since it is too vague and does not define the scope of the discretion conferred upon the authorities.

2. The applicant further alleges a violation of Article 6 para. 1 of the Convention on the ground that she did not receive a fair hearing within a reasonable time after the events of 1984 on which the findings were based. She also alleges a violation of Article 6 para. 1 on the ground that the same judges decided first on the immediate care order and then on the final care order. She submits that the requirement of an impartial tribunal was not satisfied.

THE LAW

1. The applicant complains that her daughter has been taken into care and alleges a violation of Article 8 (Art. 8) of the Convention which reads as follows:

"1. Everyone has the right to respect for his private and family life, home and 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 finds that the taking into care of the applicant's daughter interfered with her right to respect for her family life protected by Article 8 para. 1 (Art. 8-1) of the Convention. It must therefore be examined whether this interference was justified under the terms of Article 8 para. 2 (Art. 8-2), i.e. whether the interference was "in accordance with the law" and pursued one or more of the legitimate aims enumerated in para. 2 of Article 8 (Art. 8-2) and whether it was "necessary in a democratic society" for that or those aims.

The Commission recalls that it is established that the relevant provisions in the 1980 Act with Special Provisions on the Care of Young Persons satisfy the requirement as to the quality of the law (Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no. 130, pp. 30-31, paras. 60-63). In the opinion of the Commission, there is nothing to suggest that the decision taken by the Courts in the present case were contrary to Swedish law. The issue of taking the child into care was examined by the competent administrative courts up to the Supreme Administrative Court. In these circumstances, the Commission is satisfied that the decision to take the applicant's daughter into care was "in accordance with the law".

The Commission furthermore considers that the interference had a legitimate aim under Article 8 para. 2 (Art. 8-2), namely the interests of the child, which falls under the expression "for the protection of health and morals" and "for the protection of the rights and freedoms of others" (cf. above-mentioned Olsson judgment, p. 31, paras. 64-65).

It remains to be examined whether the interference was "necessary in a democratic society" in the interests of the child.

According to the established case-law the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" the Commission furthermore has to take into account that a margin of appreciation is left to the Contracting States. However, the Convention organs' review is not limited to ascertaining whether a respondent State has exercised its discretion reasonably, carefully and in good faith. They cannot confine themselves to considering the relevant decisions in isolation but must look at them in the light of the case as a whole. They must determine whether the reasons adduced to justify the interference at issue are "relevant and sufficient" (cf. Olsson judgment, loc. cit., pp. 31-32, paras. 67-68).

The Commission recalls that both the County Administrative Court and the Administrative Court of Appeal held oral hearings. The applicant was present at both hearings and was assisted by counsel on these occasions. The County Administrative Court heard two experts as well as seven witnesses, three of them at the applicant's request. Before the Administrative Court of Appeal one of the experts who had been heard by the County Administrative Court was heard again. Having regard to these facts, the Commission finds that, insofar as certain procedural requirements are implicit in Article 8 (Art. 8), these requirements were satisfied, since the applicant was involved in the decision-making process to a degree sufficient to provide her with the requisite protection of her interests.

However, a decision to take a child into care must also be supported by sufficiently sound and weighty considerations since such a decision is a serious interference with the right protected under Article 8 para. 1 (Art. 8-1). In order to determine whether in the present case the reasons can be considered "relevant and sufficient" for the purpose of Article 8 (Art. 8), the Commission has examined the reasons adduced by the courts and the evidence available to them.

The Commission recalls the grounds on which the judgment of the Administrative Court of Appeal of 26 February 1987 was based. The Court found it not excluded that the applicant was emotionally and intellectually capable of taking care of her daughter, but in the specific circumstances of the case it was a condition that she received considerable support from closely related persons or from the Social Council. However, it was not possible to receive the required support from a closely related person and the applicant had firmly opposed co-operation with the Social Council. Consequently, the Court found that the support which was necessary could not be ensured.

The Commission finds that these reasons are "relevant" to a decision to take a child into care.

It further recalls that a number of reports and certificates were available to the courts when they examined the case. Furthermore, the Courts heard experts as well as witnesses. The Courts' judgments accordingly were not only founded on documentation but also on the evidence given at the hearings held before them and they had the benefit of their own impression of the persons involved.

The Commission finds that the decision to take the applicant's child into care was supported by "sufficient and relevant" reasons and that, having regard to their margin of appreciation, the Swedish authorities were entitled to find it necessary to take the applicant's child into care. The Commission concludes that this decision can be regarded as "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention in the interests of the child.

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 further complains of violations of Article 6 (Art. 6) of the Convention which in the first sentence of the first paragraph (Art. 6-1) reads:

"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 applicant's allegation of a violation of Article 6 para. 1 (Art. 6-1) is in substance based on three contentions, i.e. that the courts were not impartial, that she did not receive a fair hearing and that the condition of "reasonable time" was not satisfied.

As to the question of impartiality, the Commission recalls that the existence of impartiality must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubts in this respect (see, amongst other authorities, Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A no. 86, pp. 86, pp. 13-14, para. 24).

As to the subjective test, the personal impartiality of a judge must be presumed until there is a proof to the contrary. The

applicant has in no way shown that the judges concerned acted with personal bias.

Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings. Accordingly, any judge in respect of whom there is a legitmate reason to fear lack of impartiality must withdraw (cf. De Cubber judgment, loc. cit., Series A no. 86, p. 14, para. 26).

This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the complaining party is important but not decisive. What is decisive is whether this fear can be held objectively justified.

In the present case, the fear of lack of impartiality was based on the fact that the County Administrative Court judge who presided at the hearing, following which the final care order was issued, had previously taken the decision that the child should be taken into immediate care, and that similarly, at the level of the Administrative Court of Appeal, the judges who took part in the judgment had previously decided on the immediate care order.

This kind of situation may occasion misgivings on the part of a party as to the impartiality of a judge, misgivings which are understandable but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be so treated depends on the circumstances of each particular case.

In the present case, the judge of the County Administrative Court and the judges of the Administrative Court of Appeal were first called upon to examine whether an immediate care order should be confirmed and later whether a final care order should be issued. As regards the first examination the courts were required to examine whether it was "likely" that a final care order would be issued and whether the courts' final decision on the care could be awaited. This examination involves a summary assessment of the available material, and is different from the assessment as to whether a final care order should be issued.

In the Commission's view, the mere fact that a judge or an appeal judge, in a system like the Swedish one, has first to determine a request for an immediate care order, which is a temporary measure normally constituting an initial phase to a decision to take a child into public care, and then to take part in the decision on the final care order, cannot be held as, in itself, justifying fears as to his impartiality. The Commission is therefore of the view that in the circumstances of the case the impartiality of the tribunals was not capable of appearing to be open to doubt and that the applicant's fear in this respect cannot be considered objectively justified.

As to the contention that she did not have a fair hearing, the applicant submits that the psychologist, who expressed his view on her mental health, had not examined her since August 1983. The psychologist's statement was in her opinion not founded on scientific methods. She points out that a psychiatrist who examined her in February 1987 had declared that she was not mentally retarded.

With regard to the judicial decisions of which the applicant complains in this connection, the Commission first recalls that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. It is not competent to deal with an application alleging that errors of law or fact have been committed by domestic

courts, except where it considers the rights and freedoms set out in the Convention (see e.g. No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31 and 45). In this respect the Commission recalls that the applicant's case was dealt with by three different courts, i.e. the County Administrative Court, the Administrative Court of Appeal and the Supreme Administrative Court.

As regards the procedure before the courts, the Commission notes that hearings were held before the County Administrative Court and the Administrative Court of Appeal. During these hearings the applicant was assisted by counsel. Several witnesses and other persons were heard, including experts who had issued certificates. There is no indication that the applicant was prevented from presenting her arguments and views to the courts or that the procedure was in any other respect unfair. The Commission is not called upon to examine whether the Courts correctly assessed the evidence before them.

The applicant further claims that the proceedings have not been concluded within a reasonable time. The Commission here notes that, on 9 November 1986, Jennie was taken into care. The proceedings terminated on 10 July 1987 when the Supreme Administrative Court refused leave to appeal.

Consequently, the proceedings lasted approximately eight months. The Commission finds that the duration of these proceedings, at three levels of jurisdiction, is not excessive for the purpose of Article 6 para. 1 (Art. 6-1). The fact that the courts took into consideration facts which dated back to 1984 cannot change this assessment.

Consequently the Commission finds no appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that also this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)