AS TO THE ADMISSIBILITY OF

Application No. 28625/95
by Peter WHITEAR
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

Mrs. M.F. BUQUICCHIO, 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 30 June 1995 by Peter WHITEAR against the United Kingdom and registered on 21 September 1995 under file No. 28625/95;

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 a British citizen, born in 1948 and resident in Buckinghamshire in England. The facts as submitted by the applicant and contained in the relevant documents may be summarised as follows.

The applicant and A married in 1981 but separated in 1985, shortly before their daughter ("F") was born. On 14 May 1985 A issued a petition for divorce. On 18 February 1986, in the course of the divorce proceedings, A was granted custody of F and arrangements were made for the applicant to remain in contact with F. Since 1991 A has been living with a Mr. S. The applicant lives alone.

On 14 May 1986 the applicant applied to the Court for a contact order and he was granted an order allowing him to visit F once per fortnight. Shortly thereafter recriminations between the parents and disputes as to contact arrangements arose. In 1992 the local authority became involved because of concern as to the effect that the parents were having on F. In November 1992 the local authority obtained a report from a consultant psychiatrist ("Dr. W"). While he described F as being a child at risk of significant harm from the continuing hostility that existed between the mother and father, he recorded that F showed no anxiety or hesitation in meeting the applicant and

described their relationship as healthy. Having seen the parents together, Dr. W wrote the following:

> "it became apparent that the two parents were locked in a power struggle whereby [the applicant] perceives [A] as using withholding [F] as a way of controlling him and [A] sees [the applicant] as shouting at her as a way of controlling her. Both parents admitted that this pattern of relating had become very entrenched and it appeared that both of them had resorted to using the law as a way of trying to gain extra power over the other."

On 11 May 1993 an order was made by consent providing for F to live with her mother and to have substantial contact with the applicant, including staying with him for alternate weekends and for part of the school holidays. There was provision for contact during the week by telephone. However, this arrangement did not work satisfactorily and on 17 June 1994 the Court Welfare Officer recorded a change in the attitudes of F; she now wished to spend less time with her father. The welfare officer considered that F's change in attitude was because she recognised that it was the contact that she was having with her father that gave rise to the hostility that was clearly overshadowing the family.

On 18 November 1994 A applied for the contact orders of 11 May 1993 and 25 July 1994 to be discharged and the applicant to be prevented from making any further application as to contact. She claimed that the applicant had failed to return F from a contact visit on 16 November 1994 and that she had to take F out of school the next day since F was anxious, upset, tired and hungry. Further, she claimed that the applicant had told F that he would not be returning her on time in the future. On 2 December 1994 Judge Pearce sitting in the County Court referred the matter to the High Court and invited the Official Solicitor to act as guardian ad litem to F. The applicant denied the allegations and on 13 February 1995, applied for a residence order.

By 16 June 1995, when the matter came before the High Court there had been eighty-five applications to the court by A and the applicant of which forty three related directly to contact.

In the course of the proceedings before the High Court, the Official Solicitor, following recommendations from an experienced child psychiatrist, Dr. S, recommended that F should continue to live with her mother, that face-to-face and telephone contact with her father should cease but that contact by letter should be encouraged. Dr. S had based his recommendations contained in his report on interviews that he had carried out with the applicant, A, F and Mr. S. He concluded that F was well cared for by A and that were her carer to be changed by order of the court, it would have a disastrous effect on her; she would suffer a profound sense of loss, bereavement, a sense of betrayal and resentment and her capacity to develop relationships with others would be interfered with. He stated that F had expressed her opinion that she should have no contact with her father very cogently and that she had adhered to this view despite an apparently successful contact session with the applicant. He further stated that although she was no doubt influenced by the views of her mother, he believed her views were genuinely held and that serious note should be taken of her wishes. Dr. S concluded that there should be no enforced contact with the applicant and that were F to wish for contact, it would be facilitated by A and Mr. S. As regards the possible benefits of the court enforcing contact, Dr. S stated as follows:

> "Her father is not a stranger to her. She has grown up with the knowledge of who and what he is and she is aware of paternal relations. She is aware that if and when she wants to resume contact with her father, and paternal relations, this would be

facilitated by her mother, at her request. She is of an age and capacity when she can write letters and make telephone calls of her own volition and, as she gets older, she will certainly be in a position to seek contact with her father if she wishes. She is not growing up devoid of male influence for Mr. S does appear to be a satisfactory step-parent. In my opinion F requires a lengthy period of stability without the hassle and inevitable strain that follows contentious litigation.... F is the unfortunate victim of her parents' ongoing "battle" and if this matter drags on and on, without a definitive decision, it will only prolong the insecurity for F - and with it, have a detrimental effect on her development and, I would submit, cause serious harm.
I have no doubt that [the applicant] has much to offer F in terms of his general cultural interests and in time it may be feasible for F to turn to him and to learn from him. She will, however, need to develop a strength of character, a quality of resilience, "toughness" and independence that I think it was not easy for her mother to attain. Whilst I would not at this stage advocate defined contact, there is no reason why [the applicant] should not be encouraged to maintain written contact with F, particularly at times of celebrations such as birthdays and Christmas, so that he remains "alive" in F's mind, thereby encouraging her to resume contact when she feels more secure."

On 16 June 1995 Mr. Justice Johnson, dismissed the applicant's application for a residence order and, accepting the recommendations of the Official Solicitor and Dr.S, ordered that unless otherwise previously agreed in writing between A and the applicant, there should be no contact by the applicant, either face to face, by telephone or in any other way, save that the applicant should be permitted to write and send gifts to F once per calender month. In the course of his judgment he stated the following:

"But it is obvious, I think, that Dr. S has it right when he says that contact cannot continue in the sense of face-to-face contact or indeed of contact over the telephone. There have been no less than forty-three court hearings in which judges have sought to wrestle with the problems created for [F] by her parents. I think [F] is entirely right in her judgment in the matter, that the only way to preserve her security and to give her the peace which she wants and which she deserves is to cut off contact. That I propose to do. It is a result which I regard as being the best option for [F] not in the sense that I think it is a good option but I think it is the least bad of the options. It is a result which I regard as totally unjust to the father and one which the mother may regard as a step towards the ambition about which she spoke ... in November 1992..."

On 11 March 1996 the applicant was refused leave to make an application for a residence order. On 7 June 1996 the applicant made a further application for leave to apply for a residence order but the judge advised him to re-apply for leave to apply for a contact order. This he did on 3 July 1996. On 26 July 1996 the parties came before the court and leave was again refused. The applicant made a further application for leave on 9 September 1996 which was again refused.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention of an interference in his right to respect for his family life. The applicant accepts that the order denying him access to his daughter is in accordance with the law, in that it was made under the Children Act 1989 but does not accept that it was necessary for any of the reasons set out in the second paragraph of Article 8.

2. The applicant further complains under Article 5 of Protocol No. 7

that, in being refused contact with his child, he was not treated equally with his former spouse who now enjoys unlimited contact with A and that the denial of contact was not in F's interest.

THE LAW

1. The applicant complains that the refusal to grant him access to his child constitutes an interference in his right to respect for his family life in violation of Article 8 (Art. 8) of the Convention. That provision 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 or morals, or for the protection of the rights and freedoms of others."

The Commission recognises that in principle a parent always has a right of access to his or her child under paragraph 1 of Article 8 (Art. 8-1) of the Convention (see Eur. Court HR, W v. United Kingdom judgment of 8 July 1987, Series A No. 121, p. 27, para. 59). However, when deciding the question of access to children on the break-up of a marriage, domestic courts may properly take into account under paragraph 2 of Article 8 (Art. 8-2) a child's mental stability and physical well-being. In every case where a domestic court has refused to a parent a right of access to his of her children, the Commission nevertheless ultimately has the task of judging whether such a refusal was justifiable under paragraph 2 of Article 8 (Art. 8-2) and in particular, whether it was supported by necessary and sufficient reasons (see Eur. Court HR, Olsson v. Sweden (no. 1) judgment of 22 June 1989, p. 32, para. 68; Johansen v. Norway judgment of 7 August 1996, para. 64 to be published in Reports 1996).

The Commission recalls that while authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, a stricter scrutiny is called for in respect of further limitations, such as restriction placed by the authorities on parental rights of access (see Eur. Court HR, Johansen v. Norway judgment, ibid). The Commission considers that such principles apply equally to a decision as to the rights of access of a parent who has not been granted custody of his/her child.

In considering whether the right of access to a child by a parent not entitled to custody, is or is not in accordance with Article 8 (Art. 8) of the Convention, the Commission considers that the best interests of the child are of crucial importance (see Johansen v. Norway, ibid). Consequently, the interference would be justified as pursuing a legitimate aim when intended to protect the child's health (in the broad sense) (see no. 7911/77, Dec. 12.12.77, D.R. 12 p. 192).

As regards whether the interference was necessary in a democratic society, the Commission must consider whether the reasons were "necessary and sufficient" in the light of the case as a whole (see Eur. Court HR, Johansen v. Norway, referred to above).

The Commission observes that in this case the applicant was initially able to see his daughter without too many difficulties, but that because of disputes between himself and A access became increasingly problematic. A situation developed where the applicant and A were constantly applying to the courts; over 85 applications appear to have been made of which at least 45 concerned access. On the advice of Dr. S, a child psychiatrist, who considered the constant

litigation between the applicant and A to be damaging to F, the Court finally terminated the applicant's access rights on 16 June 1995. The Commission notes that the judge considered his judgment caused severe injustice to the applicant. However, the Commission also notes the specialist advice on which his decision was based. From the report of Dr. S, it appears that F expressed a wish not to see the applicant any more. In view of the fact that she was 10 years old at the relevant time, and taking into account the assessment of Dr. S that she had sufficient maturity to know her mind, the Commission considers that the

determination of the judge pursued the legitimate aim of protecting the health (in the broad sense) of F.

The Commission recalls that when determining the rights of access between parents, the State is attempting to minimise the damage caused by a broken relationship. Thus, it attempts to balance the interests of the mother, the father and the child. As stated above, the Commission has always regarded the interests of the child as primary. In view of the recurrent litigation between the applicant and A, the judge considered the stability of F to be sufficiently threatened to require him to make a determination that would cause injustice to one party. When he took the decision to end contact between the applicant and F, he was aware that this was unjust to the applicant. However, having considered all the possible solutions and balanced the interests of the parties involved, he decided that this was the best solution for F. In the circumstances the Commission considers that the interference was justified for the purposes of Article 8 para. 2 (Art. 8-2).

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

2. The applicant further complains under Article 5 of Protocol No. 7 (P7-5) that he has not been treated equally to A and that the Court's decision to refuse him contact was not in F's interest.

The Commission recalls that the United Kingdom has not ratified Protocol No. 7.

It follows that this complaint must be dismissed as incompatible ratione personae in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber