AS TO THE ADMISSIBILITY OF

Application No. 33029/96
by Bruno POLI
against Denmark

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

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 26 February 1996 by Bruno POLI against Denmark and registered on 19 September 1996 under file No. 33029/96;

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 applicant is an Italian citizen, born in 1942. He resides in Montalto, Italy. Before the Commission he is represented by Mr Alberto Salzano, Ravenna, Italy.

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

a. Particular circumstances of the case

The applicant was cohabiting with a Danish woman, S.B., in Italy from February 1984 to September 1987. On 2 May 1985 their daughter, S, was born. In September 1987 S.B. left the applicant and their residence in Italy, taking S with her. They went to Denmark.

The applicant contacted the Danish authorities and requested them to help him in securing access to S. In order to facilitate access to his child he moved to Denmark and took action to establish himself in the country by inter alia acquiring real estate there. S.B. was opposed to the applicant being granted any access to S.

On 30 June 1988 the County Authority of Århus (Århus Statsamt) refused to grant the applicant access to his daughter for the time being referring mainly to various practical problems in exercising a right of access to S.

On 23 December 1988 the Department of Private Law (Civilrets-direktoratet) upheld the decision of the County Authority referring to the fact that the applicant's stay in Denmark had not lasted very long and to information that the applicant had threatened to kidnap S.

By decision of 12 June 1989 of the County Authority of Århus, the applicant was granted visiting rights to S. The County fixed a place, in a neutral environment, and the time for the meetings. It further decided that a neutral third person and an interpreter should be present during the meetings. This decision was upheld by the Department of Private Law on 17 November 1989.

From 22 June 1989 to May 1990 the applicant was able to exercise his visiting rights to S only on a few occasions. The last meetings, in May 1990, took place in S.B.'s home at the request of S.B. Since then it appears that the applicant has not seen his daughter.

In October 1990 the applicant gave up his real estate and left Denmark for Italy. It appears that he suffered from a depression for which he received treatment in a hospital in Italy.

At the request of S.B., who had now moved to Viborg, the County Authority of Viborg (Viborg Statsamt), on 17 May 1991, revoked the applicant's rights of access to S

due to the fact that he no longer had any attachment to Denmark. The County Authority expressed a fear that the applicant might kidnap S if he maintained his rights of access. The applicant did not appeal against this decision.

When the applicant had recovered he again requested the Danish authorities to grant him access to his daughter. On 5 January 1993 the County Authority of Århus, which was now the competent authority, refused to grant the applicant visiting rights referring to the time which had elapsed since the applicant's last contact with S, to his lack of attachment to Denmark and to the fear of kidnapping.

The applicant appealed against this decision to the Department of Private Law which, on 22 March 1993, announced that it would be willing to grant the applicant rights of access to S if the meetings could be carried through safely. Thus, the applicant's access to S was conditional on the meetings being supervised by a neutral third person and the applicant depositing his passport and identity card. The details concerning the place where the meetings were to be held and who should supervise them were to be fixed after hearing the parties. The applicant was given 20 days notice to submit his proposals.

The applicant sent letters of 28 March, 10 April and 11 June 1993 to the Department of Private Law.

On 12 August 1993 the Department proposed a place for future meetings and a person who should act as supervisor. However, the applicant did not accept the supervisor suggested.

After the parties had submitted their proposals for a supervisor, the Department, on 18 October 1993, decided that the person suggested by the applicant should act as supervisor during the meetings. The Department further suggested that the applicant should initially have access to S a few hours, on Friday, Saturday and Sunday during day time, every last weekend in the month. The applicant was obliged to deposit his passport during the meetings.

On 3 November 1993 the applicant agreed to the conditions proposed. S.B. had consistently opposed the applicant being granted any access to S.

On 17 November 1993 the Department decided to grant the applicant visiting rights on the aforementioned conditions.

S.B. did not turn up with S to the first meeting, on 31 December 1993. Instead S.B. sent a lawyer explaining that she was on holiday and did not intend to bring S to the designated meeting place.

On 15 January 1994 the applicant requested the Bailiff's Court of Silkeborg (Fogedretten i Silkeborg) to execute the Department's decision of 17 November 1993.

On 22 February 1994 the parties were heard by the Bailiff's Court. S.B. objected to the applicant being given access to S. She argued that there would be a risk of severely damaging the daughter's mental health if the applicant's visiting rights were carried out. She explained that S had reacted very negatively when S.B. had told her that the applicant had been granted access to her. On account of the daughter's recent conduct her teacher had referred her to the school's psychologist. The Bailiff's Court decided to adjourn the case in order to hear S and the school's psychologist.

On 23 February 1994 S was heard by the Bailiff at S.B.'s address. The Bailiff explained to S the conditions under which the applicant's access was to be carried out. S stated that she did not want to see her father and that she did not want to leave home. Nor did she want to commit herself to a short meeting with her father under the supervision of a person with whom she was well acquainted.

On 24 February 1994 the Bailiff contacted the school's psychologist by phone, who confirmed that S had been referred to her at the request of the teacher due to the fact that S started having problems in school around Christmas. The psychologist stated that it was a sudden change and that it was her impression that S did not function normally.

On 25 February 1994 the Bailiff's Court decided to adjourn the case in order to initiate a psychological examination of S and the parties. On 7 March 1994 the Bailiff's Court requested a psychologist to start his examination.

The applicant appealed against the Bailiff's Court's decision to the High Court of Western Denmark (Vestre Landsret), which, on 15 March 1994, upheld the appealed decision.

On 16 May 1994 the Ministry of Justice refused to grant the applicant leave to appeal to the Supreme Court.

At the applicant's request, the Bailiff's Court, on 5 September 1994, decided to appoint another psychologist as the one first chosen was considered to be biased.

S.B. appealed against this decision to the High Court which, on 24 October 1994, annulled the Bailiff's Court's decision as there were no grounds to believe that the psychologist was not fully impartial. Thus, the first appointed psychologist, who had already started his examination, remained appointed.

It appears that the applicant, subsequent to the High Court's decision of 24 October 1994, requested the Bailiff's Court to arrange for a hearing of the psychologist. Such a hearing was scheduled for 21 January 1995 and the applicant was duly notified thereof. However, on the date of the hearing the applicant failed to appear without giving notice. No explanation has been given for the applicant's failure to appear.

On 16 March 1995 the applicant requested a meeting in the Bailiff's Court in order to try to reach a settlement.

A meeting was held on 28 March 1995 in the Bailiff's Court with only the parties' counsel being present. No settlement was reached.

It appears that a hearing was held in the Bailiff's Court on 3 May 1995 during which evidence was produced and the parties pleaded the case.

On 10 May 1995 the Bailiff's Court made the decision not to enforce the applicant's visiting rights. The decision reads, as far as relevant, as follows:

(Translation)

"...
From the report submitted by the psychologist and his supplementary testimony given in the Bailiff's Court it appears that [S] is not willing to participate in the meetings and that her refusal is not solely a consequence of influence from those around her. [It is also a consequence of her] independent attitude to [the prospect] of being together with [the applicant], whom she, according to the report, recalls only vaguely and to whom she has no positive emotional attachment. The applicant's visiting rights can, according to the psychologist, only be carried out by the use of physical as well as psychological force and [S] will, due to her attitude, experience this as an injustice which can have as a consequence that she, being severely burdened by the dispute, will risk severe psychological harm.
...

Thus, as the carrying out of [the applicant's] visiting rights is likely to subject [S] to a severe risk of damaging her mental state, the applicant's request for execution of the decision of the Department of Private Law cannot be granted.

It is decided:

[The applicant's] request is rejected."

The applicant appealed against this decision to the High Court of Western Denmark. The High Court held a hearing during which S.B. gave testimony. The applicant, while not appearing before the Court, had submitted a written statement.

On 20 December 1995 the High Court upheld the Bailiff's Court's decision by referring to its reasoning.

On 24 February 1997 the applicant again requested the Danish administrative authorities to grant him access to S.

The applicant submitted his written statements to the County Authority of Århus on 26 March, 14 April and 8 May 1997. S.B. submitted her statements on 6 April 1997.

On 14 May 1997 the applicant was informed of an interview which an official from the County Authority of Århus had had with S on 24 April 1997. The transcript from the interview reads as follows:

(Translation)

"[S] ... had appeared for an interview in private at the County's office in Silkeborg on occasion of her father's renewed request for access to her.

[S] stated that she did not wish to get in contact with her father in any way. She just wanted to be left in peace.

She does not want her father being granted visiting rights, but she wants to decide herself whether she might want to contact her father later on, when she has grown older.

She stated that this was her own opinion and that she has not been influenced by her mother to make these statements.

She was offered psychological counselling pursuant to Section 28 of the Act on Custody and Access, but she refused."

On 22 May and 10 June 1997 the applicant wrote to the County Authority requesting inter alia a psychological examination of S and the parties.

On 2 July 1997 the County Authority decided not to carry out a psychological examination referring to the fact that S had refused to commit herself to an examination. Furthermore, the County Authority decided not to grant the applicant visiting rights having regard inter alia to the time passed since the last contact between the applicant and S and to her expressed wish not to get in contact with her father.

On 1 September 1997 the Department of Private Law upheld the County Authority's decision referring to its reasoning. The Department added that it found no reason to believe that the statements made by S did not express her own independent opinion.

b. Relevant domestic law

Section 16 and 17 of the Act on Custody and Access (Lov om Forældremyndighed og Samvær) reads as follows:

(Translation)

Section 16:

"The child's connection with both parents is to be maintained by giving access to the parent with whom the child is not residing."

Section 17:

"(1) The County Authority will, if so requested, decide on the extent of and the conditions governing the access to a child and it can fix the necessary requirements for this purpose. The decision is made with regard to the interests of the child.

(2) The County Authority can alter an agreement or a decision concerning access if the alteration is in the best interests of the child in particular due to changed circumstances.

(3) The County Authority can refuse to grant access to a child or annul an agreement or a decision on access if this is justified in the interests of the child.
..."

Section 536 subsection 1 of the Administration of Justice Act (retsplejeloven) reads as follows:

"Decisions [or agreements] on custody and access can be executed under penalty of fines or by coercion. ... Execution cannot be used if this will expose the child's physical or mental health to severe risks. In case of doubts the bailiff court may postpone the execution in order to obtain an expert's evaluation."

COMPLAINTS

1. The applicant complains, under Article 8 of the Convention, that he has been prevented from establishing access to his daughter.

2. The applicant also complains that his rights under Article 13 of the Convention and Article 2 of Protocol No. 1 to the Convention have been violated. Furthermore, he claims that the County Authority has not been impartial as required by Article 6 of the Convention and that he has been discriminated against by the Danish authorities in violation of Article 14 of the Convention.

THE LAW

The applicant complains that he has been prevented from establishing access to his daughter. In this respect, he invokes Article 8 of the Convention, which reads as follows:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of

the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

The Commission recalls that, in accordance with its constant case-law, the right to respect for family life within the meaning of Article 8 of the Convention includes the right for a divorced parent, who has not been granted custody of the child after the dissolution of the marriage, to visit his child or have contacts with it; the state may not interfere with the exercise of this right except in accordance with the conditions laid down in para. 2 of this Article (cf. inter alia No. 9018/80, Dec. 4.7.83, D.R. 33, p. 9 and No. 24482/94, Dec. 29.11.95, unpublished). The Commission further recalls that Article 8 of the Convention protects the relationship between unmarried parents and their children as well as the relationship between married parents and their children (cf. No. 13557/88, Dec. 9.10.89, D.R. 63, p. 167).

Before entering into these aspects of the application the Commission has first to examine whether the requirements as to the exhaustion of domestic remedies and the observance of the six months time-limit laid down in Article 26 of the Convention have been met in the instant case.

In so far as the applicant complains of decisions taken prior to the enforcement proceedings, the Commission notes that these decisions were taken more than six months before the introduction of the present application. As regards the enforcement proceedings, the Commission notes that there are no indications in the material submitted that the applicant requested the Ministry of Justice or the Board of Leave to Appeal (procesbevillingsnævnet) to grant leave to appeal to the Supreme Court against the High Court's decision of 20 December 1995, which is a remedy that needed to be exhausted pursuant to Article 26 of the Convention. However, even assuming that the applicant exhausted this remedy, his complaint is in any case inadmissible for the following reasons.

The Commission finds that the Bailiff's Court's decision of 10 May 1995, which was upheld by the High Court on 20 December 1995, as well as the administrative decisions of 2 July and 1 September 1997 interfered with the applicant's right to respect for his family life under Article 8 para. 1 of the Convention. It must therefore be examined whether this interference was justified under the terms of Article 8 para. 2.

The Commission finds that the relevant decisions were in conformity with Danish law. The Commission further finds that the interference had a legitimate aim under Article 8 para. 2, namely the interests of the child, which in this case fall under the expressions "for the protection of health or morals" and "for the protection of the rights and freedoms of others".

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

According to the established case-law of the Commission and the Court, 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 will take into account that a margin of appreciation is left to the Contracting States. That does not mean, however, that the Commission's review is limited to ascertaining whether the respondent State has exercised its discretion reasonably, carefully and in good faith. Furthermore, it cannot confine itself to considering the relevant decisions in isolation but must look at them in the light of the case as a whole. It must determine whether the reasons adduced to justify the interference at issue are "relevant and sufficient" (cf. Eur. Court HR, Olsson v. Sweden (no. 1) judgment of 24 March 1988, Series A no. 130, pp. 31-32, paras. 67-68).

In the present case, as regards the decisions of the Bailiff's Court and the High Court not to enforce the visiting rights that were granted the applicant, the Commission recalls that these decisions were made after the Bailiff's Court's interview with S in private and on the basis of inter alia a psychological examination of S. It appears from the interview and from the psychologist's findings that S had consistently been opposed to meeting the applicant and, furthermore, the psychologist concluded that forced access would present a severe risk of harming the daughter's physical and mental health. Having regard to this and to the time which had elapsed since the applicant had last had contact with S, the Commission finds that the courts' decisions to reject the applicant's requests to enforce his visiting rights were supported by relevant and sufficient reasons.

As regards the decisions made by the County Authority of 2 July 1997 and the Department of Private Law of 1 September 1997 special attention was attached to the interview with S on 24 April 1997 in which she firmly refused to see her father. Having regard in particular to her age then the Commission finds that the administrative authorities' decisions to reject the applicant's claim for access were supported by relevant and sufficient reasons.

The Commission has not overlooked the applicant's situation. The absence of contacts with one's child may cause considerable suffering to the non-custodial parent. However, where, as in the present case, there is a conflict between the interests of a child and one of its parents which can only be resolved to the disadvantage of either the child or the parent concerned, the interests of the child must under Article 8 of the Convention prevail.

For these reasons and having regard to the Danish authorities' margin of appreciation, the Commission finds that the authorities have been entitled to reject the access claims. Accordingly, the Commission concludes that the relevant decisions can reasonably be regarded as "necessary in a democratic society" within the meaning of Article 8 para. 2 of the Convention.

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

2. The applicant also complains that his rights under Articles 6, 13 and 14 of the Convention and Article 2 of Protocol No. 1 to the Convention have been violated.

The Commission finds, however, that an examination of this part of the application, as it has been submitted, does not disclose any appearance of a violation of the rights and freedoms of the Convention or its Protocols.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER	J.-C. GEUS
Secretary	President
to the Second Chamber	of the Second Chamber