AS TO THE ADMISSIBILITY OF

Application No. 14451/88
by Kjell and Gärdh PERSSON
against Sweden

The European Commission of Human Rights sitting in private on 3 May 1993, the following members being present:

Present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI

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 2 September 1988 by Kjell and Gärdh Persson against Sweden and registered on 8 December 1988 under file No. 14451/88;

Having regard to the written observations submitted by the Government on 29 July 1991 and the applicants' written observations in reply submitted on 22 September 1991 and 11 February 1992;

Having regard to the further information submitted by the Government on 5 January 1993 and the applicants' comments in reply submitted on 5 February 1993;

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 first applicant, Kjell Persson, was a Swedish citizen born in 1965. He died in 1992. The second applicant, Gärdh Persson, is a Swedish citizen born in 1937 and resident at Spånga. She was Kjell Persson's mother and appointed guardian and is now the administrator of his estate.

The application was initially lodged by both applicants. Following Kjell Persson's death Gärdh Persson declared that she wished

to pursue the application both on his and her own behalf.

Before the Commission the applicants are represented by Ms. Siv Westerberg, a lawyer practising in Gothenburg.

The facts of the case, as they appear from the parties' submissions, may be summarised as follows.

Particular circumstances of the case

a. The care order

Kjell Persson was seriously disabled from birth, both mentally and physically. He was born, inter alia, with his tongue grown to his palate, resulting in a lack of faculty of speech and great eating difficulties. When living in the applicants' home Kjell Persson was being fed by Gärdh Persson.

From 1978 to 17 November 1983 Kjell Persson was registered with the Mental Welfare Committee (styrelsen för omsorger om psykiskt utvecklingsstörda) of the County Council (landstinget) of Stockholm.

In a medical report of 13 December 1983 Dr. H.F., medical superintendent at the child rehabilitation department of St. Göran's hospital, noted that in September 1983 a physician had visited Kjell Persson in his home, had found him to be extremely underweight and had concluded that his main problem was his lack of nutrition. Gärdh Persson had been offered the possibility to have Kjell Persson admitted to a hospital, but she had refused. However, in connection with a visit to the hospital on 23 November 1983, she had been persuaded to agree to his admission. On that occasion Kjell Persson had weighed 20.9 kg. An examination of him had further shown, amongst other things, lung changes which were assumed to be of an infectious nature.

Dr. H.F. further referred to a report of 16 December 1983 by B.P., associate professor at the hospital, finding that Gärdh Persson was having a number of false notions regarding Kjell Persson's disorder and how to care for him. When Kjell Persson had been admitted to the hospital, his nutritional condition had been very unsatisfactory and had been caused by Gärdh Persson's inadequate care, in conjunction with an infection. Prof. B.P. had concluded that it was not suitable that Gärdh Persson should continue to be responsible for Kjell Persson's care.

In reaching the same conclusion, Dr. H.F. considered it established that Gärdh Persson had not satisfactorily managed to nourish Kjell Persson. Her false notions as regards Kjell Persson's throat function had played a certain part in her difficulties in feeding him. Kjell Persson's severe mental retardation combined with his physical disablement and the feeding problems therefore warranted his placement in compulsory care in accordance with the 1967 Act on the Care of Certain Mentally Handicapped Persons (lag 1967:940 angående omsorger för vissa psykiskt utvecklingsstörda; hereinafter "the 1967 Act").

Following the drawing up of a report by the social welfare authorities and a report by a psychologist, the Chairman of the Administrative Board (beslutsnämnden) of the County Council on 20 December 1983 provisionally placed Kjell Persson in compulsory care pursuant to Section 35, subsection 1 (b) of the 1967 Act.

On 28 December 1983 the Administrative Board held a meeting at which the Director of Mental Welfare Services (vårdchefen) favoured a confirmation of the interim decision. Gärdh Persson, who was present at the meeting, objected. Dr. H.F. and others were heard.

By a decision of the same day confirming the interim decision the Administrative Board found that Kjell Persson was mentally retarded, that as a consequence of his retardation he was unable to take care of himself, and that, in view of the degree of his retardation, care in a nursing home was absolutely necessary.

On 29 December 1983 Kjell Persson was admitted to the Rosenhill nursing home in Stockholm.

In a letter received by the Psychiatric Council (psykiatriska nämnden) on 11 January 1984 Gärdh Persson appealed against the care order, alleging that the reason behind it was her repeated complaints to the authorities about the allegedly improper medical and dental treatment afforded to Kjell Persson.

The Psychiatric Council provided Gärdh Persson with an opportunity to show her competence to represent Kjell Persson before the Council. On 27 March 1984 it noted that Gärdh Persson had not done so and dismissed her appeal.

After Gärdh Persson in a letter received by the Psychiatric Council on 21 August 1984 had shown that she was Kjell Persson's appointed guardian, the Council re-opened the appeal proceedings and requested the Administrative Board to submit its opinion.

In its opinion of 10 December 1984 the Administrative Board found no reasons to change the care order, the conditions for care of Kjell Persson in a nursing home under Section 35 still being fulfilled. It appears that in expressing this opinion, the Board had relied on, amongst other things, a statement by the Director of Mental Welfare Services, made after consultations with the Senior Medical Officer (överläkaren) of the Mental Welfare Committee. According to this statement Kjell Persson was still in need of care of the kind which Gärdh Persson was not able to provide him with in the applicants' home.

On 22 January 1985 the Psychiatric Council rejected Gärdh Persson's appeal with reference to Section 35, subsection 1 (b) of the 1967 Act.

b. Kjell Persson's stay at Rosenhill from 29 December 1983 to 21 March 1988

In the Rosenhill nursing home Kjell Persson lived in a small room with a window facing the corridor, where staff members, other patients and visitors would pass. The window lacked curtains. He was being fed by nursing staff.

On 31 January 1984 a decision authorising, as from 1 February 1984, the collection of Kjell Persson's pension payments in accordance with the 1962 Ordinance on the Right in Certain Cases of a Municipality or Other Body to Collect Pension Payments (kungörelse 1962:393 om rätt i vissa fall för kommun eller annan att uppbära folkpension; hereinafter "the 1962 Ordinance") was made by the local Social Insurance Office (allmänna försäkringskassan), thereby authorising the County Council to deduct the fees for Kjell Persson's care at Rosenhill from his pension and to pay the remainder to his bank account. The decision was not appealed against.

Gärdh Persson alleges that when Kjell Persson was provisionally discharged on 21 March 1988 she was given some 2.000 SEK by the manager of the nursing home, who claimed that to be the remaining amount of the pension paid out to Kjell Persson. She was further shown a bankbook showing that staff members of the nursing home had regularly withdrawn considerable sums of money from his account. She then stated that she had never consented to those withdrawals and reported the matter to the Mental Welfare Committee.

In a letter of 5 December 1988 the Acting Director of Mental Welfare Services and the Head of the Finance Department of the Mental Welfare Committee informed Gärdh Persson that the administration of the patients' means had been subjected to regular audits by the auditors of the Mental Welfare Committee as well as to random audits by external auditors. It was further noted that from 1 January 1984 to 31 March 1988 41.847 SEK, corresponding to some 25 per cent of the total amount of his pension payments for that period, had been paid out to Kjell Persson. For the years 1986 to 1988 an account was given of how this money had been used. Due to the closing down of Rosenhill in the summer of 1988 it had not yet been possible to find the verifications pertaining to the administration of Kjell Persson's means in 1984 and 1985. The remainder, 3.438,20 SEK, had been handed over to Gärdh Persson when Kjell Persson had been provisionally discharged from Rosenhill.

Gärdh Persson then lodged a complaint with the police alleging that a large part of Kjell Persson's pension payments had been stolen by nursing staff.

The police investigation, including a control of the verifications available, disclosed nothing to support Gärdh Persson's allegations, and on 20 December 1988 the Public Prosecutor decided to close the investigation. The decision was upheld by the Regional Prosecutor of Stockholm and Gotland (regionåklagaren) on 14 April 1989 and by the Prosecutor-General (riksåklagaren) on 27 April 1989.

As regards visiting rights at Rosenhill the applicants allege that in the beginning of January 1984 Gärdh Persson was orally informed by the nursing staff that her right to visit Kjell Persson would be restricted to two hours twice a week. Soon after this her visiting rights were restricted to two hours once a week. Kjell Persson was not allowed to leave the nursing home to see Gärdh Persson. The restriction was not confirmed in writing until on 27 June 1984.

The Government submit that the restriction was imposed by the Director of Mental Welfare Services, together with other officials, and notified to Gärdh Persson in writing on 27 June 1984. It did not enter into force until 2 July 1984, it was to be applied until the end of August 1984 and allowed the applicant to visit the nursing home twice a week, i.e. Thursdays and Sundays from 1 p.m. to 3 p.m. According to the notification the restriction was imposed in view of the difficulties caused by Gärdh Persson's daily visits at Rosenhill, her lack of confidence in the nursing staff and her frequent questioning of his care there. It was not aimed at limiting Gärdh Persson's possibility of following Kjell Persson's care, but to improve the conditions for providing him with adequate care. It appears from the notification that the matter had been discussed with Gärdh Persson on 8 June 1984.

In the nursing home Kjell Persson fell ill with repeated inflammations and bleedings in his gullet, as a result of which which he had to be taken to hospital for emergency treatment on several occasions.

c. The discharge proceedings

In a letter received by the Discharge Board (utskrivningsnämnden) of Southern Stockholm on 28 October 1987 Mr. K.W. requested, in his capacity as Kjell Persson's then counsel, that Kjell Persson's final discharge be considered.

In an opinion of 9 November 1987 the Director of Mental Welfare Services referred to a statement of the same day by the Acting Senior Medical Officer and concluded that the initial grounds for Kjell

Persson's placement in the nursing home still existed.

On 7 December 1987 the Discharge Board followed the opinion of the Director of Mental Welfare Services and refused Kjell Persson's final discharge. The Board found it necessary, however, to further examine the question of a provisional discharge and to give the parties an opportunity to designate a suitable person to supervise Kjell Persson's care under Section 39 of the 1967 Act.

Following a new request lodged by the applicants' then counsel, Ms. Westerberg, the Discharge Board on 25 February 1988 held a hearing, at which Gärdh Persson and her counsel were present. Simultaneously, an inspection of Kjell Persson's conditions in the nursing home was carried out. The Director of Mental Welfare Services, the manager of the nursing home and the Senior Medical Officer, Dr. M. B., were heard as well as Mr. K.-E.G. at the applicants' request. The Board found no reason to question the conditions at the nursing home or the manner in which Kjell Persson's care was being implemented.

The applicants submit that the hearing was adjourned in order to enable the Board to inspect the nursing home, where the hearing was to be continued. However, the Chairman allegedly ordered it to continue in a very short time so as to prevent Gärdh Persson from attending it. This attempt being unsuccessful, he allegedly refused, at the close of the hearing, to let the applicants' counsel verify whether she could attend the next hearing on 14 March 1988, and told her to send, if necessary, a substitute.

Following its hearing on 14 March 1988 the Discharge Board found no grounds for finally discharging Kjell Persson, but granted him a provisional discharge as from 16 March 1988 for a period of six weeks. Kjell Persson was to submit to medical treatment and/or medication, and was to be under the supervision of Dr. M. B. or her substitute.

The applicants did not appeal against the supervision order.

The Government submit that there is no indication in the decision or in the Discharge Board's case-file as to whether the decision relied on Kjell Persson's medical records. Where such information is relied upon it is to be made available to the parties at the hearing, unless the 1980 Secrecy Act (sekretesslag 1980:100) calls for a decision to the contrary.

On 21 March 1988 Kjell Persson returned to the applicants' home. His provisional discharge was subsequently extended.

On 5 April 1988 the Legal Aid Appeals Board (besvärsnämnden för rättshjälpen) granted Kjell Persson the right to representation by official counsel.

On 21 April 1988 the Discharge Board rejected a request that Ms. Westerberg, who resides at Gothenburg, be appointed official counsel. The Board found that her engagement in a case in Stockholm would entail substantially increased and unjustifiable costs. Instead, Ms. A-S. W., a lawyer practising in Stockholm, was appointed.

On 18 May 1988 the Legal Aid Appeals Board upheld the decision. On Kjell Persson's behalf Gärdh Persson then objected to the appointment and stated that the applicants wished to be represented by Ms. Westerberg at their own expense.

In a letter received by the Discharge Board on 10 June 1988 Gärdh Persson appealed against the initial care order of 1983.

On 30 June 1988 the Discharge Board rejected the appeal, noting that the order had already been duly examined and that, in any event, Kjell Persson's final discharge was under consideration.

On 27 July 1988 the Discharge Board again met to consider an extension of Kjell Persson's provisional discharge. Both Gärdh Persson and Ms. Westerberg had been summoned to the meeting, but neither of them attended it. The Board therefore rejected Ms. Westerberg as counsel on the ground that she had shown a lack of judgment, skill and maturity in presenting the case to the Board. It extended, however, Kjell Persson's provisional discharge until 15 December 1988.

In three submissions of 18 March, 13 July and 4 August 1988, the applicants appealed to the Psychiatric Council against the above decisions of the Discharge Board of 14 March, 30 June and 27 July 1988 demanding, inter alia, that Kjell Persson be finally discharged. They alleged, inter alia, that the first decision to place Kjell Persson in public care had been based on very vague grounds following a very summary examination carried out by Dr. M.B. and that the decision of the Discharge Council appeared to be wholly based on the opinion submitted by that doctor. They further referred to the allegedly unprofessional way in which Dr. M.B. had carried out visits to their home, for example by asking Gärdh Persson to serve her coffee, by seeming more interested in talking about personal problems than in examining Kjell Persson and, in general, by showing no respect for the applicants' private and family life. Dr. M.B. could therefore not be considered impartial when submitting her statement to the Discharge Board. Furthermore, Kjell Persson's state of health had improved considerably during his provisional discharge and his repeated vomiting of blood had come to an end. He was no longer apathetic or depressed, as he had been during his stay at Rosenhill.

On 30 August 1988 the Psychiatric Council upheld the Discharge Board's decision of 27 July 1988 to dismiss Ms. Westerberg as Kjell Persson's counsel.

On 18 October 1988 the Psychiatric Council replied to the applicants' requests that the remaining appeals be speedily decided and that Gärdh Persson be given access to Kjell Persson's medical records. With regard to the first request, the Council noted that Ms. A.-S.W., who had been appointed Kjell Persson's official counsel had, for reasons attributable to Gärdh Persson, not yet been able to fulfil her task and that, therefore, the matter could not yet be decided. With regard to the medical records the Council noted that photocopies of certain documents had already been delivered to Ms. A.-S.W., but invited Gärdh Persson to study the records at the Council's premises, where she herself could obtain copies.

On 20 December 1988 the Psychiatric Council rejected the applicants' appeals against the Discharge Board's decisions of 14 March, 30 June and 27 July 1988, stating, inter alia:

(translation from Swedish)

" ... It appears from the medical records and other documents in the case that [Kjell Persson], who is mentally retarded, is clearly in need of care, having regard to the degree of [his] retardation and the fact that because of his retardation he is incapable of taking care of himself. ... Pursuant to ... Section 35 of [the 1967 Act] in conjunction with Section 6 of [the 1985 Transitional Act] conditions for [his placement in] public care thus exist ... "

d. Kjell Persson's admission to the Björnkulla nursing home and his stay there (from 27 December 1988 to 29 September 1989)

During the summer and autumn of 1988 Kjell Persson's condition deterio-rated continuously. According to a medical report of 14 December 1988, issued by K.-O.S., associate professor at St. Göran's hospital, Kjell Persson had since 26 June 1988 been admitted to the hospital on six occasions, the total period of care amounting to 56 days. Kjell Persson had been suffering from constipation, vomiting and epileptic attacks and the problems in feeding him had persisted.

On 15 December 1988 the Discharge Board held a hearing in order to consider whether Kjell Persson's provisional discharge should be extended. Ms. A.-S.W. appeared before the Board in her capacity as official counsel. Gärdh Persson had been summoned to the meeting, but did not attend it. In a letter received by the Discharge Board on the same day she had stated that the applicants did not wish to avail themselves of Ms. A.-S.W.'s services.

At the hearing oral reports were given by the Director of Mental Welfare Services and Dr. M.B., and Prof. K.-O.S's report was presented.

Following the hearing the Discharge Board revoked Kjell Persson's provisional discharge, stating the following:

(translation from Swedish)

" ... It appears from the investigation that Kjell Persson's ... conditions have now developed in such a way that the provisional discharge should no longer continue. The Council bases its opinion partly on the information regarding [his] physical condition and partly on the fact that [Gärdh Persson] does not appear competent to satisfy [his] special need for adequate care ... "

The applicants appealed to the Psychiatric Council against the revocation of Kjell Persson's provisional discharge.

The applicants allege that on 27 December 1988 Kjell Persson was taken from their home by policemen and officials to the Björnkulla nursing home.

The Government state that they have not been able to verify whether this allegation holds true.

Gärdh Persson further alleges that upon Kjell Persson's admission to Björnkulla she was orally informed by a nurse that her visiting rights would be restricted to two hours on Wednesdays and two hours on Sundays. No written decision was given.

The Government submit that no restrictions of visiting rights seem to have been applied during Kjell Persson's stay at Björnkulla.

After a few weeks' stay Kjell Persson fell ill and started, amongst other things, to vomit blood and was taken to hospital for emergency treatment.

On 7 February 1989 the Social Insurance Office again decided to authorise the collection of Kjell Persson's pension payments pursuant to the 1962 Ordinance. The decision was reviewed on 6 March 1989 and upheld.

The decision was upheld on appeal by the Regional Social Insurance Court for Central Sweden (försäkringsrätten för Mellan-sverige) on 24 April 1990. That decision was not appealed against.

In a letter received by the Psychiatric Council on 22 May 1989

the applicants withdrew their appeal against the Discharge Board's decision of 15 December 1988 to revoke Kjell Persson's provisional discharge.

e. Kjell Persson's final discharge from Björnkulla

Following a further request by Kjell Persson's then counsel, Mr. A.E., that Kjell Persson be finally discharged, the Discharge Board met on 1 June 1989. Gärdh Persson attended, together with her counsel. The Director for Mental Welfare Services informed the Board that an agreement had been reached according to which Kjell Persson could be fetched by Gärdh Persson every Friday and stay at home until Monday morning and that he would be staying with her for five weeks during the summer. The request for Kjell Persson's final discharge was then withdrawn.

On 29 September 1989 the Director of Mental Welfare Services finally discharged Kjell Persson from Björnkulla. As from then on he lived with Gärdh Persson until 21 June 1992, when he died at the St. Göran's hospital, where he had been taken for emergency treatment.

The Government submit that on the day of Kjell Persson's discharge Gärdh Persson was, in the presence of counsel A.E., orally informed of the revocation of his care order. No request for a decision in writing was made at that moment.

f. Proceedings subsequent to Kjell Persson's discharge

On 6 November 1989 the Disciplinary Board of Health and Medical Care (Hälso- och sjukvårdens ansvarsnämnd) rejected a complaint by Gärdh Persson against a number of physicians who, in treating Kjell Persson, had allegedly neglected their professional duties. Among the persons complained of were the Senior Medical Officer of the Mental Welfare Committee and the physician responsible for the medical care at Rosenhill. The Board found nothing to support the allegations. Its decision was not appealed against.

Gärdh Persson submits that at her request the Mental Welfare Committee by letter of 7 March 1991 informed her that Kjell Persson's compulsory care had been discontinued on the day of his final discharge.

Relevant domestic law

a. The 1967 Act

aa. General provisions

The 1967 Act, in force up to 1 July 1986, related to the care of mentally handicapped persons (Section 1).

Nursing homes were to be provided for mentally handicapped in need of special care. In certain circumstances care could be given in their own homes (Section 4, subsections 1 and 2).

The management of the care rested with a Mental Welfare Committee of the County Council. In each County Council at least one Administrative Board was to be established (Section 6, subsections 1 and 5).

Each Mental Welfare Committee appointed a Chief Education Officer (särskolchef), a Director of Mental Welfare Services and a Senior Medical Officer (Section 7).

Every nursing home was to have an appointed manager and physician (Section 11, subsections 1 and 2).

The National Board of Education (skolöverstyrelsen) and the National Board of Health and Welfare (socialstyrelsen) were to supervise the activities carried out under the 1967 Act (Section 13, subsection 1).

bb. Admission to and discharge from a nursing home

A mentally handicapped person who had attained the age of fifteen could be given compulsory care in a nursing home, if such care was absolutely necessary in view of the degree of his mental handicap and the fact that due to this handicap he was, inter alia, incapable of taking care of himself (Section 35, subsection 1).

Decisions on admission to a nursing home were to be made by the Director of Mental Welfare Services following consultations with the Senior Medical Officer and, in the case of a nursing home, with its manager. If requested by the Director of Mental Welfare Services, the Senior Medical Officer or the manager of the nursing home the matter was to be decided by the Administrative Board. The same procedure was applied if the custodian or the guardian, or the mentally handicapped person himself, if he had attained the age of fifteen, was not in agreement with the person authorised to make a decision pursuant to subsection 1.

A person admitted to a nursing home under Section 35 could be provisionally discharged, if special reasons existed and the discharge did not involve any danger to the personal safety of others or the person's own life. A provisional discharge could be granted for a specified period not exceeding six months and could be extended for not more that six months at a time. The patient could be obliged to comply with special instructions and could be placed under the supervision of a suitable person. A person who had been provisionally discharged could be readmitted to the nursing home, if the circumstances so required (Section 39).

A person admitted to a nursing home under the provisions of Section 35 was to be immediately and finally discharged, if the conditions under which care could be provided no longer existed. The fact that the patient constituted a danger to the property of others, or to any other interest protected by law which was not referred to in Section 35, subsection 1 para. (a), was not to constitute grounds for continued care, except where he had been committed to an institution by a court order (Section 40).

Under Section 41 decisions on the matters referred to in, inter alia, Sections 39 and 40 were to be made by the Director of Mental Welfare Services following consultations with the Senior Medical Officer of the Mental Welfare Committee or, with regard to patients in nursing homes, by the manager of the home following consultation with the home's physician.

Decisions on the matters referred to in, inter alia, Section 39 and Section 40 were, however, to be made by the Administrative Board:

- if the Director of Mental Welfare Services, the Senior Medical Officer, the manager of the nursing home or the home's physician so requested;

- if there was a disagreement between the person authorised to make a decision pursuant to subsection 1 and the custodian or the guardian or the patient himself, if he had attained the age of fifteen;

- if the Board found that it should examine the matter for other

reasons.

Police authorities were to give assistance at the request of, inter alia, the Director of Mental Welfare Services or the manager of a nursing home, where a person admitted to the home did not present himself there or did not return following a decision to readmit him to a nursing home under Section 39. Such assistance could only be given if the decision to which the requested assistance related could be immediately enforced (Section 54, subsections 1-2).

cc. Right of appeal

Under Section 44, subsection 1 an appeal could be lodged with the Psychiatric Council referred to in the 1966 Act on Mandatory Institutional Psychiatric Care in Certain Cases (lag 1966:293 om beredande av sluten psykiatrisk vård i vissa fall, hereinafter "the 1966 Act") against, inter alia, decisions whereby:

- a person had been admitted to a nursing home in the manner described in the present application;

- a patient's request for permission to spend time on his own outside the nursing home had been refused or if such a permission had been withdrawn;

- an application for discharge from, inter alia, a nursing home had been refused;

- a person had been readmitted to, inter alia, a nursing home after a provisional discharge;

- a patient had, in connection with a provisional discharge, been obliged to comply with special instructions or placed under supervision.

Under Section 45, subsection 1 no appeal lay against a decision of the Psychiatric Council or a decision pursuant to Section 44 of the chief supervisory authority.

Decisions regarding, inter alia, re-admission as well as decisions by an Administrative Board could be immediately enforced. However, pending its final decision, the authority examining an appeal could prohibit or suspend the execution of a decision against which an appeal had been made (Section 48).

dd. Requests for discharge

The question of discharge from, inter alia, a nursing home was to be reviewed regularly. A custodian or guardian or the mentally handicapped person himself, if he had attained the age of fifteen, could submit an application for a discharge. An Administrative Board was, however, not obliged to consider an application for a discharge until three months had passed since the consideration of a previous application (Section 51, subsections 1-3).

ee. Notification of a final discharge from a nursing home

A decision finally to discharge a person from a nursing home could be made either by the Director of Mental Welfare Services or the Administrative Board.

With regard to the notification of a decision taken by the Director, Section 21 of the 1986 Act on Administrative Procedure (förvaltningslag 1986:223, hereinafter "the 1986 Act") is applicable as from 1 January 1987. Thus, a party is to be notified of the decision by which a matter had been finally determined, unless this is clearly

unnecessary. It falls within the discretion of the authority concerned to decide on how to inform the party of the decision. However, if requested by the party, the notification shall be made in writing. If the decision has been made by a Discharge Board the party shall always be notified in writing.

b. The 1985 Act on Special Care of Mentally Handicapped Persons and Others and the Transitional Act

The 1985 Act on Special Care of Mentally Handicapped Persons and Others (lag 1985:568 om särskilda omsorger om psykiskt utvecklingsstörda m.fl.) and the Transitional Act to that Act (lag 1985:569 om införande av lagen 1985:568 om särskilda omsorger om psykiskt utveklingsstörda m.fl.) entered into force on 1 July 1986.

The 1985 Act does not provide for any committal to an institution irrespective of consent. Upon its entry into force, the 1967 Act was repealed with certain exceptions provided for in the Transitional Act. As regards nursing homes, Section 6 of the Transitional Act provided that Section 35 and some related provisions - Sections 36-37a and 39-54 - of the 1967 Act were to remain in force. This meant that care in a nursing home could still be imposed on a person without his consent where the conditions laid down in Section 35 of the 1967 Act were satisfied.

According to Section 7 of the Transitional Act, the duties which had been incumbent upon the Senior Medical Officer and the Director of Mental Welfare Services under the 1967 Act were to be carried out by officials appointed by the County Council. Decisions which had been taken by an Administrative Board under the 1967 Act were now to be taken by a Discharge Board under the 1966 Act in certain cases. Appeals could still be lodged with the Psychiatric Council.

As from 1 January 1992 the tasks of the Discharge Boards and the Psychiatric Council have been transferred to the County Administrative Courts (länsrätter) and the Administrative Courts of Appeal (kammarrätter).

c. The 1966 Act

aa. General Provisions

The 1966 Act was in force until 1 January 1992, when it was repealed and replaced by the 1991 Act on Compulsory Psychiatric Care (lag 1991:1128 om psykiatrisk tvångsvård). Under the new law the tasks which were previously incumbent on the Discharge Boards and the Psychiatric Council have been entrusted to the Administrative Courts. The following summary of the law therefore only reflects the situation as it was before 1 January 1992.

The Senior Medical Officer and the patient shall be present at the meeting of the Discharge Board, unless there are special reasons to the contrary. If the patient is represented by another person, that person shall be afforded the opportunity to attend, unless there are special reasons to the contrary (Section 30, subsection 1 of the 1966 Act).

In cases before the Psychiatric Council a hearing shall be held if the nature of the case so requires. The provisions of Section 30, subsection 1 shall then be applicable by analogy (Section 31).

In cases before a Discharge Board or the Psychiatric Council hearings may be arranged with persons who are likely to be able to supply relevant information. The patient shall be present at such hearings, unless there are special reasons to the contrary (Section 33, subsections 1-2).

Discharge Boards or the Psychiatric Council may only decide on a matter if all the members are present. The provisions of Chapter 29 of the Code of Judicial Procedure relating to votes in superior courts shall be applicable by analogy to decisions by Discharge Boards or the Psychiatric Council (Section 34, subsections 1-2).

bb. Communication of medical records introduced in proceedings before the Discharge Board

As from 1 January 1987 the 1986 Act became applicable to the proceedings before a Discharge Board. According to Section 16 a party has the right to have access to, inter alia, any document that has been introduced in the proceedings. The rule is subject to some exceptions which are not of relevance in the present case.

d. The legislation and directives governing the administration of patients' means

If a patient entitled to pension payments stays in a nursing home for at least a whole month, the provider of the care may collect his pension payment for that month (Chapter 10, Section 3 of the 1962 Social Security Act; lag 1962:381 om allmän försäkring, and Section 2 of the 1962 Ordinance).

The collector of the pension payments shall hand over a certain amount of the payments received to the patient. However, if the patient himself is unable, due to his state of health, to make use of the money, it shall be used to improve his comfort or otherwise be spent for his personal benefit (Section 4 of the 1962 Ordinance).

A decision allowing for a person's pension payments to be collected is to be taken by the competent Social Insurance Office. The decision could, under the rules in force at the relevant time, be appealed to a Regional Social Insurance Court (försäkringsrätten) and, ultimately, to the Supreme Social Insurance Court (försäkrings-överdomstolen).

In a circular letter by the National Board of Health and Social Welfare of 4 January 1972 (socialstyrelsens cirkulär om medel för pensionsberättigade psykiskt utvecklingsstördas personliga behov, MF 1972:5) it is confirmed that a patient who is capable of administering cash has an absolute right to spend the money received as he wishes. A deduction from this sum of money to be spent on the general comfort in the nursing home can, thus, only take place with his consent. While there are no formal requirements for such a consent it shall, on the other hand, not be assumed to exist for certain purposes. Under no circumstances shall money be deducted for a purpose which the patient cannot benefit from.

The circular letter further prescribes that even those patients who are incapable of administering cash themselves shall receive a certain amount of money to be spent on their behalf in order to improve their comfort or otherwise for their personal benefit. In these cases it is, in principle, up to the manager of the nursing home to administer the patient's means, provided that he can benefit from any money being spent. It is "important" (angeläget) that, whenever possible and expedient, the administration and spending of money is based on consultations with the parents, the custodian or the guardian of the patient.

A general directive issued by the National Board of Health and Social Welfare on 31 January 1983 (socialstyrelsens allmänna råd om förvaltning av privata medel m.m. inom socialtjänsten, sjukvården och omsorgerna om psykiskt utvecklingsstörda, SOSFS 1983:4) prescribes that the administration of a patient's private means shall be governed

by a written agreement between the provider of the care and the patient or his legal representative. Such an agreement may include a consent to withdrawals from the patient's bank account and may at any stage be renounced by the patient or his representative. Private means shall be registered, kept and administered in an adequate manner. Staff shall not keep private possessions on a patient's behalf, except when necessary for the purpose of his social training.

e. Control mechanisms, civil and criminal liability, etc.

The activities carried out under the 1967 Act are subject to supervision by the National Board of Health and Welfare (socialstyrelsen) which may carry out inspections of, inter alia, nursing homes. This applies equally to activities carried out before 1 July 1986 and, by virtue of the 1985 Transitional Act, after that date.

Medical care provided by, or under the responsibility of, a physician of a nursing home falls under the 1980 Act on the Supervision of Health and Medical Care Staff and Others (lag 1980:11 om tillsyn över hälso- och sjukvårdspersonalen m.fl.; hereinafter "the 1980 Act"). The 1980 Act contains provisions on the duties of such staff, as well as on disciplinary sanctions that may be imposed in case of a failure to comply with those duties. Questions concerning disciplinary sanctions are to be determined by the Disciplinary Board of Health and Medical Care. A decision of this Board may be appealed to an Administrative Court of Appeal (kammarrätt) and, ultimately, to the Supreme Administrative Court (regeringsrätten).

An incident shall, for the purpose of criminal charges being brought, be reported to the police either by the National Board of Health and Social Welfare or the Disciplinary Board in cases where an official can reasonably be suspected of having committed an offence for which imprisonment is prescribed.

The authorities responsible for, and public officials carrying out, activities under the 1967 Act and the 1985 Transitional Act are subject to supervision also by the Parliamentary Ombudsman (riksdagens justitieombudsman). The task of the Ombudsman is to ensure that public authorities and officials comply with their duties and, in particular, that fundamental rights and freedoms are not violated. As a last resort, the Ombudsman is empowered to institute criminal proceedings, or disciplinary proceedings where disciplinary sanctions are provided for, against an official who has, by act or omission, wilfully or through negligence disregarded his duties.

The State, a municipality or a similar public organ is liable for personal and pecuniary damages caused by a fault or negligence committed by an official when carrying out an activity for which the organ is responsible (the 1972 Tort Liability Act; skadeståndslag 1972:207). The fault or negligence may further constitute an offence under the Penal Code (brottsbalken).

COMPLAINTS

1. The applicants complain under Article 3 of the Convention that the implementation of the care order in the Rosenhill nursing home subjected Kjell Persson to inhuman and degrading treatment. They allege, in particular, that the general medical care afforded to Kjell Persson was inadequate and his feeding was often assigned to inexperienced nursing staff, this resulting in repeated inflammations and bleedings in his gullet requiring emergency treatment.

2. The applicants further complain of a lack of respect for their private and family life as a result of:

a) the total deprivation of Kjell Persson's privacy due to the fact that the window of the room in which he was staying at Rosenhill had no curtains and was facing a corridor in frequent use by staff, patients and visitors;

b) the restrictions of Gärdh Persson's right to visit him in the nursing homes;

c) the supervision by Dr. M.B. of Kjell Persson's care in the applicants' home during his provisional discharge from 16 March 1988 to 15 December 1988; and

d) the taking of Kjell Persson to the Björnkulla nursing home on 27 December 1988.

They refer to Article 8 of the Convention.

3. Under Article 6 of the Convention the applicants complain:

a) that they could not obtain a court review of the restriction of Gärdh Persson's visiting rights;

b) that in the proceedings concerning Kjell Persson's final discharge from the Rosenhill nursing home starting on 28 October 1987 and ending with the decision of the Psychiatric Council of 20 December 1988, they did not get a fair hearing in that Kjell Persson's medical records were not communicated to them for comments prior to the Discharge Board's hearing on 14 March 1988;

c) that the Psychiatric Council, when considering the applicants' appeals against the refusal of Kjell Persson's final discharge on 20 December 1988, was not an impartial tribunal;

d) that the proceedings ending with the Psychiatric Council's decision of 20 December 1988 were unreasonably lenghty; and

e) that in the proceedings on 15 December 1988 before the Discharge Board resulting in the revocation of Kjell Persson's provisional discharge they did not get a fair hearing in that Dr. K.-O. S.'s medical report was not communicated to them for comments and that, in any case, the report was misinterpreted.

4. In respect of the restrictions of Gärdh Persson's visiting rights the applicants also complain of the absence of an effective remedy in order to challenge those restrictions. They invoke in this respect Article 13 of the Convention.

5. The applicants further complain that during Kjell Persson's stay at the Rosenhill nursing home money was withdrawn from his bank account without their consent and spent mostly for unknown purposes. They invoke in this respect Article 1 of Protocol No. 1 to the Convention.

6. On 15 March 1991 the applicants complained under Article 5 of the Convention that the taking of Kjell Persson into compulsory care and the keeping in force of the care order were not justified and that they were not duly informed of the termination of Kjell Persson's care.

7. On 22 September 1991 the applicants finally complained under Article 6 of the Convention of the absence of a right to have Kjell Persson's compulsory care reviewed by a court.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 September 1988 and registered on 8 December 1988.

On 15 April 1991 the Commission decided to communicate the application to the respondent Government, with the exception of the complaint regarding the justification of the care order.

The Government's observations were submitted on 29 July 1991 and the applicants' observations in reply were submitted on 22 September 1991. Additional observations were submitted by the applicants on 11 February 1992.

On 13 September 1991 the Commission granted the applicants legal aid.

On 9 November 1992 the Commission was informed of the death of Kjell Persson and Gärdh Persson's wish to pursue the application both in her personal capacity and on his behalf.

On 11 December 1992 the Government were invited to submit further information. The information was submitted on 5 January 1993. The applicants' comments in reply were submitted on 5 February 1993.

THE LAW

The Commission first observes that Kjell Persson died in 1992 and that Gärdh Persson has expressed the wish to pursue the application both on her own behalf and on behalf of Kjell Persson's estate. Under Article 25 (Art. 25) of the Convention "the Commission may receive petitions ... from ... individuals claiming to be the victim of a violation by one of the Contracting Parties of the rights set forth in [the] Convention ...". The question therefore arises whether and to what extent Gärdh Persson may pursue the application both in her personal capacity and on behalf of Kjell Persson.

As regards the complaint under Article 3 (Art. 3) of the Convention the Commission considers that Gärdh Persson, being Kjell Persson's mother and guardian at the time, may reasonably claim to have suffered moral damage as a result of his alleged ill-treatment. She may therefore pursue this complaint on both applicants' behalf (cf. No. 7467/76, Dec. 13.12.76, D.R. 8 p. 220).

In respect of the matters complained of under Article 8 (Art. 8) of the Convention the Commission considers that it is not sufficiently informed to decide whether both applicants can claim victim status and, in the affirmative, in relation to which of the complaints or all of them. Accordingly, it finds it necessary to obtain, in this respect, further observations from the parties.

The complaint under Articles 6 and 13 (Art. 6, 13) of the Convention relating to the absence of a right to a court review of the restriction of Gärdh Persson's visiting rights affected her directly, for which reason she may pursue the complaints in her own name.

The other complaints under Article 6 (Art. 6) relate primarily to Kjell Persson, but also affected Gärdh Persson in her capacity as his guardian and party in the discharge proceedings. In these circumstances she has a sufficient legal interest in pursuing the complaint on both applicants' behalf.

As regards the complaint under Article 1 of Protocol No. 1 (P1-1) to the Convention the Commission observes that Gärdh Persson was, in her capacity as Kjell Persson's guardian, directly affected by the interference complained of. Moreover, she is now the administrator of his estate. In these circumstances she has a sufficient legal interest in pursuing the complaint both on Kjell Persson's and her own behalf (cf. No. 8003/77, Dec. 3.10.79, D.R. 17 pp. 80, 82).

Finally, as regards the remaining complaints under Articles 5 and 6 (Art. 5, 6) of the Convention the Commission can, for the reasons mentioned below (see 6-7), leave the victim question open.

1. The applicants complain under Article 3 (Art. 3) of the Convention that the implementation of the care order subjected Kjell Persson to inhuman and degrading treatment. They allege, in particular, that the general medical care afforded to Kjell Persson was inadequate and his feeding was often assigned to inexperienced nursing staff, this resulting in repeated inflammations and bleedings in his gullet requiring emergency treatment.

Article 3 (Art. 3) of the Convention reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

As regards the alleged inadequate medical care afforded to Kjell Persson and the alleged incorrect technique used for feeding him, the Government argue that domestic remedies have not been exhausted. The alleged negligence of the medical and nursing staff could have served as a basis for instituting civil damage proceedings or criminal proceedings. No action was, however, taken by the applicants in order to have their allegations examined by a court of law, nor did they turn to the National Board of Health and Welfare or the Parliamentary Ombudsman. Finally, they did not appeal against the decision of the Disciplinary Board of Health and Medical Care of 6 November 1989.

In the alternative, the Government submit that the complaint is manifestly ill-founded. There is nothing to indicate that the authorities and the staff concerned did not fully understand Kjell Persson's particular needs or that they failed to provide care and treatment adequate to his mental and physical condition. The incidents when Kjell Persson had to be taken to hospital for emergency treatment cannot warrant any conclusion regarding the quality of the care in the nursing homes. Similar emergency treatment was also called for when Kjell Persson was cared for by Gärdh Persson. Both the Discharge Board, which inspected Rosenhill, and the Disciplinary Board of Health and Medical Care rejected the applicants' complaints regarding Kjell Persson's allegedly inadequate conditions and care at Rosenhill. Institutional care and, in particular compulsory care, almost inevitably involve elements of inconvenience such as a certain lack of privacy. Considerable discretion must be given to those responsible for the care.

The Commission need not resolve the question whether effective domestic remedies have been exhausted, as the complaint under Article 3 (Art. 3) of the Convention is inadmissible for the following reasons.

The notion of inhuman and degrading treatment covers at least such treatment as deliberately causes severe suffering, mental or physical. The treatment may be said to be degrading if it grossly humiliates an individual before others (the Greek case, Comm. Report 5.11.69, Yearbook 12 p. 186; Ireland v. the United Kingdom, Comm. Report 25.1.76, Eur. Court H.R., Series B no. 23-I, p. 388). Ill-treatment must, however, attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim, etc. (Eur. Court H.R., Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 65, para. 162).

It is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used to preserve the physical and mental health of patients for whom the authorities are responsible. Patients nevertheless remain under the

protection of Article 3 (Art. 3), whose requirements permit no derogation. The established principles of medicine are in principle decisive; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Convention organs must nevertheless satisfy themselves that the medical necessity has convincingly been shown to exist (cf., mutatis mutandis, Eur. Court H.R., Herczegfalvy judgment of 24 September 1992, para. 82, to be published in Series A no. 242-B). Medical treatment must not contravene the standards of medical science (cf., mutatis mutandis, Herczegfalvy v. Austria, Comm. Report 1.3.91, para. 249, to be published in Series A no. 242-B).

Turning to the present case concerning the implementation of the care order and the alleged inadequate medical treatment in general the Commission considers the complaint in this respect to have remained wholly unsubstantiated.

As regards the technique used for feeding Kjell Persson the Commission further observes that an important reason for placing him in compulsory care was the acute danger to his health due to his extreme under-nourishment, apparently at least partly caused by one feature of his physical disability, that is that his tongue was grown together with his gullet. Bearing this in mind, the Commission finds no reason to doubt that the technique used for feeding Kjell Persson could reasonably be considered justified by therapeutic considerations.

It follows that this complaint must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants further complain of a lack of respect for their private and family life as a result of:

a) the total deprivation of Kjell Persson's privacy due to the fact that the window of the room in which he was staying at Rosenhill had no curtains and was facing a corridor in frequent use by staff, patients and visitors;

b) the restrictions of Gärdh Persson's right to visit him in the nursing homes;

c) the supervision by Dr. M.B. of Kjell Persson's care in the applicants' home during his provisional discharge from 16 March 1988 to 15 December 1988; and

d) the taking of Kjell Persson to the Björnkulla nursing home on 27 December 1988.

The applicants invoke Article 8 (Art. 8) of the Convention, which reads:

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

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 has examined the respective complaints separately.

a) As regards Kjell Persson's lack of privacy the Government argue that this was inherently caused by his compulsory care. The applicants

refute this argument.

The Commission considers that it is not sufficiently informed to decide on this complaint. Accordingly, it finds it necessary to obtain, in this respect, further observations from the parties on the admissibility and merits.

b) As regards the restrictions of Gärdh Persson's right to visit Kjell Persson in the nursing homes the Government maintain that a restriction was only in force in the Rosenhill nursing home and consider the complaint inadmissible for non-exhaustion of domestic remedies. While admitting the absence of a right of appeal against the restriction as such, the Government argue that Kjell Persson could have asked for permission to visit Gärdh Persson outside the nursing home. A negative decision upon such a request could under Section 44 of the 1967 Act have been challenged before the Psychiatric Council.

In the alternative, the Government submit that the complaint is manifestly ill-founded, as the interference was justified under Article 8 para. 2 (Art. 8-2).

As to the lawfulness of the interference the Government submit that it is not feasible to provide an explicit legal basis for each and every measure taken during compulsory institutional care. A measure affecting a patient in such care must be considered lawful if it was adequate and reasonably foreseeable, having regard to the purpose of the care, and provided the procedure applied showed respect for the private and family life of those concerned.

As regards the aim and necessity of the interference the Government recall that Gärdh Persson's daily visits, her lack of confidence in the nursing staff and her frequent questioning of the Kjell Persson's care had caused such difficulties that a restriction of her right to visit the Rosenhill nursing home had been considered necessary. The restriction was imposed exclusively in order to create conditions necessary for an adequate care of Kjell Persson and did not prevent Gärdh Persson from visiting him on a regular basis.

The applicants contend that restrictions were in force in both nursing homes. Kjell Persson's state of health rendered it impossible for him to leave the nursing homes in order to meet Gärdh Persson. Thus, there existed no remedy against the restrictions. On the merits the applicants maintain that the restrictions were unlawful and, in any event, unnecessary.

The Commission considers that it is not sufficiently informed to decide on this complaint. Accordingly, it finds it necessary to obtain, in this respect, further observations from the parties on the admissibility and merits.

c) As regards the supervision by Dr. M.B. of Kjell Persson's care in the applicants' home during his provisional discharge from 16 March to 15 December 1988 the Government submit that this complaint is also inadmissible for non-exhaustion of domestic remedies, as the applicants never appealed against the supervision order of 14 March 1988.

The Commission is not required to decide whether or not the facts alleged by the applicants disclose any appearance of a violation of Article 8 (Art. 8) of the Convention in respect of this particular complaint as, under Article 26 (Art. 26) of the Convention, it may only deal with a complaint after all domestic remedies have been exhausted, according to the generally recognised rules under international law.

In regard to the present complaint the applicants failed to lodge an appeal under Section 44 of the 1967 Act in order to challenge the appointment of Dr. M.B. and has, therefore, not exhausted the remedies available to them under Swedish law. Moreover, an examination of the

complaint does not disclose the existence of any special circumstance which might have absolved the applicants, according to the generally recognised rules of international law, from exhausting the domestic remedies at their disposal.

It follows that this complaint must be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

d) As regards the complaint of the taking of Kjell Persson to the Björnkulla nursing home the Government, assuming the applicants' allegation to be correct, admit that there was an interference with the applicants' rights under Article 8 (Art. 8), but argue that this was justified under para. 2 of the said provision. They refer, in particular, to Section 54, subsection 2 of the 1967 Act authorising the Director of Mental Welfare Services or the manager of a nursing home to request police assistance for the purpose of enforcing a readmittance order pursuant to Section 39 of the said Act.

The Commission considers that the complaint focuses both on the grounds for the taking of Kjell Persson to the Björnkulla nursing home and on the particular manner in which it was enforced.

The taking of Kjell Persson to Björnkulla interfered with the applicants' right to respect for their family life. Such an interference under Article 8 (Art. 8) of the Convention must be "in accordance with the law", have one or several aims which are legitimate under para. 2 of that provision and be "necessary in a democratic society" (Eur. Court H.R., Rieme judgment of 22 April 1992, Series A no. 226-B, p. 68, para. 56).

It has not been alleged that the interference was not carried out in accordance with Swedish law. The Commission, for its part, accepts that the interference took place in accordance with those provisions of the 1967 Act which remained in force after the enactment of the 1985 Act.

The Commission observes that the interference served the purpose of enforcing the Discharge Board's decision of 15 December 1988 revoking Kjell Persson's provisional discharge. This decision was made in order to prevent Kjell Persson's physical condition from further deterioration. Thus, the interference was clearly aimed at protecting Kjell Persson's health, this being a legitimate aim under Article 8 para. 2 (Art. 8-2).

The notion of necessity implies that the interference with a right under Article 8 para. 1 (Art. 8-1) must correspond to a "pressing social need" and, in particular, be proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" a margin of appreciation is to be left to the Contracting State. The Commission must further satisfy itself that the reasons adduced to justify the interference are "relevant and sufficient" (Eur. Court H.R., Olsson no. 2 judgment of 27 November 1992, para. 87, to be published in Series A no. 250).

In the present case the Commission observes that at its hearing on 15 December 1988 the Discharge Board had regard to a number of expert reports on Kjell Persson's state of health and the care provided by Gärdh Persson, including a report by Dr. M.B., who had been supervising that care. The Discharge Board concluded that Kjell Persson could no longer be cared for outside a nursing home and that therefore his provisional discharge had to be revoked. The Commission therefore accepts that the reasons for the Discharge Board's decision of 15 December 1988 constituting the legal basis for the taking of Kjell Persson to the Björnkulla nursing home were relevant and sufficient. Having regard to the margin of appreciation left to the State, the Commission finds that the placing of Kjell Persson in the Björnkulla

nursing home corresponded to a pressing social need and was proportionate to the aim sought to be achieved.

The Commission concludes therefore that the taking of Kjell Persson to the Björnkulla nursing home could be regarded as being necessary in a democratic society for the protection of Kjell Persson's health.

Finally, as regards the particular manner in which Kjell Persson was taken to Björnkulla the Commission cannot find any appearance of a violation of Article 8 (Art. 8) of the Convention.

It follows that this complaint must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicants complain under Article 6 (Art. 6) of the Convention:

a) that they could not obtain a court review of the restriction of Gärdh Persson's visiting rights;

b) that in the proceedings concerning Kjell Persson's final discharge from the Rosenhill nursing home starting on 28 October 1987 and ending with the decision of the Psychiatric Council of 20 December 1988, they did not get a fair hearing in that Kjell Persson's medical records were not communicated to them for comments prior to the Discharge Board's hearing on 14 March 1988;

c) that the Psychiatric Council, when considering the applicants' appeals against the refusal of Kjell Persson's final discharge on 20 December 1988, was not an impartial tribunal; and

d) that the proceedings ending with the Psychiatric Council's decision of 20 December 1988 were unreasonably lenghty; and

e) that in the proceedings on 15 December 1988 before the Discharge Board resulting in the revocation of Kjell Persson's provisional discharge they did not get a fair hearing in that Dr. K.-O. S.'s medical report was not communicated to them for comments and that, in any case, the report was misinterpreted.

These complaints fall to be considered under Article 6 para. 1 (Art. 6-1) of the Convention, which reads, insofar as it is relevant:

"In the determination of his civil rights..., everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

The Commission has examined the respective complaints separately.

a) As regards the alleged absence of a right to a court review of the restriction of Gärdh Persson's visiting rights the Government submit that the complaint in this respect is incompatible ratione materiae with the provisions of the Convention. The present case differs from those governed by the Convention organs' constant case-law under Article 8 (Art. 8) of the Convention in that the present care order not only separated Gärdh Persson from Kjell Persson, but deprived Kjell Persson of his liberty for the purposes of compulsory care in a nursing home. The measures subsequently taken formed an inherent part of the day-to-day administration of the institution for the sole purpose of creating adequate conditions for the implementation of his care. The restriction did not finally determine Gärdh Persson's right of access to Kjell Persson, but only her right to visit the nursing home.

In the alternative, the Government submit that the complaint is manifestly ill-founded, as under Section 44 of the 1967 Act Kjell Persson could have requested permission to meet Gärdh Persson outside the nursing home. A decision in the negative could have been appealed against to the Psychiatric Council, which fulfils the requirements of a tribunal within the meaning of Article 6 para. 1 (Art. 6-1).

The Commission considers that it is not sufficiently informed to decide on this complaint. Accordingly, it finds it necessary to obtain, in this respect, further observations from the parties on the admissibility and merits.

b) As regards the fairness of the proceedings regarding Kjell Persson's final discharge due to the alleged failure by the Discharge Board to communicate Kjell Persson's medical records to the applicants for comments prior to its hearing on 14 March 1988, the Government submit that the complaint is incompatible ratione materiae with the Convention, as the proceedings at issue concerned exclusively the question whether the conditions under Section 35 of the 1967 Act for Kjell Persson's compulsory care were still at hand. Thus, the proceedings did not involve a determination of any "civil right" of the applicants. In the alternative, the Government submit that domestic remedies have not been exhausted, as this complaint was not raised in the applicants' appeal to the Psychiatric Council.

The applicants maintain that as there was never any formal refusal to communicate documents to them they could not appeal against this. Although Gärdh Persson was given the opportunity to study Kjell Persson's medical records in the office of the Psychiatric Council she was at that time taking care of Kjell Persson in her home and could not free herself for that purpose, nor could she have afforded to pay for photocopies.

The Commission recalls the case of L. v. Sweden, in which it concluded that Article 6 para. 1 (Art. 6-1) was inapplicable to proceedings for the determination of whether or not a person provisionally discharged from a psychiatric hospital should be finally discharged. The Commission found the issue, as examined by the Discharge Board and the Psychiatric Council, to be whether the applicant was still in need of certain medical treatment. In those circumstances the examination did not determine any "civil rights or obligations" of the applicant, nor were the proceedings decisive for any such rights or obligations (Comm. Report 3.10.88, para. 87, to be published in D.R., admissibility decision 20.1.86 published in D.R. 45 p. 181).

The Commission considers that similar considerations apply to the present case, notwithstanding the fact that Kjell Persson was taken into care in application of the 1967 Act, while L. had been detained in accordance with the 1966 Act.

It follows that this complaint is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

c) As regards the alleged failure of the Psychiatric Council to meet the requirement of an "impartial tribunal" when examining the applicants' appeals against the refusal of Kjell Persson's final discharge on 20 December 1988, the Government reiterate their argument that the complaint is incompatible ratione materiae with the Convention. In any case, it is manifestly ill-founded, as the Psychiatric Council fulfils the requirements of an "impartial tribunal".

Gärdh Persson maintains that she could not have the question of Kjell Persson's final discharge examined by an independent and impartial tribunal. Generally speaking, neither the Discharge Board nor the Psychiatric Council meet the requirements under Article 6 para. 1

(Art. 6-1). Furthermore, in the applicants' case the Chairman of the Discharge Board was biased and acted in the interests of the Rosenhill nursing home. Reference is made to the Board's hearing on 25 February 1988.

It follows from the Commission's above considerations under b) that this complaint is also incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

d) As regards the length of the proceedings ending with the Psychiatric Council's decision of 20 December 1988 the Government reiterate their argument that the complaint is incompatible ratione materiae with the Convention.

It again follows from the Commission's above considerations under b) that this complaint is also incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

e) As regards the fairness of the proceedings regarding the revocation of Kjell Persson's provisional discharge due to the alleged failure by the Discharge Board to communicate Dr. K.-O. S.'s medical report to the applicants for comments prior to its hearing on 15 December 1988, and due to the alleged interpretation of that report, the Government reiterate their argument that the complaint is incompatible ratione materiae with the Convention. In the alternative, it is inadmissible for non-exhaustion of domestic remedies, as the appeal to the Psychiatric Council against the Discharge Board's decision was not pursued by the applicants. In any event, the complaint is manifestly ill-founded, as Dr. K.-O. S.'s report was presented at the hearing and commented upon before the Board on 15 December 1988, which was attended by counsel A.-S.W., although not by the applicants themselves.

It again follows from the Commission's above considerations under b) that this complaint is also incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

4. In respect of the restrictions of Gärdh Persson's visiting rights the applicants also complain of the absence of an effective remedy in order to challenge those restrictions. They invoke in this respect 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 Government admit that no formal procedure existed for the purpose of challenging the restriction as such. They submit, however, that the complaint is manifestly ill-founded and refer to above-mentioned possibility for Kjell Persson under Section 44 of the 1967 Act to request permission for visits outside the nursing home. In any case, this remedy together with the supervision carried out by the National Board of Education and the National Board of Health and Welfare as well as by the Parliamentary Ombudsman satisfy the requirements of Article 13 (Art. 13).

The applicants maintain their view that there was no remedy against the restrictions of Gärdh Persson's visiting rights.

The Commission considers that it is not sufficiently informed to decide on this complaint. Accordingly, it finds it necessary to obtain, in this respect, further observations from the parties on the

admissibility and merits.

5. The applicants further complain that during Kjell Persson's stay at the Rosenhill nursing home money was withdrawn from his bank account without their consent and spent mostly for unknown purposes. They invoke in this respect Article 1 of Protocol No. 1 (P1-1) to the Convention, which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Government consider the complaint inadmissible for non-exhaustion of domestic remedies, as it could have been raised by the applicants in civil proceedings claiming that the money withdrawn and spent be restored to them. They did not avail themselves of this possibility, nor did they institute private prosecution proceedings against those suspected of the embezzlement.

The Government maintain that, in any event, the complaint is manifestly ill-founded and refer to the decisions made under the 1962 Ordinance authorising pension payments to be collected by the nursing homes in order to cover the costs for Kjell Persson's care. As a result of the decisions, Kjell Persson only retained a right either to be given a certain part of his pension payments, as withdrawn from his bank account by the nursing home, or to have that part used for his own benefit. Accordingly, it is questionable whether the money withdrawn at all formed part of his possessions.

Assuming, however, that Kjell Persson could claim a right to the money withdrawn from his bank account, the Government admit that his property rights were interfered with. However, the control of the use of the money was lawful under the 1962 Ordinance, the purpose of which is to ensure that patients use their money in their best interests. There is nothing to indicate that the money was not used for the sole benefit of Kjell Persson or that Gärdh Persson was not duly informed of the way in which it was used.

The applicants contend that at the Rosenhill nursing home the patients' money was stored in such a way that almost any of the staff members could have embezzled them. In Kjell Persson's case the authorities refused to carry out a proper investigation in order to determine the suspected embezzlers. Thus, private prosecution proceedings against nursing staff would have lacked any prospect of success. Finally, in fear of Kjell Persson again being admitted to a nursing home the applicants did not insist that further investigations be carried out.

As to the merits of the complaint, the applicants contend that the withdrawals of Kjell Persson's pension payments were unlawful. No domestic legal provision authorises the administration of a patient's means without his or his guardian's written consent. Such a consent is called for in the circular letter by the National Board of Health and Social Welfare (MF no. 1972:5) and the general directive (SOSFS no. 1983:4). Gärdh Persson objected to staff members administering Kjell Persson's money. Moreover, the book-keeping shown to her indicated withdrawals of "pocket money" to Kjell Persson in the amount of several thousand SEK, but there is no account of how that money was really spent. The audit further indicated that his money had been spent on,

amongst other things, candy and restaurant meals, although Kjell Persson was unable to eat solids. Admittedly, a tape recorder and some music cassettes had been bought for Kjell Persson. However, out of a sum of almost 40.000 SEK to which Kjell Persson was entitled some 38.000 SEK has disappeared or been spent in unknown ways.

The Commission considers that it is not sufficiently informed to decide on this complaint. Accordingly, it finds it necessary to obtain, in this respect, further observations from the parties on the admissibility and merits.

6. On 15 March 1991 the applicants complained under Article 5 (Art. 5) of the Convention that the taking of Kjell Persson into compulsory care and the keeping in force of the care order were not justified and that the applicants were not duly informed of the termination of Kjell Persson's care.

The Commission is not required to decide whether or not the facts alleged by the applicants disclose any appearance of a violation of Article 5 (Art. 5) of the Convention, as Article 26 (Art. 26) of the Convention provides that the Commission "may only deal with the matter ... within a period of six months from the date on which the final decision was taken".

The Commission recalls that Kjell Persson's compulsory care terminated on 29 September 1989 by a decision of the Director of Mental Welfare Services finally to discharge Kjell Persson from the Björnkulla nursing home. No evidence has been submitted showing that Gärdh Persson, or at least her counsel, was not immediately informed, in an unambiguous way, of that decision.

The complaint was, however, only raised in the applicants' submissions of 15 March 1991, that is, more than six months after the termination of the care. Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have interrupted or suspended the running of that period.

It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

7. On 22 September 1991 the applicants finally complained of the absence of a right to have Kjell Persson's compulsory care reviewed by a court. They invoke in this respect Article 6 (Art. 6) of the Convention.

The Commission is, however, not required to decide whether or not the facts alleged by the applicants disclose any appearance of a violation of that provision, as it "may only deal with the matter ... within a period of six months from the date on which the final decision was taken".

The Commission observes that the present complaint was only raised in the applicants' submissions of 22 September 1991 and has thus been lodged more than six months from the date of the termination of the care, that is on 29 September 1989.

It follows that this complaint has been lodged out of time and must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission

by a majority,
DECIDES TO ADJOURN the examination of

the complaint under Article 8 (Art. 8) of the Convention

relating to Kjell Persson's lack of privacy at the Rosenhill nursing home;

the complaint under Article 8 (Art. 8) of the Convention relating to the restriction of Gärdh Persson's visiting rights;

the complaints under Article 6 para. 1 and Article 13 (Art. 6-1, 13) of the Convention relating to the absence of a right to a court review of the restriction of Gärdh Persson's visiting rights;

the complaint under Article 1 of Protocol No. 1 (P1-1) elating to the administration and spending of Kjell Persson's pension income; and

unanimously,
DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)