AS TO THE ADMISSIBILITY OF

Application No. 14688/89
by André SIMPSON
against the United Kingdom

The European Commission of Human Rights sitting in private on 4 December 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 31 January 1989 by André SIMPSON against the United Kingdom and registered on 24 February 1989 under file No. 14688/89;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1973 and resident in Swansea. He is represented before the Commission by Messrs. A.E. Smith and Son, Solicitors, Stroud.

A. The particular facts of the case

The facts of the present case, as submitted on behalf of the applicant, may be summarised as follows:

The applicant suffers from dyslexia. This means that despite his high intelligence he has cognitive difficulties because certain parts of his brain do not function properly. He has a significant weakness in auditory short term memory, some weakness in visual short term memory and poor fine motor manipulative skills. These cognitive difficulties cause serious retardation in his literary and arithmetical attainment. His personality is delicate. Before being placed in a special school he experienced behavioural problems because his cognitive difficulties were not diagnosed or treated.

In October 1985 the local education authority (LEA) concerned made a "statement" of the applicant's special educational needs under

section 7 of the Education Act 1981. They agreed to pay for the applicant to attend a private fee-paying special school where he had already been placed by his mother. The applicant's family then moved areas and the competent LEA was unwilling to continue the payment of these fees. They hurriedly attempted to issue a different statement of needs (21 July 1986) but subsequently withdrew it (5 March 1987). They prepared a further statement in the same terms as the previous one. This statement dated 29 April 1987 diagnosed the applicant's special educational needs as follows:

> "Normal secondary curriculum, but offering daily individual help, using a multisensory approach, from a teacher experienced in teaching children with specific learning difficulties.
> Liaison between this teacher and other members of Staff who teach André in order to engender a continuity of approach.
> Access to appropriate teaching materials and computer programs designed for children with specific learning difficulties in reading and spelling."

However, they proposed that the applicant be sent to a normal comprehensive school of 1400 pupils, which had an Individual Learning Department.

As the applicant's mother disagreed with this statement, she appealed to a local appeal committee. It was submitted by independent experts on the applicant's behalf that, inter alia, "such was his delicate personality and due to the fact that he had previously suffered behavioural and psychological problems, the placement in a large school would mean that he would be in danger, could not cope, or that he would be in significant danger of reverting and all progress would be lost." The head of the specialist department of the school in question apparently admitted that it would be unable to cope with the applicant. The appeal was allowed on 24 September 1987 and the LEA advised to reconsider the case.

On 4 November 1987 the LEA considerably amplified their statement, but still concluded that the applicant could be educated at the local large comprehensive school. The applicant's mother appealed to the Secretary of State for Education under section 8 of the Education Act 1981. She submitted, inter alia, that as far as she was aware the proposed school's remedial department is controlled by three members of staff dealing with 150-300 pupils. None of these teachers is trained to deal specifically with dyslexic children. The LEA has one such part time teacher who spends three hours a week at the school. The applicant would not therefore have the daily training he requires and receives in the special private school where he is happy and is making good progress. The Secretary of State, through the Welsh Office, informed the applicant's representatives, by letter dated 24 August 1988, that he considered that the applicant's needs could be catered for at the comprehensive school. He therefore upheld the LEA's statement and proposal, subject to annual review.

Since then this letter appears to have been communicated to another local appeal committee in connection with another case without the consent of the applicant's mother. The applicant's solicitors complained of a breach of confidentiality to the Welsh Office on 15 November 1988.

For the time being it appears that the applicant's mother struggles to pay the special school's fees herself.

B. The relevant domestic law

Section 8 of the Education Act 1944 (the 1944 Act) creates a statutory duty on local authorities to provide suitable primary and

secondary full-time education "to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes ...". In particular local authorities must provide appropriate special education for disabled children. This duty was reinforced by the Education Act 1981. The LEA's duties are enforceable, pursuant to a parent's complaint or otherwise under sections 68 and 99 of the 1944 Act, by the Secretary of State for Education. He may seek an order of mandamus against a recalcitrant LEA. A subsidiary obligation is placed upon parents to secure suitable education for their children in accordance with their age, aptitude and ability. This latter obligation is ultimately enforceable through criminal proceedings (sections 36, 37 and 39 of the 1944 Act). Section 76 of the 1944 Act requires education authorities to have regard to parents' wishes so far as is compatible with the provision of efficient instruction, and the avoidance of unreasonable public expenditure.

By virtue of the Education Act 1981 (the 1981 Act) LEAs are required to meet the special educational needs of handicapped children in their area but, if possible, not to segregate them from other children, provided that parents' wishes have been taken into account and provided that this is compatible with the making of the special educational provision required, the provision of efficient education for the other children and the efficient use of resources (section 2 of the 1981 Act). Section 5 of the 1981 Act enables the LEA to assess the special educational needs of disabled children, in respect of which assessment the parents may make representations and submit written evidence. If the LEA decides that a child's special educational provision is called for, they must make a statement of the child's special educational needs and make suitable arrangements to meet them (section 7), even if it means placing the child in a school outside the LEA's jurisdiction (section 6 of the Education (Miscellaneous Provisions) Act 1953). Special educational assessments are subject to periodic review. Parents may appeal against the LEA's statement to an appeal committee which may confirm the special educational provision contained in the statement in the light of the circumstances of the case at the time of the hearing of the appeal, or remit the case to the LEA for reconsideration in the light of the committee's observations (section 8 (1), (2) and (4)). Appeal committees comprise three, five or seven members, drawn from the local education authority and people who have experience in education and are acquainted with educational conditions in the area (Schedule 2 Part I of the Education Act 1980).

Following the confirmation or remit of a case, the parents may finally appeal to the Secretary of State for Education who may confirm, amend or annul the LEA's statement (section 8 (6) and (7) of the 1981 Act). These appeals are normally dealt with by Ministry of Education civil servants, not the Minister himself. There is no right to an oral or adversary hearing with this form of appeal.

Judicial review of the Secretary of State's decisions, or any binding decision of an appeal committee, will lie if they are tainted by irrationality, illegality or procedural impropriety. An action for a declaration or damages for breach of statutory duty may also be available.

In general LEA's must respect parental choice of schools (section 6 of the Education Act 1980). Section 7 (1) of the 1980 Act provides for an appeal by parents against an LEA's decision concerning school admissions or a school's refusal to accept a pupil. This appeal is to the appeal committee, but section 7 (5) of the 1980 Act renders the appeal committee's decision fully binding on the LEA or school concerned. A similar binding appeal to an appeal committee is available under section 26 of the Education (No. 2) Act 1986 on the question of a child's expulsion from a school.

COMPLAINTS

The applicant complains that the procedures determining his special educational needs and provision were in breach of Article 6 para. 1 of the Convention, being a biased, unlawful determination of his civil rights by partial bodies, who created unreasonable delays. He alleges that the local education officers were biased throughout his case; that there are no speedy statutory time limits for issuing a statement of special educational needs under section 7 of the Education Act 1981; that appeal committees have no decision making power if they agree with the appellant - they can only recommend reconsideration of the case by the LEA ; and that there is no fair, oral or public hearing before the Secretary of State for Education, who himself cannot constitute an independent and impartial tribunal. Part of the applicant's submission is that there are major financial constraints placed on LEAs by central Government, resulting in institutional bias against a full and fair consideration of a child's special educational needs which might result in extra public expense.

The applicant submits that his mother does not have sufficient means to challenge the Secretary of State's decision by way of judicial review; but she is not so poor as to be able to qualify for legal aid to pursue such a challenge.

The applicant next complains that he is denied the right to education in accordance with his educational needs and that his mother is entitled to have him educated in accordance with her firm philosophical convictions on the subject. He contends that the Secretary of State's decision is in breach of Article 2 of Protocol No. 1 to the Convention.

The applicant also complains of discrimination in that the Education Act 1980 allows appeals against decisions on school admissions or expulsions to the same kind of appeal committee as in the applicant's case, but in the former cases the appeal committee has binding powers of decision. In this respect he invokes Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1.

Finally, the applicant invokes Article 8 of the Convention (family life) for, he submits, to place him in the comprehensive school would lead to the deterioration in his mental condition and his ability to be educated.

In conclusion he submits that United Kingdom law is seriously in breach of the Convention in relation to children who have special educational needs.

THE LAW

1. The applicant has first complained that the procedures determining his special educational needs and provision were in breach of Article 6 para. 1 (Art. 6-1) of the Convention, the relevant part of which provides as follows:

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

In analysing complaints of this kind the Convention organs must deal with three questions:

- whether the case gives rise to a "contestation" (dispute) concerning a right;

- if so, whether the right at issue is civil in character;

- if so, whether there has been compliance with Article 6 para. 1 (Art. 6-1) of the Convention (cf. Eur. Court H.R., Benthem judgment of 23 October 1985, Series A no. 97).

As to the first question the Commission considers that the case does give rise to a "contestation" or dispute over a right. The various Education Acts have created obligations on local education authorities to provide suitable education for all children in their areas. Parents dissatisfied with the education proposed for their children may complain to the Secretary of State and, ultimately, they may seek judicial review of the decisions of the local authority or Minister. Thereby the relevant legislation has created a right which reflects the guarantees of Article 2 of Protocol No. 1 (P1-2) to the Convention - a right for children not to be denied an education appropriate to their needs and aptitudes.

However, the Commission does not consider that this right under English domestic law or under Article 2 of Protocol No. 1 (P1-2) is of a civil nature for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention. Although the notion of a civil right under this provision is autonomous of any domestic law definitions, the Commission considers that for the purposes of the domestic law in question and the Convention, the right not to be denied elementary education falls, in the circumstances of the present case, squarely within the domain of public law, having no private law analogy and no repercussions on private rights or obligations (cf. Eur. Court HR, Deumeland judgment of 29 May 1986, Series A no. 100 pp. 24-25 paras. 71-74). The Commission concludes, therefore, that there is no civil right at issue in the instant case and, accordingly, Article 6 para. 1 (Art. 6-1) of the Convention is not applicable to the administrative procedures before the domestic education authorities. It follows that this aspect of the applicant's case must be rejected as being incompatible ratione materiae with the provisions of the Convention, pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains that he is denied the right to education in accordance with his educational needs, contrary to Article 2 of Protocol No. 1 (P1-2) to the Convention, the first sentence of which provides that no one shall be denied the right to education. The applicant has also raised a complaint on his mother's behalf concerning an alleged failure by the LEA to respect her philosophical convictions about his education, contrary to the right ensured by the second sentence of Article 2 of Protocol No. 1 (P1-2). However, according to Article 25 (Art. 25) of the Convention, the Commission may only deal with complaints from the purported victim of a breach of the Convention. In the circumstances of this case it is not clear why the applicant's mother could not have lodged an application on her own behalf. Nor has the applicant shown that he is an indirect victim of his mother's alleged grievance. This latter aspect of the complaint under Article 2 of Protocol No. 1 (P1-2) is accordingly incompatible ratione personae with the provisions of the Convention, pursuant to Article 27 para. 2 (Art. 27-2).

As regards the applicant's personal complaint of a denial of his right to education under Article 2 of Protocol No. 1 (P1-2), the Commission observes that Article 2 of Protocol No. 1 (P1-2) is not an absolute right which requires Contracting Parties to subsidise private education of a particular type or level. In principle, it guarantees access to public educational facilities which have been created at a given time and the possibility of drawing benefit from the education received. This right "by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals", as long as the substance of the right to education is preserved (Eur. Court H.R. Belgian Linguistic judgment of 23 July 1968, Series A no. 6 pp. 30-32

paras. 3-5).

The Commission notes that the United Kingdom Government provides special education for disabled children either in normal mainstream schools with special departments, or in specialised segregated institutions. In keeping with current educational trends, section 2 of the Education Act 1981 provides that children with special educational needs should be educated in an ordinary school with normal children of their own age if that is compatible with the special education which the former require, the provision of efficient education for other children at the school and the efficient use of resources. The Commission recognises that there must be a wide measure of discretion left to the appropriate authorities as to how to make the best use possible of the resources available to them in the interests of disabled children generally. While these authorities must place weight on parents' and pupils' views, it cannot be said that the first sentence of Article 2 of Protocol No. 1 (P1-2) requires the placing of a dyslexic child in a private specialised school, with the fees paid by the State, when a place is available in an ordinary State school which has special teaching facilities for disabled children.

As regards the facts of the present case, the Commission notes that the applicant's behavioural problems in a State school arose at a time when his disabilities had not been diagnosed or treated. His dyslexia has now been identified and would be treated in the special department of the comprehensive school proposed by the education authorities. It is not the Commission's task to assess the standard of the special facilities provided by this State school. It is clear, however, that the applicant's progress at the school would be monitored and his needs kept under review by the education authorities. In these circumstances, the Commission concludes that the applicant is not denied his right to education and that the present case does not disclose any appearance of a violation of Article 2, first sentence, of Protocol No. 1 (P1-2). It follows that this aspect of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains of discrimination contrary to Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 (Art. 14+P1-2). His complaint is based on the fact that appeal committees do not have full and final decision making powers in appeals against an LEA's statement of a disabled child's special educational needs, whereas such committees can take binding decisions on appeals against school admission or expulsion.

However, the Commission finds that these procedures before the appeal committee do not impinge on the substance of the right to education ensured by the first sentence of Article 2 of Protocol No. 1 (P1-2). Whether the final administrative decision on the type of school or the particular school to which a child should be sent is taken by the Secretary of State for Education or an appeal committee, the decisions of both of which being subject to judicial review before the civil courts, is not a matter, which, in the Commission's view, raises a significant difference in treatment. In these circumstances the Commission concludes that the applicant's claim of discrimination contrary to Article 14 (Art. 14) of the Convention is unsubstantiated and, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. Finally, the applicant has complained that the proposal to place him in the State comprehensive school is in breach of his right to respect for family life, ensured by Article 8 (Art. 8) of the Convention, as it would lead to the deterioration of his mental condition and his ability to be educated. However, the Commission finds that this complaint is hypothetical at the present stage because it is by no means certain that the applicant's attendance at the school in question, which has certain special educational facilities,

will lead to the deterioration he fears. In these circumstances the Commission concludes that the complaint is unsubstantiated. Accordingly this aspect of the case is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)