AS TO THE ADMISSIBILITY OF

Application No. 18280/91
by M.V.
against Malta

The European Commission of Human Rights sitting in private on 9 April 1992, the following members being present:

MM. C.A. NØRGAARD,
J.A. FROWEIN
F. ERMACORA
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 RUIZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

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 20 March 1991 by M.V. against Malta and registered on 29 May 1991 under file No. 18280/91;

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

- the observations submitted by the respondent Government on 6 December 1991 and the observations in reply submitted by the applicant on 28 January 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Maltese citizen born in 1965 and resident in Birkirkara, Malta. He is represented by Mr. Giovanni Bonello, an advocate practising in Valletta.

The facts of the case, as they have been submitted by the parties, may be summarised as follows.

In June 1987, the applicant began a relationship with R., a girl then aged fourteen. When R. became pregnant in August 1987, the applicant intended to marry her and their families discussed what should be done. At the beginning of 1988, however, R. broke off the relationship and her parents told the applicant not to contact her

again.

On 30 May 1988, R. gave birth to a daughter M. and registered the birth as "father unknown". M. was given immediately to a couple who wished to adopt her. The applicant, on subsequently finding out about the birth of M. in July, had his paternity officially registered by a notarised deed on 20 July 1988. On 22 July 1988 he served on R. notice that he was applying for access to M. and opposing any adoption.

On 20 July 1988 a formal request was filed for adoption in the Second Hall of the Civil Court by adopters unknown. On 25 July 1988 the applicant intervened in the adoption proceedings, stating that he wished to apply for custody and access and applying for suspension of the adoption proceedings. On 25 July the Second Hall rejected his application for access. It appointed a curator, Dr. C., to report on the case. He wrote to the applicant on 22 September 1988, requesting him to lodge written submissions. He held 10 sittings at which he interviewed the applicant and his parents and the mother of the child and her parents. The applicant was represented by counsel during these proceedings.

On 28 September 1988 the applicant filed a writ of summons before the First Hall of the Civil Court for custody of M. and requested that the matter be dealt with urgently. The First Hall listed the case for hearing on 2 November 1988. On that date, the case was adjourned until 16 November when the court appointed Dr. C. as Legal Referee and further adjourned the case to April 1989 pending his report. The applicant's application for the child meanwhile to be placed with the Ursuline Sisters or other neutral persons and for access were refused on 18 November 1988. A similar application dated 15 December 1988 was rejected on 28 November 1989.

On 6 April 1989 the applicant applied to the Second Hall again, requesting that the adoption proceedings be suspended pending the outcome of the contentious proceedings before the First Hall, and he applied to the First Hall for access. Both applications were refused.

On 12 May 1989 the Second Hall referred the case to the First Hall as regarded the complaints raised by the applicant under the European Convention on Human Rights.

The First Hall rejected his complaints on 6 February 1990. It had before it the report of Dr. C. which concluded after interviews with all the parties that it was in the best interests of the child to remain with the prospective adopters. He referred to the fact that the applicant had apparently taken no initiative between January and July 1988 and that the real impetus behind the case was the applicant's father. He stated that when R. informed the applicant on the telephone that she intended to place the child for adoption he responded by saying, "Do what the hell you like as long as you keep me out of trouble". He also considered there were doubts as to whether the applicant intended to care for the child himself or to give it to be adopted by his brother and his wife.

In its judgment, the First Hall found that there was no violation of the applicant's rights under the Maltese Constitution or Articles 3, 6, 8 and 14 of the European Convention on Human Rights. It found, inter alia, that:

"the applicant has a right of respect for his illegitimate family which includes the child ..."

It considered however that his interests were outweighed by the interests of the child. It found that the case had been pursued with all necessary expeditiousness and that the refusal of access in the interests of the child could not amount to inhuman treatment. As regarded the applicant's complaint of discrimination, it considered

that the difference in treatment between married and unmarried fathers had reasonable justification.

The Court went on to comment that in this particular case the applicant had demonstrated a lack of interest in the child since he made no contact with R. during the last five months of her pregnancy and when R. phoned him at work after the birth did not go to the phone to take the call.

The applicant appealed to the Constitutional Court, raising Articles 3, 8 and 14 of the Convention. Following a hearing, the case was adjourned on 18 May 1990 for judgment. The applicant's application to the Constitutional Court for access was postponed until final judgment.

Meanwhile, the applicant's request for access was again refused by the First Hall on 18 May 1989 on the ground that an application had been filed with the Constitutional Court. A further request of 21 June 1989 was refused on 12 July 1989 on the basis that the proceedings were soon to be terminated and it was not in the minor's interests for access to be granted.

On 22 April 1991 the Constitutional Court rejected the appeal.

In the proceedings before the Maltese courts, the applicant was represented by a lawyer.

RELEVANT DOMESTIC LAW AND PRACTICE

RIGHTS OF NATURAL FATHERS

Section 90 of the Maltese Civil Code provides as follows:

"(1) The parent who has acknowledged an illegitimate child shall have in regard to him all the rights of paternal authority, other than the legal usufruct.

(2) Where the acknowledgment is made by both parents, parental authority shall be exercised by the father."

ADOPTION

The Maltese law governing adoption is set out in the Civil Code CAP. 16, Title III.

Section 115 provides, inter alia:

"(3) Subject to the provisions of section 117, an adoption decree shall also not be made -

(a) in any case other than the case of an illegitimate person except with the consent of every person who is a person who is parent of the person to be adopted and is alive:

(b) in the case of an illegitimate person except with the consent of the mother if she is alive...

(4) Subject to the provisions of section 117 before an adoption decree is made the court shall-

(a) in the case of an illegitimate person hear the natural father if he has acknowledged the person to be adopted as his child or if the court is satisfied that he has contributed towards his maintenance or has shown a genuine

and continuing interest in him..."

Section 119 provides inter alia :

"(1) the court before making an adoption decree shall be satisfied -

(a) that every person whose consent is necessary for the making of the adoption decree and whose consent is not dispensed with has consented to and understands the nature and effect of the adoption decree...

(b) that the decree if made will be for the welfare of the person to be adopted..."

COMPLAINTS

The applicant complains of inhuman and degrading treatment contrary to Article 3 of the Convention, as a result of being deprived of any form of access to his daughter. The applicant also complains under Article 8 of the Convention of interference with his right to family life in that his child was given for adoption despite his application, in that he has been refused all access since her birth and deprived of her custody although he is a fit parent.

The applicant also complains under Article 6 of the Convention of the length of the proceedings in which, despite the urgency of the matter, there have been several adjournments, in particular a delay of 11 months for the judgment of the Constitutional Court. The applicant complains that he did not have a fair and public hearing since the adoption proceedings were confidential and the applicant was not informed of the identity of the adopters and has thus been unable to present evidence as to their fitness.

The applicant also complains of discrimination contrary to Article 14 of the Convention in conjunction with Article 8. He complains in particular that a married father of a child can withhold his consent to adoption whereas an unmarried father's consent is unnecessary. He further complains of discrimination in that the mother of a child born out of wedlock retains the right to withhold consent to adoption.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 May 1991 and registered on 29 May 1991.

On 7 July 1991 the Commission decided not to apply Rule 36 of its Rules of Procedure in this case.

On 17 October 1991 the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the complaints made under Articles 6, 8 and 14 of the Convention. It also decided to grant the application priority under Rule 33 of its Rules of Procedure.

The Government's observations were submitted on 6 December 1991 and the applicant's observations in reply were submitted on 28 January 1992.

The Commission granted the applicant legal aid on 10 April 1992.

THE LAW

1. The applicant complains of inhuman and degrading treatment contrary to Article 3 (Art. 3) of the Convention as a result of being denied any form of access to his daughter.

Article 3 (Art. 3) provides:

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

The Commission recalls that the case-law of the Convention organs establishes that ill-treatment must attain a certain minimum level of severity if it is to fall within the scope of the above provision (see e.g. Eur. Court H.R., Ireland v. the United Kingdom judgment of 13 December 1977, Series A No. 25, p. 65, paras. 162-164).

The Commission notes that the applicant did not have custody of his daughter who was born out of wedlock and that his applications for access and custody were refused in the course of the proceedings instituted by him in the domestic courts. The Commission is satisfied that distressing as the outcome of these proceedings may have been for the applicant, it cannot be considered in the circumstances of this case as attaining the level of seriousness necessary to constitute inhuman or degrading treatment within the meaning of Article 3 (Art. 3) of the Convention. The Commission has had regard in this respect to its findings below under Article 8 (Art. 8) of the Convention that the interference was "in accordance with the law" and in the interests of the child.

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

2. The applicant complains under Article 8 (Art. 8) of the Convention that he has been refused custody of and access to his daughter although he is a fit parent.

Article 8 (Art. 8) of the Convention provides:

"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 or morals, or for the protection of the rights and freedoms of others."

The Government have submitted that the applicant did not enjoy a "family life" with his daughter within the meaning of the first paragraph of Article 8 (Art. 8), having regard in particular to the shortness of the applicant's relationship with the child's mother. They submit that a mere blood link is insufficient to bring the relationship within this provision. The applicant submits that Article 8 (Art. 8) cannot be construed as only protecting "family life" which has already been established and must extend to allowing a natural father to develop a family life with his child born out of wedlock.

The Commission recalls that the existence or not of a family life falling within the scope of Article 8 (Art. 8) will depend on a number of factors, of which previous cohabitation is only one, and on the circumstances of each particular case (see e.g. No. 12402/86, Dec. 9.3.88, D.R. 55 p. 224). The application of this principle extends equally to the relationship between natural fathers and their children. The Commission finds however that it is unnecessary for the reasons given below, to decide whether the applicant has established sufficient

links with the child for the relationship to fall within the scope of Article 8 (Art. 8).

The Commission has examined whether the alleged interference is justified under Article 8 para. 2 (Art. 8-2) of the Convention, namely, whether it is "in accordance with the law", pursues one or more of the legitimate aims enumerated in Article 8 para. 2 (Art. 8-2) and whether it is "necessary in a democratic society" for one or more of these aims.

The Commission recalls that the decisions concerning access and custody were taken by the First Hall of the Civil Court and upheld by the Constitutional Court. The Commission finds no indication that these decisions were in any way outside the competence of these organs or contrary to Maltese law. Further, the Commission notes that the decisions were taken as being in the best interests of the child. It therefore finds that they were "in accordance with the law" and for the legitimate aim of protecting the child's health and rights.

The question remains whether the decisions were "necessary" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention. The case-law of the Commission and the Court establishes that the notion of necessity implies that the interference corresponds to a pressing social need and that it is proportionate to the aim pursued. Further, in determining whether an interference is necessary the Commission and the Court will take into account that a margin of appreciation is left to the Contracting States, which are in principle in a better position to make an initial assessment of the necessity of a given interference (see e.g. Eur. Court. H.R., W v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 27, para. 60).

The Commission recalls that the First Hall acknowledged that the applicant had a right to respect for his family born out of wedlock but considered, inter alia, that the applicant had demonstrated a lack of interest in the child. It concluded in the circumstances of the case that the interests of the child lay in adoption. The Commission recalls that the report of the Legal Referee before the First Hall also indicated that the real impetus behind the case was the applicant's father and that it was unclear whether the applicant intended in any case to look after the child himself or place it instead to be adopted by his brother and his wife. The Commission further notes that the applicant's relationship with his girlfriend was of a very short duration lasting only a number of months. She was also only 14 years of age at the relevant time, which is below the age of consent for sexual intercourse in Maltese law.

The Commission also recalls that the applicant was present at the hearings before the courts and was represented by a lawyer. The applicant therefore had the possibility of putting forward any views which in his opinion would be decisive for the outcome of the case. With regard to these facts, the Commission finds that the procedural

requirements implicit in Article 8 (Art. 8) were satisfied since the applicant was involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests (see e.g. W v. the United Kingdom judgment, loc. cit., pp. 28-29, paras. 63-65).

The Commission therefore finds that, bearing in mind the margin of appreciation accorded to the domestic authorities, and having regard to the nature of the applicant's relationship with the mother of the child, any interference which might have occurred in the present case was justified under the terms of Article 8 para. 2 (Art. 8-2) of the Convention as being "necessary in a democratic society" for the

protection of health and for the protection of the rights of others.

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

3. The applicant also complains under Article 6 (Art. 6) of the Convention of the length of the proceedings and that he did not have a fair and public hearing since the adoption proceedings were confidential and he was not informed of the identity of the prospective adopters and thus unable to comment on their fitness.

Article 6 para. 1 (Art. 6-1) of the Convention provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Commission notes first of all that under Maltese law, the father of a child born out of wedlock who has acknowledged his paternity enjoys parental rights in respect of that child. In these circumstances, the Commission finds that the proceedings before the courts dealing with issues of adoption and custody of and access to the applicant's daughter must be considered as involving the determination of his civil rights and obligations within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission has therefore examined whether the length of the proceedings exceeded a reasonable time. They commenced on 22 July 1988 and closed on 22 April 1991 having lasted 2 years and 9 months.

The Commission recalls that the reasonableness of proceedings must be assessed in the light of the particular circumstances of the case and with the help of the following criteria: the complexity of the case, the conduct of the parties and the conduct of the authorities dealing with the case (see Eur. Court H.R., Vernillo judgment of 20 February 1991, Series A no. 198, p. 12, para. 30).

The Commission notes that the case involved important and sensitive questions relating to the welfare of the child which required careful consideration and investigation by the courts. The Commission finds that in the circumstances of the case the applicant's case was decided with reasonable expedition. While it took 11 months to deliver the decision of the Constitutional Court, the Commission finds that this period is not in the circumstances sufficient to render unreasonable the time taken for the proceedings as a whole.

As regards the applicant's complaints that the adoption proceedings were confidential and that he was not informed of the identity of the adopters, the Commission has had regard to the nature of these proceedings which dealt with the welfare and future of a child. There is nothing in the circumstances of the case to indicate that the confidentiality of the proceedings which were necessary to safeguard the interests of the child prejudiced the applicant. The Commission recalls that under Maltese law the court has a duty to hear the natural father in the course of adoption proceedings and that the applicant in this case had the opportunity to present his views as to the future of his daughter and was represented in these proceedings,

which determined the issues on the merits. The Commission does not consider that the guarantees of Article 6 (Art. 6) required in addition that the applicant be informed of the identity of the prospective adopters.

The Commission concludes therefore that these complaints are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant also complains of discrimination contrary to Article 14 (Art. 14) of the Convention in that as an unmarried father he has no power to withhold consent to an adoption of his child whereas a married father and unmarried mother can.

Article 14 (Art. 14) of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission recalls that whether a difference in treatment constitutes a discrimination in the sense of Article 14 (Art. 14) depends on whether there exists an objective and reasonable justification. The difference in treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see eg. Eur. Court H. R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 35, para. 72, and Inze judgment of 28 October 1987, Series A no. 126 p.17-18, paras. 36-40).

In the present case, the Commission notes that while the applicant had no right to withhold consent to the adoption of his child born out of wedlock, he had the opportunity as provided for under Maltese law to put forward his views as to the child's future and to participate in the proceedings. The Commission also recalls the background circumstances of the case - in particular, that the mother of the child was at the relevant time a 14 year old girl below the legal age of consent and that the applicant's relationship with her was of very short duration. It notes from the report of the Legal Referee that the applicant had shown little interest in the child during the mother's pregnancy and that it was doubtful whether he intended in fact to take responsibility for the child himself. In these circumstances, the Commission considers that there was an objective and reasonable justification for not giving the applicant the right to withhold consent to the adoption.

The Commission therefore concludes that the facts of this case fail to disclose any appearance of a violation of Article 14 of the Convention read in conjunction with Article 8 (Art. 14+8).

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

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H. C. KRÜGER) (C. A. NORGAARD)